Death sentence on “Per incurium judgment”

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In the last one month death sentence might be the most frequently used word in Indian Newspapers after “rape”. A large number of people are supporting death sentence on rape cases. This kind of an emotional reaction towards a grave and inhuman crime is not uncommon in India. The public memory is very short lived. Therefore authors don’t know whether the hue and cry for more deterrent punishments ranging from chemical castration to death sentence will last forever or whether it will culminate into an effective legislation. However, the authors felt the need off discussing about another story of death sentence which have not received enough public attention as it deserved. Of course authors admit that perhaps the law students in authors mind might have generated the curiosity into the legal aspects of it. This paper is attempted in the light of the Honorable president of India’s rejection of mercy petition filed by Saibana Ningappa Natikar,a death row convict . This is the President Pranab Mukerjee’s second rejection of mercy petition after assuming the office of President. Of course the 1st rejection was made in the mercy petition of Kasab, the convict in the historic 26/11 incident. Authors wish to make it clear in the outset itself that this ‘Article’ exclusively deals with remedies available to a person sentenced to death on a per incurium judgment of the Supreme Court. Saibanna was a life convict for the murder of his 1st wife. While he was released on parole on 1994, he killed his 2nd wife suspecting her fidelity along with his daughter. He attempted to suicide after these two murders. The Sessions Court tried and convicted Saibana for death sentence. Interestingly Karnataka High Court Division bench gave a split verdict on his appeal which necessitated the reference of the case to the 3rd judge who confirmed the death penalty and resulted in the appeal to the Supreme Court of India.

Supreme Court of India confirmed the death sentence of Saibana. The interesting legal issue involved in this case is the application of section 303 in Indian Penal code 1860 which has been considered as a dead letter ever since the Apex Court verdict in Mittu Singh v. State of Punjab1. Section 303 of Indian Penal code says that anyone who has been sentenced to life sentence is found guilty of committing murders during life sentence should mandatorily be sentenced to death. In Mittu Singh v. State of Punjab2 Supreme Court examined the constitutional validity of section 303 of Indian Penal Code and had finally came to a conclusion that section 303 is violating the fundamental rights guaranteed under Article 14 and Article 21 of Constitution of India. Supreme Court of India held that there is no intelligible differentia (“visible difference”) in classifying murders into one who does it otherwise and murder committed during life sentence and there is no rational nexus between the intelligible differentia and the object sought to be achieved. In conclusion Supreme Court declared Sec.303 of IPC as unconstitutional and thereby struck down. As a general rule of constitutional Law a provision declared as unconstitutional is not in existence unless the constitutional infirmity is removed by an amendment3 or if the earlier judgment is reversed by a larger bench of the Apex Court as a general practice in common law jurisprudence based on precedents. In Saibana v. State of Karnataka4

References:

1 1983 CriLJ 811
2 1980 CriLJ 636
3 State of Gujarat v. Ambica mills
4 (2005) 4 SCC 165

