(2016) 12 DEL CK 0017

DELHI HIGH COURT

Case No: Writ Petition (CRL) 441 of 2015

Sonu Sardar	APPELLANT
Vs	
The Union of India	RESPONDENT

Date of Decision: Dec. 6, 2016

Acts Referred:

- Constitution of India, 1950 - Article 226

Citation: (2017) 3 ADDelhi 7 : (2016) 235 DLT 530 : (2016) 160 DRJ 456

Hon'ble Judges: Mr. G.S. Sistani and Mr. Vinod Goel, JJ.

Bench: Division Bench

Advocate: Mr. Navin Chawla, Senior Advocate with Mr. Amit Rajput and Mr. Aditya V. Singh, Advocates, for the Respondent No. 1; Mr. Atul Jha, Senior Advocate with Mr. Sandeep Jha, Advocate, for the Respondent No. 2; Ms. Nitya Ramakrishnan, Senior Advocate with Ms. R

Final Decision: Dismissed

Judgement

G.S. Sistani, J. - CRL M.A. No. 3651/2015 (under Section 482 CrPC)

This is an application under Section 482 filed on behalf of the respondent no. 2/ State of Chhattisgarh for dismissal of the present writ petition on the ground that this court lacks territorial jurisdiction to entertain the present writ petition.

2. The present writ has been filed impugning the orders of the President and the Governor of Chhattisgarh rejecting the mercy petition of the petitioner herein, inter alia, on account of delay, non-application of mind, ingnorance of relevant considerations and without taking into account that the petitioner was kept in solitary confinement.

3. Brief background to the present controversy is thus, the petitioner had been accused of killing 5 persons at Village Cher, Baikunthpur District, Chhattisgarh on the intervening night of 26-27.11.2004. He was convicted by the Sessions Court at

Koriya District, Chhattisgarh and sentenced to death. On an appeal filed, the High Court of Chhattisgarh confirmed the sentence of death and dismissed the appeal preferred by the petitioner herein on 08.03.2010. On 23.02.2012, the Supreme Court upheld the death sentence and dismissed the appeal. The petitioner filed a mercy petition to the President on 09.04.2012. As per procedure, the petition was first sent to the Government of Chhattisgarh for placing the same before the Governor of Chhattisgarh under Article 161 of the Constitution of India. The Governor rejected the mercy petition on 08.04.2013 and thereafter, the President also rejected the mercy petition on 05.05.2014. The Supreme Court has dismissed the review petition on 10.02.2015. Aggrieved by the rejection of his mercy petition by the Governor of Chhattisgarh and the President of India, the petitioner has filed the present writ petition.

4. During the course of the present proceedings, on 05.09.2016, this court was informed that a petition seeking transfer [being Transfer Petition (Criminal) No. 297/2016] had been filed before the Supreme Court of India by the respondent no. 2 and further proceedings in the present petition were stayed. Accordingly, the next date was cancelled and the matter was fixed for 16.11.2016. In the meanwhile, on 08.11.2016, the Supreme Court of India modified its previous order and directed this Court to decide the issue of maintainability within four weeks. The parties did not approach this court immediately to appraise this court about the order of the Supreme Court, but waited till 16.11.2016, the date fixed, to inform the Court. Even on the said date, the petitioner sought an adjournment; accordingly the matter was adjourned to 22.11.2016. It was only on 22.11.2016 that the arguments in the matter commenced; even though the Supreme Court had passed the order on 08.11.2016.

5. The submissions of the counsel for the respondent no. 2/applicant are on the following lines:

5.1. Learned counsel for the applicant has drawn our attention to paragraph 43 of the petition to show that the petitioner has alleged the jurisdiction of this court on two grounds; first, that the respondent no. 1 is situated in Delhi and second, the cause of action also arises in Delhi. He has also drawn our attention to the order dated 02.03.2015 passed by this Court, the relevant portion of which reads as under:

"On the question whether a writ petition would be maintainable before the High Court as the punishment of death sentence stands confirmed on merits by the Supreme Court, reliance has been placed on the decision of Bombay High Court in Smt. Renuka v. Union of India, W.P.(Crl.) No.3103/2014 dated 20.08.2014 and the decision of Allahabad High Court dated 28.01.2015 in Public Interest Litigation (PIL) No.57810/2014 People''s Union For Democratic Rights And Others v. Union of India with Criminal Miscellaneous Writ Petition No. 23471/2014 in Surendra Koli v. Union of India and Ors. Our attention is also drawn on the earlier order passed in the same writ petition dated 31.10.2014. On the question of territorial jurisdiction, learned Senior counsel for the petitioner has relied upon the decision of the Supreme Court

in **Kusum Ingots v. Union of India, (2004) 6 SCC 254** and submits that the cause of action which is the subject matter of challenge relates to procedural lapses in the decision of the Mercy Petition. It is submitted that Mercy Petition was decided in Delhi by the President of India."

