Reserved Judgement

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Writ Petition (Criminal) No. 1531 of 2017

Om Prakash @ Israel @ Raju @ Raju Das … Petitioner

Versus

Union of India and Another … Respondents

Present: Mr. Yash S. Vijay, Advocate with Mr. Shobhit Saharia, Advocate for the petitioner
Mr. V.K. Kaparwan, Standing Counsel for the Union of India / respondent No. 1.
Mr. Pratiroop Pandey, AGA for the State/respondent No. 2

Reserved on : 23.05.2019
Delivered on :23.08.2019

Hon'ble Sharad Kumar Sharma, J.

1. Before entering into the actual controversy which has been sought to be raised by the petitioner in the present writ petition, which is in the light of the amendment which has been brought into effect in the Juvenile Justice (Care and Protection of Children) Act, 2015, (hereinafter to be referred as "the Act of 2015") and reference to it is for the purpose to derive the impact of it on the instant proceedings which has already culminated upto the stage contemplated under Articles 161 and 72(1)(c) of the Constitution of India, much prior in time than from the enforcements of the Act of 2015, whether it becomes relevant? After Article 161 which provides with the special executive powers to the Governor to grant pardon or to suspend, remit or conjoin a sentence in certain cases. Similarly, after culmination of proceedings under Article 72(1)(c) of the Constitution of India before the President of India, who exercises his executive powers to grant pardon etc. or suspend remit or commute a sentence, over and above the determination made after the Courts of law have concluded its proceedings of conviction.

2. This issue, it has been settled in Joy's case reported in **2011(4) SCC 353**, ***Narayan Dutt and Others v. State of Punjab and others,*** that the stage at which the Governor exercises the powers under Article 161 for pardoning a convict for commission of offence is a stage where the convict has already been determined and sentenced to undergo a punishment imposed by the "Court" competent under law, its at that stage that the provision contained under Article 161 is pleaded before the Governor to plead mercy from the punishment imposed on the convict by the Courts is invoked. Hence it has been held that it is exclusive administrative/executive power which could be exercised by Governor over or against, any law of the land contemplating a conviction of convict, after being sentenced by the Courts upto the level of Hon'ble Apex Court. Thus scope of judicial review after the stage under Article 161 or under Article 72(1)(c) of the Constitution of India is very limited.

> "Article 161 - Power of Governor to grant pardons, etc., and to suspend, remit or commute sentences in certain cases
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> The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends."

Relevant paragraphs of the said judgement reads as follow:-

> "25. The Bench having regard to the nature of the power of the President under Article 72, stated that the President under Article 72 could scrutinize the evidence on record of a criminal case and come to a different conclusion from that of the court. 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.
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> 22. In Kehar Singh (supra) this Court observed that the order of the President under Article 72 could not be subjected to judicial

> review on merits except within the strict limitations defined in Maru Ram (supra). Therefore, on the ambit of judicial review, Kehar Singh (supra) concurred with Maru Ram (supra).
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> 27. In Epuru Sudhakar and Anr. v. Government of A.P. and Ors. AIR 2006 SC 3385 this Court observed that it was well settled that the exercise or non-exercise of the power of pardon by the President or Governor was not immune from judicial review and limited judicial review was available in certain cases.
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> 31. From the abovementioned judicial decisions it is clear that there is limited scope of judicial review on the exercise of power by the Governor under Article 161. Keeping the aforesaid principles in our mind if we look at the order of the Governor it appears that there has been consideration of various aspects of the matter by the Governor in granting pardon. The Governor's order also contains some reasons."