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Saibauna case) even though the accused was charged under Sec.303 of IPC initially, considering Mithu Singh case\textsuperscript{5} Sessions Court did not convict him under Sec. 303 of IPC. However he was convicted under Sec.302 and sentenced to death. It is stated by many that Supreme Court failed to follow or ignored the guidelines laid down in Bachan Singh v. State of Punjab\textsuperscript{6} in which the Honorable Apex Court propounded the theory of ‘rarest of the rare case’ for awarding death sentence. In addition to that it is also stated that Santosh Kumar Bariyar v.state of Maharashtra\textsuperscript{7} Honourable Apex Court declared the judgment in Saibauna Case is per incurium. In the light of this not less than 14 judges appealed to President Pranab Mukerjee to allow his mercy petition. However the Honourable President declined. Interestingly judges in Saibauna Case stated that they are doubtful as to whether two life sentences can run concurrently. Actually it is an interesting question in light of Supreme Court judgment in Gopal Vinayak Godse v.State of Maharashtra\textsuperscript{8} followed by so many other judgments declaring that life sentence means sentence for the entire life and not 14 years or 20 years.\textsuperscript{9} (as against the general misconception prevailing in the society). Supreme court of India clarifies this legal position in a number of cases in the last few years. In this context the doubt of the Supreme Court as to the propriety of double life imprisonment which is virtually impossible as life is only one is absolutely genuine and is an issue enough to be resolved by a larger bench. With due respect to the Honourable Supreme Court such a cause ought to have been taken by the court rather than giving a judgment, that too affirming death sentence. In the authors humble opinion judgment in one case will be binding on parties even if the ratio which formed, the basis of it was found invalid or is declared as per incurium on an subsequent judgment. Therefore a judgment declared as per incurium is no relief to parties affected by it and such a declaration will only suffice to nullify the precedential value of the judgment since it need not be followed by the same court or any other bench or court sub-ordinate or lesser in jurisdiction than it. Therefore it is left open to parties affected by such a judgment to knock the doors of a higher bench or court through an appeal or revision as the case may be, provided the law governing the matter provides any such remedy and if not to seek a review again provided the law provides for it. If the judgment of the Supreme Court is later declared per-incurium party affected by such per incurium judgment can once again move the Supreme Court through a review petition under Art. 137 of the Constitution of India. In the humble view of the authors the president’s rejection of mercy petition will not stand in the way of such a person as the pardoning power of the executive under Article 72 of the constitution cannot be treated as an appeal or revision from the judgment of the Supreme Court and the president of India is not sitting as a court of appeal to the highest court of appeal of this land. Authors admit that the constitutional provision which provides for the same consequences of an acquittal to the pardoning given by the President of India. Apex Court declared pardoning power of the president under Article 72 and the governor under article 161 as being amendable to judicial review\textsuperscript{10} by Honourable of higher courts under Articles 226 and 32 of the constitution of India. Moreover if at all there is any such doubt,Supreme Court can exercise its inherent power under Article 142 of the constitution in this matter as no man shall be sentenced to death on a per incurium judgment. Supreme Court can exercise this power suo moto also, even without any petition from the convict in the light of Articles 137 and 142 of the constitution of India.\textsuperscript{11} As the custodian of fundamental rights of the citizens Supreme Court is duty bound to do complete justice. It is open for the party to challenge the president’s decision as the president failed to notice or under evaluate the fact that the judgment which confirmed the death sentence of the person whose mercy petition he is dealing with has been declared as per incurium by the same court. It can pleaded that the President of India ought not have ignored this issue and dismissed

\textsuperscript{5} 1983 Cri LJ 811
\textsuperscript{6} 1980 Cri LJ 636
\textsuperscript{7} (2009) 6 SCC 498
\textsuperscript{8} 1961 Cri LJ 736
\textsuperscript{9} Ashok kumar alias Golu v. Union of India AIR 1991 SC 1792;Md.Munna v.Union of India&Ors (2005) 7SCC 417;State of MP v.Ratan Singh AIR 1976 SC 1552
\textsuperscript{10} Eppuru Sudhakar v. Government of Andhra Pradesh AIR 2006 SC 3385
\textsuperscript{11} Art.142 Provides the power of Supreme Court to pass any order to do complete justice
the mercy petition of a convict whose death sentence is based on a judgment not good in law as per judgment of the Supreme Court (the final interpreter of the constitution of India). Supreme Court of India in Eppuru Sudhakar v. Govt. of A.P\textsuperscript{12}, held that it can quash a decision taken by the president or the governor when it is perverse or based on irrelevant facts and non-consideration of material facts. Before concluding this ‘Article’ authors wish to note that they have not expressed any opinion that Saibana who committed murders of both his 1\textsuperscript{st} wife and 2\textsuperscript{nd} wife along with his own daughter deserves any lenient punishment and opined only what should be done when a person’s death sentence is affirmed by the Supreme Court and such an affirmation is later found per incurium. One more thing is also opined by these authors that is they have not stated that Saibana is “Per Incurium”

\textsuperscript{12} AIR 2006 SC 3385