(Emphasis Supplied)

5.2. Learned counsel for the applicant/respondent no.2 has contended that no cause of action has arisen in Delhi and accordingly, this court has no jurisdiction to entertain the present petition. Mr. Jha, learned counsel for the applicant submits that the crime was committed at Chhattisgarh; the trial took place at Chhattisgarh; appeal was heard by the Chhattisgarh High Court; in the proceedings before the Supreme Court, the respondent no. 2/ State of Chhattisgarh was the sole respondent; the mercy petition was submitted through the Jail Superintendent, Raipur, Chhattisgarh; and the rejection was initially communicated to the Secretary (Home) (Jail), Government of Chhattisgarh. As per procedure, the rejection of a mercy petition by the President is communicated by the Central Government to the State Government, the respondent no. 2 in the present case, with a direction to inform the petitioner, thus no cause of action has arisen within the terroritial jurisdiction of this Court.

5.3. Learned counsel further submits that the rejection of the mercy petition does not give rise to any cause of action as the order of rejection was not communicated to the convict. It is submitted that the order of rejection was communicated only through the concerned state, i.e. the State of Chhattisgarh in the present matter. He concludes that it is the communication which may give rise to a cause of action and not the order of rejection of the mercy petition itself. He relies upon paragraphs 31 and 33 of the judgment of the Supreme Court in **Shatrughan Chauhan and Another v. Union of India and Others, (2014) 3 SCC 1** to draw the attention of this Court to the procedure involved in the rejection of a mercy petition. He submits that the role of the respondent no. 1 is limited in deciding the mercy petition by the President. He has also drawn our attention to the letter dated 13.05.2014 issued by the Ministry of Home Affairs to the Secretary (Home) (Jail), Government of Chhattisgarh communicating the rejection of the mercy petition of the petitioner herein and directing that the convict be informed accordingly.

5.4. The next contention raised by the learned counsel for the applicant is that it is a well established principle in criminal jurisprudence that crime is always local and the consequent investigation is also carried out by the local police. The said contention of the counsel is premised on the fact that the deciding of a mercy petition is part and parcel and in continuation of the criminal proceedings and is subject to the same rules. He contends that rejection of mercy petition cannot be delinked and treated as an independent act giving rise to a fresh cause of action. Mr. Jha contends that the entire proceedings have been conducted in Chhattisgarh and even before the Supreme Court, State of Chhattisgarh was the only respondent. To fortify his

contention, learned counsel has relied upon Sections 177, 178 and 179 of the Code of Criminal Procedure and upon the judgments of the Supreme Court in **Navinchandra N. Majithia v. State of Maharashtra, (2000) 7 SCC 640** (paragraph 22) and **Manoj Kumar Sharma v. State of Chhattisgarh, (2016) 9 SCC 1** (paragraph 27).

5.5. Learned counsel further submits that the reliance placed on **Kusum Ingots & Alloy Ltd. v. Union of India and Another, (2004) 6 SCC 254** by the counsel for the petitioner is misplaced. Mr. Jha relies upon paragraph 26 to fortify his submission; the paragraph reads as under:

"26. The view taken by this Court in U.P. Rashtriya Chini Mill Adhikari Parishad that the situs of issue of an order or notification by the Government would come within the meaning of the expression "cases arising" in clause 14 of the (Amalgamation) Order is not a correct view of law for the reason hereafter stated and to that extent the said decision is overruled. In fact, a legislation, it is trite, is not confined to a statute enacted by Parliament or the legislature of a State, which would include delegated legislation and subordinate legislation or an executive order made by the Union of India, State or any other statutory authority. In a case where the field is not covered by any statutory rule, executive instructions issued in this behalf shall also come within the purview thereof. Situs of office of Parliament, legislature of a State or authorities empowered to make subordinate legislation would not by itself constitute any cause of action or cases arising. In other words, framing of a statute, statutory rule or issue of an executive order or instruction would not confer jurisdiction upon a court only because of the situs of the office of the maker thereof."

(Emphasis Supplied)

5.6. Learned counsel for the applicant further submits that the President in deciding a mercy petition does not pass any order, executive instruction or legislative act; but he exercises a constitutional mandate based upon his discretion. Counsel further contends that the President cannot be said to have a seat as he is the head of the entire country. The location at which the President exercises his discretion is irrelevant and the order can be said to be passed, if at all, at the time when it was communicated by the respondent no. 1 to the respondent no. 2 or to the convict thereafter.

