



DOES THE PARDONING POWER OF THE PRESIDENT UNDER THE CONSTITUTION EXTEND TO CRIMINAL CONTEMPTS OF COURT

ARTICLE 72 of the Constitution of India deals with the pardoning power of the President. Does it extend to criminal contempt of court? This issue is *res integra* in our country but not so in the United States and the United Kingdom. In *ex parte Grossman*,¹ the U.S. Supreme Court held that the President's power to pardon extends to criminal contempt of court. It was contended in *Grossman* that if pardoning power is extended to criminal contempt of court, it would be an invasion of judicial power; it may be abused and may amount to tinkering of the concept of separation of powers. All the contentions were negated. For the contention as to abuse of power, Chief Justice Taft's remarkable observations are worth quoting²:

If we could conjure up in our minds a President willing to paralyse courts by pardoning all criminal contempts, why not a President ordering a general jail delivery.

The position in the U.K. was stated by Chief Justice Taft in *ex parte Grossman* in the following words³:

The King of England, before our Revolution, in the exercise of his prerogative, had always exercised the power to pardon contempts of court, just as he did ordinary crimes and misdemeanours, and as he has done to the present day.

The observations of Chief Justice Taft in *ex parte Grossman* that pardoning power of the President extends to criminal contempts of court may apply to the Indian context. The language of article 72, which deals, *inter alia*, with the pardoning power of the President, supports that view. Article 72 is as follows:

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1. 69 L Ed 527.
 2. *Id.* at 536.
 3. *Id.* at 531.



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) ***
 - (3) ***

Article 72 (1) (b) empowers the President (union council of ministers) to exercise the power of pardon for 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. The executive power is co-extensive with that of legislative power i.e. the executive power extends to the areas where the Parliament has the power to legislate under the Constitution. Entry 77 of list I of the seventh schedule reads as follows:

Constitution, organisation, jurisdiction and powers of the Supreme Court (*including contempt of such court*) and the fees taken therein; persons entitled to practise before the Supreme Court (emphasis supplied).

Contempt of Courts Act, 1971 was enacted by the Parliament under the above entry read with entry 14 of list III of schedule VII. Since contempt of Supreme Court is made a subject matter of legislation for the Union, it falls within the extent of the executive power of the union. Therefore it falls under article 72 (1) (b) and therefore the pardoning power of the President extends to criminal contempts of court also. But the matter does not end there. If the punishment is not under the Contempt of Courts Act, 1971 but under articles 129 and 142 (2) of the Constitution, can the President exercise his pardoning power? If the Parliament has power to prescribe maximum punishment, then even if the punishment is under articles 129 and 142 then also the President's power should be deemed to extend to criminal contempts of court. But the question is whether the Parliament has the competency to prescribe maximum punishment? In *Supreme Court Bar Association v. Union of India*,⁴ A.S. Anand, J. (as he then was) for a unanimous constitution bench observed⁵ :

4. (1998) 4 SCC 409.

5. *Id.* at 428.



The Parliament by virtue of Entry 77, List I is competent to enact a law relating to the powers of the Supreme Court with regard to contempt of itself and such a law may prescribe the nature of punishment which may be imposed on a contemner by virtue of the provisions of Article 129 read with Article 142 (2). Since, no such law has been enacted by the Parliament, the nature of punishment prescribed, under the Contempt of Courts Act, 1971 may act as a guide for the Supreme Court but the extent of punishment as prescribed under that Act can apply only to the High Courts, because the 1971 Act ipso facto does not deal with the contempt jurisdiction of the Supreme Court, except that Section 15 of the Act prescribes procedural mode for taking cognizance of criminal contempt by the Supreme Court also. Section 15, however, is not a substantive provision conferring contempt jurisdiction. The judgement in Sukhdev Singh's case (*supra*) as regards the extent of "maximum punishment" which can be imposed upon a contemner must, therefore, be construed as dealing with the powers of the High Courts only and not of this court in that behalf. We are, therefore, doubtful of the validity of the argument of the learned Solicitor General that the extent of punishment which the Supreme Court can impose in exercise of its inherent powers to punish for contempt of itself and/or of subordinate courts can also be only to the extent prescribed under the Contempt of Courts Act, 1971. We, however, do not express any final opinion on that question since that issue, strictly speaking, does not arise for our decision in this case. The question regarding the restriction or limitation on the extent of punishment, which this court may award while exercising contempt jurisdiction may be decided in a proper case, when so raised.

Thus the question whether the Parliament by virtue of article 246 (1) read with entry 77 of list I of schedule VII can prescribe maximum punishment was left undecided in this case. But the observations extracted above tends to point out that the Parliament can prescribe maximum punishment for contempt of the Supreme Court also but the content of articles 129 & 142 (2) cannot be diluted by that process. The observations made by a three judges bench in *Delhi Judicial Service Association v. State of Gujarat*⁶ was not brought to the attention of the five judge bench which decided the *Supreme Court Bar Association case*, which are as follows⁷:

The Parliament is thus competent to enact a law relating to the powers of the Supreme Court with regard to contempt of itself; such a law may prescribe procedure to be followed *and it may also prescribe*

6. (1991) 4 SCC 406.

7. *Id.* at 445.



the maximum punishment which could be awarded and it may provide for appeal and for other matter (emphasis supplied).

It is submitted that Parliament has the competency by virtue of the aforesaid constitutional provisions to prescribe the maximum punishment which the Supreme Court can impose if the contempt is established under articles 129 and 142 subject to the condition that the punishment should not dilute the constitutional power of the apex court under articles 129 and 142.

In *Kehar Singh v. Union of India*⁸, Pathak, C. J. for the constitution bench while dealing with the question as to whether the President while acting under article 72 can come to a different conclusion from that of the court's, observed⁹:

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 given by the courts to Article 21 of the Constitution...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 denial of personal liberty. The power so entrusted is a power belonging to the people and reposed in the highest dignitary of the state....

It is submitted that though the observations were made in a different context, it squarely applies to criminal contempt also as it involves personal liberty of an individual. It was held in *Kehar Singh's* case that the President can come to a different conclusion on merits while acting under article 72. A criminal case could cross three stages namely the trial court, high court and the Supreme Court. Even in such cases, the apex court held that to protect personal liberty, the President can come to a different conclusion. In cases of contempt under articles 129 and 142, there is only one stage and therefore a broader interpretation is needed to strengthen the purpose of article 21 and since the Parliament has the power to prescribe maximum punishment, article 72 (1) (b) is attracted to contempt actions also. Since in *Kehar Singh's* case, the constitution bench held that the President can go into the merits afresh, he can go into the merits in cases of contempt also and may come to a different conclusion. It is therefore submitted that even if the punishment for contempt is rendered under articles 129 and 142 of the Constitution, the President's power to pardon extends to such cases also.

8. (1998) 1 SCC 204.

9. *Id.* at 210.



Before parting with the discussion, it may be apposite to quote the observation of Fazal Ali, J. in *Maru Ram v. Union of India*¹⁰ in his concurring note¹¹:

Doubtless, the President of India under Article 72 and the State Government under Article 161 have absolute and unfettered powers to grant pardon, reprieves, remission, etc. This power can neither be altered, modified nor interfered with by any statutory provision. *But, the fact remains that higher the power, the more cautious would be its exercise...It cannot be doubted as a proposition of law that where a power is vested in a very high authority, it must be presumed that the said authority would act properly carefully after an objective consideration of all the aspects of the matter* (emphasis supplied).

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10. (1981) 1 SCC 107.

11. *Id.* at 162.

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