3. Similarly is the powers vested with the President of India, under Article 72(1)(c) of the Constitution of India, which too grants an extraordinary executive constitutional powers to the President of India, to grant pardon or to suspend, remit or conjoin a sentence in relation to a person who has already been convicted or sentenced by the Courts' of the country upto the Hon'ble Apex Court, on establishment of a commission of an offence as per the provisions contained under the Indian Penal Code, that to and when the conviction has attained its judicial finality upto the Hon'ble Apex Court. Meaning thereby it's the liberty which is granted to the President of India, under the Constitution of India which is supreme, to be exercised after culmination of all the judicial proceedings. In the present case at hand, we are concerned with the powers of the President of India, which has already been exercised by the President of India under Article 72(1)(c) i.e. a right to pardon in cases where a person is convicted with, sentence of death (capital punishment).

> "Article 72 - Power of President to grant pardons, etc., and to suspend, remit or commute sentences in certain cases
>
> (1) ……..
>
> (a) ……..

(b) ……..

(c) in all cases where the sentence is a sentence of death."

4. Reference to Article 72(1)(c) and 161 has been made prior to entering into the exact and actual controversy in order to rationally substantiate the controversy from the view point, that the stages of Article 72(1)(c) and 161, are the stages which has been invoked by the petitioner, where after the exhaustion of all the judicial proceedings and process contemplated under an Act or Law of the country, before the Court's created under law, which has attained its finality and the conviction of a person accused for commission of an offence, which has been settled down by the Courts and are proved against him upto the Hon'ble Apex Court, created under law. That means to say that the powers of the President of India under Article 72(1)(c) or those the powers of the Governor under Article 161 of the Constitution of India are the extraordinary executive powers, which has been vested with the constitutional dignitaries for the purpose of pardoning a convict who has been otherwise judicially convicted with a death sentence, hence when the proceedings reaches up to the stages of either Article 72(1)(c) or Article 161, it crosses over the proceedings or the stages of the judicial proceedings contemplated under law before the court created under it, meaning thereby in other terms it has attained its judicial finality.

5. It is a very unfortunate case which this Court has to deal with at this stage, for which the brief narration of the pleadings which has been raised in the writ petition, which has been preferred by the petitioner, before this Court by invoking Article 226 to be read with Section 482 of the Code of Criminal Procedure, it is resorted to after crossing over the stage of Article 72(1)(c) of the Constitution of India and after crossing over the stage of Article 161

of the Constitution of India. After passing over the cumulative proceedings which were held before the Hon'ble Apex Court. The petitioner had yet again invoked the writ jurisdiction of this Court under Article 226 of the Constitution of India to be read with Section 482 Cr.P.C. after the culmination of trial and affirmation of sentence of death penalty upto the Hon'ble Apex Court, under the pretext of the amended law of the Act of 2015 as enforced w.e.f. 15.01.2016 being Act No. 2 of 2016.

6. The fact which are essentially involve consideration are that under the garb of the relief sought for in the petition, the petitioner's prayer is nothing but an effort to override the effect of the proceedings which has otherwise reached and crossed the stage up to the stage of its final determination and conviction by the Hon'ble Apex Court and it has also attained the finality when the death sentence has been converted to a life imprisonment, on a compassion/pity which has been shown by the President of India by exercise of his executive powers, vested in him, which can under the law can only precede over a judicial pronouncement under Article 72(1)(c), it cannot be ruled out also that the invocation of the writ jurisdiction after culmination of the proceedings upto the stage of Article 72(1)(c), is nothing but a deliberate malicious attempt to have a re-trial for an offence, which otherwise already stands established and settled against the accused/convict petitioner.

FACTS

7. Briefly put, the case as placed before this Court was that the petitioner who claims to have been born on 04.01.1980, contended that he had his initial schooling from Dariya Pari, Berinath Middle School, situated near Jalpaiguri, West Bengal. According to the case of the petitioner as pleaded, his case is that as

per the school records, his date of birth which has been recorded therein is 04.01.1980 and in order to further substantiate the proof of date of birth, he has made a reference to the date of birth certificate, which has been issued in his favour on 28.04.2001 for defying his date of birth as 04.01.1998, which was the basis of the proceedings which stands culminated upto the stage under Article 72(1)(c) of the Constitution of India.