5.7. Learned counsel further submits that the present proceedings are a continuation of the criminal judicial proceedings. Relying upon **Dashrath Rupsingh Rathod v. State of Maharashtra, (2014) 9 SCC 129**, learned counsel submits that civil concepts should not be extrapolated to criminal law. The relevant paragraph reads as under:

"13. We are alive to the possible incongruities that are fraught in extrapolating decisions relating to civil law onto criminal law, which includes importing the civil

law concept of "cause of action" to criminal law which essentially envisages the place where a crime has been committed empowers the court at that place with jurisdiction. In **Navinchandra N. Majithia v. State of Maharashtra [(2000) 7 SCC 640 : 2001 SCC (Cri) 215]** this Court had to consider the powers of High Courts under Article 226(2) of the Constitution of India. Noting the presence of the phrase "cause of action" therein it was clarified that since some events central to the investigation of the alleged crime asseverated in the complaint had taken place in Mumbai and especially because the fundamental grievance was the falsity of the complaint filed in Shillong, the writ jurisdiction of the Bombay High Court was unquestionably available. The infusion of the concept of "cause of action" into the criminal dispensation has led to subsequent confusion countenanced in High Courts. It seems to us that Bhaskaran allows multiple venues to the complainant which runs counter to this Court''s preference for simplifying the law. Courts are enjoined to interpret the law so as to eradicate ambiguity or nebulousness, and to ensure that legal proceedings are not used as a device for harassment, even of an apparent transgressor of the law. Law''s endeavour is to bring the culprit to book and to provide succour for the aggrieved party but not to harass the former through vexatious proceedings. Therefore, precision and exactitude are necessary especially where the location of a litigation is concerned."

(Emphasis Supplied)

5.8. Accordingly, the counsel concludes that this court does not have any jurisdiction in the present petition and it can be entertained only by the High Court of Chhattisgarh as per the basic tenets of criminal law.

5.9. As an alternative submission, learned counsel has contended that in case this court comes to a conclusion that it is vested with jurisdiction to entertain the present petition, it should still refrain from doing so. He primarily relies upon the concept of forum non conveniens. Elaborating his arguments, Mr. Jha submits that the scope of the present proceedings is extremely limited. He states that the advice of the Ministry of Home Affairs cannot be looked into; what can be looked into is whether the material upon which such advice was tendered was proper. In the present case, counsel submits the petition is based upon the three supervening circumstances, i.e. solitary confinement, delay and procedural lapses and the material in respect of the three grounds relate to Chhattisgarh and the convict is also in fact at Chhattisgarh. To buttress his contention, learned counsel has relied upon the full court judgment of this Court in **Sterling Agro Industries Ltd. v. Union of India & Ors., 2011 (124) DRJ 633** (paragraphs 30, 31 and 32).

5.10. Learned counsel finally contends that all the judgments relied upon in the order dated 02.03.2015; the writ petitions were entertained by the respective High Courts in whose jurisdiction the crime was committed.

6. Per contra, learned counsel for the petitioner/ non-applicant contends that this court is vested with jurisdiction concurrent to that of the High Court of Chhattisgarh. In support of the same, learned counsel has made the following submissions:

6.1. Learned counsel submits that the submission of the counsel for the applicant that present proceedings are a continuation of the criminal judicial proceedings is completely misplaced. She submits that the present proceedings are in fact separate proceedings independent of the judicial proceedings which stand concluded. The power to pardon is an executive function and it is the consequent order which is relevant and not the previous judicial proceedings which have attained finality. To fortify her submissions, learned counsel has relied upon the judgments of the Supreme Court in **Kehar Singh and Another v. Union of India and Anr., (1989) 1 SCC 204** (paragraph 15) and Shatrughan Chauhan (Supra).

6.2. Learned counsel for the non-applicant has submitted that after Article 226 (2) has been inserted in the Constitution, the limitation on territorial jurisdiction has been given a go bye and for the present what is relevant is that the cause of action should have arisen within the jurisdiction of the court even though the authorities may be situated outside its territory. Ms. Ramakrishnan has drawn our attention to the Statement of Objects and Reasons to the Constitution (Fifteenth Amendment) Act, 1963 and the following observations of the Supreme Court in **Alchemist Ltd. v. State Bank of Sikkim, (2007) 11 SCC 335**:

"16. It may be stated that by the Constitution (Forty-second Amendment) Act, 1976, Clause (1-A) was renumbered as Clause (2). The underlying object of amendment was expressed in the following words:

"Under the existing Article 226 of the Constitution, the only High Court which has jurisdiction with respect to the Central Government is the Punjab High Court. This involves considerable hardship to litigants from distant places. It is, therefore, proposed to amend Article 226 so that when any relief is sought against any Government, authority or person for any action taken, the High Court within whose jurisdiction the cause of action arises may also have jurisdiction to issue appropriate directions, orders or writs."

(emphasis supplied)

The effect of the amendment was that the accrual of cause of action was made an additional ground to confer jurisdiction on a High Court under Article 226 of the Constitution.

17. As Joint Committee observed:

"This clause would enable the High Court within whose jurisdiction the cause of action arises to issue directions, orders or writs to any Government, authority or person, notwithstanding that the seat of such Government or authority or the residence of such person is outside the territorial jurisdiction of the High Court. The

Committee feels that the High Court within whose jurisdiction the cause of action arises in part only should also be vested with such jurisdiction."

(Emphasis Supplied)

6.3. Relying upon the observations of the Apex Court, learned counsel for the petitioner/ non-applicant submits that the very intention of adding Article 226 (2) was to introduce the concept of cause of action. The learned counsel submits that in the present case substantial cause of action has arisen in Delhi and therefore, this Court would have the jurisdiction to entertain the present petition. Learned counsel has also relied upon the decision of this court in Sterling Agro Industries Ltd. (Supra).

6.4. Ms. Ramakrishnan next submits that in case of mercy petitions, the previous judicial proceedings are irrelevant as they have attained finality and only the order rejecting the mercy petition is in question and subject matter of the present writ petition. It is submitted that the primary relief is against the respondent no. 1/ Union of India as it is the material provided by the Ministry of Home Affairs which has to be scrutinized.

6.5. In respect of cause of action, learned counsel for the non-applicant submits that the mercy petition filed by the petitioner was processed in Delhi; the impugned order rejecting the petition was made at Delhi; and the letter communicating the rejection of mercy petition was also signed at Delhi. Therefore, substantial cause of action has arisen in Delhi.

6.6. In response to the contention that rejection of mercy petition cannot give rise to a cause of action, learned counsel submits that the mercy petition was the last option available to the convict/ petitioner before issuance of warrants for execution of the penalty and the same would give rise to a cause of action and the submission of the applicant that communication alone can give rise to a cause of action is misplaced.

6.7. Learned counsel also states that a complete reading of the judgment in the case of Kusum Ingots (Supra) decided by the Supreme Court of India supports the case of the petitioner. The Supreme Court has clearly distinguished between actions of the executive and legislative functions. The present case, being one based on the action of the executive, is not covered by paragraph 26 of the said judgment. To substantiate that Kusum Ingots (Supra) pertains to legislative actions, learned counsel has relied upon the judgments of this court in **Smt. Malini Mukesh Vora v. Union of India, 2009 SCC OnLine Del 1776** (paragraphs 18, 19 and 20) and Sterling Agro Industries Ltd. (Supra) (paragraphs 22, 23 and 30).

6.8. Accordingly, the counsel for the petitioner submits that this court would have the jurisdiction to entertain the present petition.

6.9. With regard to the submission made by the counsel for the applicant with respect to forum conveniens. Counsel for the non-applicant submits that this court will be the forum of convenience as the primary relief is sought against respondent no. 1 and not the respondent no. 2. It is the advice tendered by the Cabinet to the President that is to be scrutinised and not the judicial records of the criminal trial. While relying on the judgment of Sterling Agro Industries Ltd. (Supra), learned counsel sought to distinguish her case inasmuch as the proceedings before the President cannot be said to be in the form of appellate proceedings. Even though, as per procedure, mercy petitions are first sent to the Governor of the concerned state and then decided by the President; the powers of the President and Governor under Articles 72 and 161 are independent of one another and one cannot be said to be sitting in appeal over the decision of the other. Learned counsel has further relied upon the judgment of this Court in **Vishnu Security Services v. Regional Provident Fund Commissioner, 2012 (129) DRJ 661** to show that forum non conveniens should be a ground for rejection only if the court comes to the conclusion that it is "totally inconvenient" for the court to entertain the writ petition.

6.10. The counsel also submits that the judgments referred to by the applicant in the order dated 02.03.2015 were in support of the proposition that the present writ is maintainable even after the SLP and review having been dismissed by the Supreme Court.

7. During the course of the hearing, we had enquired from the counsel for the respondent no. 1/ Union of India as to the stand of the Union of India with respect to the prayer made in this application. Learned counsel had submitted that the respondent no. 1 was not contesting the jurisdiction of this Court.

8. We have heard the learned counsel for the parties and examined their rival contentions and the pleadings on record.

9. The first question which arises for our consideration is to the nature of the power exercised by the President while deciding clemency of any convict. Counsel for the applicant has strongly urged before this Court that in criminal jurisprudence, crime is local and the investigation is also carried out by the local police. Reliance has also been placed on Sections 177, 178 and 179 of the Code of Criminal Procedure. Mr. Jha has also laboured hard to convince this Court that the present proceedings are in continuation of the criminal judicial proceedings.

10. No doubt the protection of personal life and liberty as enshrined in Article 21 of the Constitution is paramount in any civilised society. All the limbs of the State must act to protect the same from any infraction. A Constitutional Bench of the Supreme Court in Kehar Singh (Supra) observing that the fallibility of human judgment had led to the Executive being reposed with the power of clemency, had observed as under:

"7. 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 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 [(1981) 1 SCC 107 : 1981 SCC (Cri) 112 : (1981) 1 SCR 1196]**, 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."

(Emphasis Supplied)

11. The Apex Court had also accepted the following observations of United States'' Chief Justice Taft in Ex parte Philip Grossman, 267 US 87:

"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."

12. It was further held as under:

"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 [75 Rs. Ed 354, 358]** 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 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 [AIR 1961 SC 334 : (1961) 2 SCR 133, 138-140]** 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: "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."

13. It seems to us that none of the submissions outlined above meets the case set up on behalf of the petitioner. We are concerned here with the question whether the President is precluded from examining the merits of the criminal case concluded by the dismissal of the appeal by this Court or it is open to him to consider the merits and decide whether he should grant relief under Article 72. We are not concerned with the merits of the decision taken by the President, nor do we see any conflict between the powers of the President and the finality attaching to the judicial record, a matter to which we have adverted earlier. 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."

14. Upon the considerations to which we have adverted, it appears to us clear that the question as to the area of the President''s power under Article 72 falls squarely within the judicial domain and can be examined by the court by way of judicial review.

15. The next question is whether the petitioner is entitled to an oral hearing from the President on his petition invoking the powers under Article 72. It seems to us that there is no right in the condemned person to insist on an oral hearing before the President. The proceeding before the President is of an executive character, and when the petitioner files his petition it is for him to submit with it all the requisite information necessary for the disposal of the petition. He has no right to insist on presenting an oral argument. The manner of consideration of the petition lies within the discretion of the President, and it is for him to decide how best he can acquaint

himself with all the information that is necessary for its proper and effective disposal. The President may consider sufficient the information furnished before him in the first instance or he may send for further material relevant to the issues which he considers pertinent, and he may, if he considers it will assist him in treating with the petition, give an oral hearing to the parties. The matter lies entirely within his discretion. As regards the considerations to be applied by the President to the petition, we need say nothing more as the law in this behalf has already been laid down by this Court in Maru Ram."

(Emphasis Supplied)

13. This Court has also in **Khem Chand v. State, (1989) ILR 2 Del 429 : 40 (1990) DLT 168** (paragraphs 26 and 27) while holding that writ petitions to this court were also maintainable against rejection of mercy petitions, held that clemency was an executive decision and this court was under an equivalent obligation to protect the life and liberty of the citizens.

14. Recently, the Supreme Court in Shatrughan Chauhan (Supra) after considering both Indian and international judicial pronouncements on the subject had observed as under:

"14. Both Articles 72 and 161 repose the power of the People in the highest dignitaries i.e. the President or the Governor of a State, as the case may be, and there are no words of limitation indicated in either of the two Articles. The President or the Governor, as the case may be, in exercise of power under Articles 72/161 respectively, may examine the evidence afresh and this exercise of power is clearly independent of the judiciary. This Court, in numerous instances, clarified that the executive is not sitting as a court of appeal, rather the power of President/Governor to grant remission of sentence is an act of grace and humanity in appropriate cases i.e. distinct, absolute and unfettered in its nature. &#65533;

19. In concise, the power vested in the President under Article 72 and the Governor under Article 161 of the Constitution is a constitutional duty. As a result, it is neither a matter of grace nor a matter of privilege but is an important constitutional responsibility reposed by the People in the highest authority. The power of pardon is essentially an executive action, which needs to be exercised in the aid of justice and not in defiance of it. Further, it is well settled that the power under Articles 72/161 of the Constitution of India is to be exercised on the aid and advice of the Council of Ministers."

(Emphasis Supplied)

15. The Apex Court in the case of Kehar Singh (Supra) which has taken into consideration various judgments of the Supreme Court and also the observations of the Supreme Court in the case of Shatrughan Chauhan (Supra), have held that the power to pardon is part of the constitutional scheme. It is a power which has been

reposed by the people through the Constitution in the Head of the State and enjoys a high status. Being a constitutional responsibility of the President of India, it is a power of great significance. It has also been held that while exercising the power, the President of India does not amend, modify or supersede the judicial record, which remains intact and undisturbed and the President of India acts in a wholly different plane from that in which the courts acted. The act of the President of India under the constitutional power is entirely different from the judicial power and cannot be regarded as an extension of it. Accordingly, it cannot be said that the power exercised by the President of India is in continuation of the judicial proceedings.

16. The learned counsel for the petitioner has also contended that this Court cannot exercise jurisdiction under Article 226 as no cause of action had arisen in Delhi. The jurisdiction of the courts under Article 226 is well settled, in Kusum Ingots (Supra) the Supreme Court had clearly drawn a distinction between legislative and executive actions, it was held that "even if a small fraction of cause of action accrues within the territorial jurisdiction of the Court, the Court will have jurisdiction in the matter."

17. Both parties have relied upon the judgment in Kusum Ingots (Supra) and claimed that the reliance of the other side is misplaced. Upon a comprehensive reading of the Judgment, we are of the view that the reliance of the applicant is, in fact, misplaced. The paragraph sought to be relied upon, paragraph 26 extracted in para 5.5 aforegoing, is in respect of legislative actions. The Supreme Court has held that the mere passing of a legislative act does not give rise to a cause of action, but it is the application that may give rise to a cause of action. In respect of orders of the executive, the Court had held as under:

"27. When an order, however, is passed by a court or tribunal or an executive authority whether under provisions of a statute or otherwise, a part of cause of action arises at that place. Even in a given case, when the original authority is constituted at one place and the appellate authority is constituted at another, a writ petition would be maintainable at both the places. In other words, as order of the appellate authority constitutes a part of cause of action, a writ petition would be maintainable in the High Court within whose jurisdiction it As situate having regard to the fact that the order of the appellate authority is also required to be set aside and as the order of the original authority merges with that of the appellate authority."

(Emphasis Supplied)

18. The concept of cause of action was inserted as Article 226 (1A) by the 15th Amendment and later renumbered as Article 226 (2) by the 42nd Amendment. The said concept was comprehensively discussed in Alchemist Ltd. (Supra). Further the Full Bench of this Court in Sterling Agro Industries Ltd. (Supra) had concluded that "[e]ven if a miniscule part of cause of action arises within the jurisdiction of this

court, a writ petition would be maintainable before this court." At the same time, the full court had cautioned that the term ''cause of action'' should be understood as per Alchemist Ltd. (Supra).

19. The case of Sterling Agro Industries Ltd. (Supra) was decided by a five Judges Bench of Delhi High Court. Initially, a Writ Petition (C) 7569/2007 titled New India Assurance Limited v. Union of India and Others, came up for hearing before a Single Judge of this Court against the order passed by the Appellate Authority (Insurance). A preliminary objection was raised with regard to the territorial jurisdiction of this Court on the ground that the parties were working for gain at Andhra Pradesh; the factory in question was situated in Andhra Pradesh where the fire had broken out; the property was insured at Andhra Pradesh; claim was made in Andhra Pradesh; claim was rejected in Andhra Pradesh and proceedings were initiated in Andhra Pradesh. The only part of cause of action which had arisen in Delhi was that the Appellate Authority was situated in Delhi. By a detailed judgment passed by one of us (G.S. Sistani, J.), while sitting single, it was held that courts in Delhi did not have jurisdiction. The matter was taken in appeal before a Division Bench and thereafter a Full Bench of three Judges held that Courts at Delhi would have jurisdiction observing that it could not be said that an insignificant or miniscule part of the cause of action had arisen in Delhi. Thereafter, a Full Court Bench of five Judges was constituted to reconsider the Judgment; which, in turn, modified the findings of the three Judge bench and concluded as under:

"33. In view of the aforesaid analysis, we are inclined to modify, the findings and conclusions of the Full Bench in New India Assurance Company Limited (supra) and proceed to state our conclusions in seriatim as follows: (a) The finding recorded by the Full Bench that the sole cause of action emerges at the place or location where the tribunal/appellate authority/revisional authority is situate and the said High Court (i.e., Delhi High Court) cannot decline to entertain the writ petition as that would amount to failure of the duty of the Court cannot be accepted inasmuch as such a finding is totally based on the situs of the tribunal/appellate authority/revisional authority totally ignoring the concept of forum conveniens. (b) Even if a miniscule part of cause of action arises within the jurisdiction of this court, a writ petition would be maintainable before this Court, however, the cause of action has to be understood as per the ratio laid down in the case of Alchemist Ltd. (supra). (c) An order of the appellate authority constitutes a part of cause of action to make the writ petition maintainable in the High Court within whose jurisdiction the appellate authority is situated. Yet, the same may not be the singular factor to compel the High Court to decide the matter on merits. The High Court may refuse to exercise its discretionary jurisdiction by invoking the doctrine of forum conveniens. (d) The conclusion that where the appellate or revisional authority is located constitutes the place of forum conveniens as stated in absolute terms by the Full Bench is not correct as it will vary from case to case and depend upon the lis in question. (e) The finding that the court may refuse to exercise jurisdiction under

Article 226 if only the jurisdiction is invoked in a malafide manner is too restricted/constricted as the exercise of power under Article 226 being discretionary cannot be limited or restricted to the ground of malafide alone. (f) While entertaining a writ petition, the doctrine of forum conveniens and the nature of cause of action are required to be scrutinised by the High Court depending upon the factual matrix of each case in view of what has been stated in Ambica Industries (supra) and Adani Exports Ltd. (supra). (g) The conclusion of the earlier decision of the Full Bench in New India Assurance Company Limited (supra) "that since the original order merges into the appellate order, the place where the appellate authority is located is also forum conveniens" is not correct. (h) Any decision of this Court contrary to the conclusions enumerated herein above stands overruled."

(Emphasis Supplied)

20. As to what amounts to ''cause of action'' is well-settled, simply put, it is the bundle of facts which the plaintiff must prove in order to succeed. We deem it necessary to reproduce the following observations of the Supreme Court in Alchemist Ltd. (Supra):

"20. It may be stated that the expression "cause of action" has neither been defined in the Constitution nor in the Code of Civil Procedure, 1908. It may, however, be described as a bundle of essential facts necessary for the plaintiff to prove before he can succeed. Failure to prove such facts would give the defendant a right to judgment in his favour. Cause of action thus gives occasion for and forms the foundation of the suit.

21. The classic definition of the expression "cause of action" is found in **Cooke v. Gill [(1873) 8 CP 107 : 42 LJCP 98]** wherein Lord Brett observed: "''Cause of action'' means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court."

22. For every action, there has to be a cause of action. If there is no cause of action, the plaint or petition has to be dismissed.

23. Mr. Soli J. Sorabjee, Senior Advocate appearing for the appellant Company placed strong reliance on **A.B.C. Laminart (P) Ltd. v. A.P. Agencies [(1989) 2 SCC 163 : AIR 1989 SC 1239 : JT (1989) 2 SC 38]** and submitted that the High Court had committed an error of law and of jurisdiction in holding that no part of cause of action could be said to have arisen within the territorial jurisdiction of the High Court of Punjab and Haryana. He particularly referred to the following observations: "12. A cause of action means every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes

all the material facts on which it is founded. It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything which if not proved would give the defendant a right to immediate judgment must be part of the cause of action. But it has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff."

(Emphasis Supplied)

21. Accordingly, the next question which arises for our consideration is as to whether cause of action can be said to have arisen in Delhi. The argument of the learned counsel for the applicant is twofold; first, that cause of action is linked with crime and second, that rejection of mercy petition does not give rise to any cause of action. We are unable to accept both the contentions of the applicant.

22. The concept of cause of action in respect of criminal proceedings cannot apply sensu stricto to the present proceedings as the same are not a continuation of the judicial proceedings but premised upon executive orders. Accordingly, the judgments of the Supreme Court in Navinchandra N. Majitha (Supra) and Manoj Kumar Sharma (Supra) do not come to the aid of the applicant as in both the cases the criminal investigation was pending; while the present proceedings have arisen as a consequence of executive actions and by no means can be said to be an extension of the criminal proceedings, which have attained finality.

23. Learned counsel for the applicant had next contended that the rejection of mercy petition does not give rise to any cause of action. As an alternative, Mr. Jha had submitted it is the communication to the convict which may give rise to a cause of action. Again, we are unable to agree with the argument of learned counsel for the applicant. The mercy petition is the last thread between the convict and the gallows; the rejection of which leads to issuance of warrants of execution. It cannot be said that the same does not give rise to any cause of action to the convict as it closes the last hope upon which his very life is reliant. Therefore, in our view, the rejection of mercy petition does give rise to a cause of action at Delhi.

24. The last aspect to be considered by us pertains to the principle of forum non conveniens. The counsel for the applicant has argued that the convenient forum would be Chhattisgarh High Court and not this court. The concept was explained by the Supreme Court in Kusum Ingots (Supra) as under:

"30. We must, however, remind ourselves that even if a small part of cause of action arises within the territorial jurisdiction of the High Court, the same by itself may not be considered to be a determinative factor compelling the High Court to decide the matter on merit. In appropriate cases, the Court may refuse to exercise its discretionary jurisdiction by invoking the doctrine of forum conveniens.[See **Bhagat Singh Bugga v. Dewan Jagbir Sawhney [AIR 1941 Cal 670 : ILR (1941) 1 Cal 490]**, **Madanlal Jalan v. Madanlal [(1945) 49 CWN 357 : AIR 1949 Cal 495]**, **Bharat**

Coking Coal Ltd. v. Jharia Talkies & Cold Storage (P) Ltd. [1997 CWN 122], **S.S. Jain & Co. v. Union of India [(1994) 1 CHN 445]** and **New Horizons Ltd. v. Union of India [AIR 1994 Del 126]**."

(Emphasis Supplied)

25. The concept was further explained in Sterling Agro Industries Ltd. (Supra), a decision by a five Judges bench of the Delhi High Court. Hon''ble Mr. Justice Deepak Misra, speaking for the bench held as under:

31. The concept of forum conveniens fundamentally means that it is obligatory on the part of the court to see the convenience of all the parties before it. The convenience in its ambit and sweep would include the existence of more appropriate forum, expenses involved, the law relating to the lis, verification of certain facts which are necessitous for just adjudication of the controversy and such other ancillary aspects. The balance of convenience is also to be taken note of. Be it noted, the Apex Court has clearly stated in the cases of Kusum Ingots (supra), Mosaraf Hossain Khan (supra) and Ambica Industries (supra) about the applicability of the doctrine of forum conveniens while opining that arising of a part of cause of action would entitle the High Court to entertain the writ petition as maintainable.

32. The principle of forum conveniens in its ambit and sweep encapsulates the concept that a cause of action arising within the jurisdiction of the Court would not itself constitute to be the determining factor compelling the Court to entertain the matter. While exercising jurisdiction under Articles 226 and 227 of the Constitution of India, the Court cannot be totally oblivious of the concept of forum conveniens�"

(Emphasis Supplied)

26. Thereafter, a coordinate bench of this court in Vishnu Security Services (Supra) considering the judgments in Sterling Agro Industries Ltd. (Supra) and Kusum Ingots (Supra) held as under:

12. The principle was succinctly stated by Lord President in Clements v. Macaulay, 4 Macph. 593. His Lordship stated the general principle relating to jurisdiction, namely, when jurisdiction is competently vested in a particular court as per law, normally the court has no discretion whether it shall exercise its jurisdiction or not, but is bound to award the justice which a suiter comes to ask. This is founded on Latin maxim Judex tenetur impertiri judicium suum which means a Judge must exercise discretion in every case in which he is seized of it. Lord President also emphasised that the plea of forum non conveniens must not be stretched so as to interfere with the aforesaid general principle of jurisprudence. Forum non conveniens is applicable where the Court is satisfied that another Court of Law is also having jurisdiction over the matter and the case can be tried more suitably for the interest of the parties and for the ends of justice in the other court. Thus, while exercising the discretion, the Court has to satisfy not only with the fact that it is a

forum non conveniens but the other forum is more convenient and in the comparative conveniens (or the non conveniens), the yardstick is to see as to which Court, out of the two, is more suitable for the interest of the parties as well as for the ends of justice. These twin requirements are to be kept in mind. In **Tehran v. Secretary of State for the Home Department, [2006] UKHL 47**, the House of Lords expounded the doctrine in the following manner:

"The doctrine of forum non conveniens is a good example of a reason, established by judicial authority, why a court should not exercise a jurisdiction that (in the strict sense) it possesses. Issues of forum non conveniens do not arise unless there are competing courts each of which has jurisdiction (in the strict sense) to deal with the subject matter of the dispute. It seems to me plain that if one of the two competing courts lacks jurisdiction (in the strict sense) a plea of forum on conveniens could never be a bar to the exercise by the other court of its jurisdiction." We may also quote the following passage from the judgment of US Supreme Court in **Gulf Oil Corporation v. Gilbert: 330 U.S. 501**: "The principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even where jurisdiction is authorised by the letter of a general venue statute. These statutes are drawn with a necessary generality and usually give a plaintiff a choice of courts, so that he may be quite sure of some place in which to pursue his remedy. But the open door may admit those who seek not simply justice but perhaps justice blended with some harassment. A plaintiff sometimes is under temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself."

(Emphasis Supplied)

27. In view of the aforegoing, it is clear that the courts should generally decide disputes upon which they have jurisdiction. They may decline to exercise such jurisdiction only if there are compelling reasons for not doing so. In doing so, the courts must apply a balancing test and reject to exercise jurisdiction only if there are compelling reasons keeping the Latin maxim Judex tenetur impertiri judicium suum in mind.

28. In the present case, the learned counsel for the applicant has resisted the jurisdiction of this court stating that the records of the supervening circumstances are maintained in Chhattisgarh and that the convict is also in Chhattisgarh. On the contrary the counsel for the petitioner has contended that the material which is to be looked into is in the possession of the respondent no. 1, the seat of which is also in Delhi.

29. The scope of judicial review in rejection of mercy petitions is limited, it extends only to the material upon which the decision is based, i.e. whether all relevant material was considered before arriving at a conclusion. [See Kehar Singh (Supra); **Ashok Kumar v. Union of India, (1991) 3 SCC 498**; **Swaran Singh v. State of U.P.,**

(1998) 4 SCC 75; **Satpal v. State of Haryana, (2000) 5 SCC 170**; **Bikas Chatterjee v. Union of India, (2004) 7 SCC 634** and Shatrughan Chauhan (Supra)]

30. The material to be examined is the advice tendered by the cabinet and all the documents and records pertaining to the same are in Delhi and the decision has also been taken in Delhi. Further the location of the convict also makes no difference, as the convict being the dominus litis is free to invoke the jurisdiction of this court. Accordingly, the said contention of the applicant must also be rejected.

31. In view of the aforegoing, we are of the view, that this Court is vested with the jurisdiction to entertain the present writ petition. Accordingly, the application is dismissed as devoid of any merit.