8. Briefly facts as involved in the instant case is that in the year 1993, the petitioner was engaged initially as a Gardener with the family of late Col. Shyam Lal Khanna, who used to reside at House No.84(ii) Vasant Vihar, Dehradun. Gradually, after the initial days of appointment as a gardener the trust in him might have increased of the family members on the petitioner, and as per the case which has been projected and proved up to the Hon'ble Apex Court, it was that later on that late Col. Shyam Lal Khanna, had rather permitted the petitioner to perform the household work. But later on, looking to his certain objectionable activities and particularly the activity with regards to commission of theft by stealing money from the purse of late Col. Shyam Lal Khanna, it was contended in the proceedings before the courts below that later, late Col. Shyam Lal Khanna and his family members owing to the manner in which the services were discharged by the petitioner, coupled with his way of reaction/indecent behavior with the family members and even with the pets of the house, it had created a certain sense of doubt in the minds of family members of late Col. Shyam Lal Khanna and thus, on 14.11.1994, it was a unanimous family decision, which was taken by the family members of late Col. Shyam Lal Sharma to dispense with the services of the petitioner. It was this decision of the family members which was taken averse by him.

9. The ghastly incident which was caused to the family by the petitioner is that of 15.11.1994, when the petitioner who was entrusted with to perform the household work is said to have offered the bed tea to all the inmates/members of the family of late Col. Shyam Lal Khanna, which included late Col. Shyam Lal Khanna, too, who was of about 62 years of age at that time, his wife Rama Khanna, his sister Smt. Bishna Mathur, aged 65 years and his son Sarit Khanna, who was of 27 years of age, who had recently returned to the country on 2.11.1994 after completing his studies of M.B.A. from United Kingdom. After taking the bed tea, late Col. Shyam Lal Khanna had walked out of the home to have his morning walk.

10. Petitioner who had sensed the decision of the family of 14.11.1994, to dispense with his inhumanly services, owing to his activities which he often carried in the home, including the ghastly treatment with the pet animals, the petitioner in order to take revenge of the decision of 14.11.1994, taken by the family members of dispensing with the services of the petitioner. He i.e. the petitioner, in the morning of 15.11.1994 had first slained the son of late Col. Shyam Lal Khanna i.e. Mr. Sarit Khanna, who was sleeping in his room at that point of time, by inflicting blows by a sword and his head was separated from his body, he was virtually beheaded and that too when he was in his deep slumber. Thereafter, the petitioner in continuity to the above incident on the same day had attacked the sister of late Col. Shyam Lal Khanna i.e. Smt. Bishna Mathur, with a sharp edged weapon and she too succumbed to her injuries and died on the spot. After hearing the hue and cry at the time when the act of attack was being consistently inflicted upon the sister Smt. Bishna Mathur by the petitioner Om Prakash, the wife of late Col. Shyam Lal Khanna, Mrs. Rama Mathur after seeing the incident out of terror and fear had locked herself in the bathroom,

which was later on bolted from outside by the petitioner so that she may not come out of it and retaliate the ghastly act of petitioner, or raise an alarm to be neighbours.

11. In the meantime, late Col. Shyam Lal Khanna who had returned back home after taking his morning walk and after seeing the ghastly scene of crime, where only 5 persons who were present initially at the time when the bed tea was served by petitioner, it included the petitioner assailant, who was also in fact named as Om Prakash @ Nazrul @ Raju Dass @ Raju Chaudhary @ Saiful Islam. When late Col. Shyam Lal Khanna returned after morning walk and saw the bloody scenario, he was taken aback, he too was attacked by the sword by the petitioner and it is a narration of fact which was made by his wife in her statement recorded before the trial Court, Smt. Rama Khanna, who was the eye witness of the entire incident and who had held herself locked in the bathroom by bolting it from inside, it was that when late Col. Shyam Lal Khanna was being attacked by Om Prakash by the sharp edged weapon, he had rather shouted, that to leave him, because he was innocent and he has not committed anything wrong to the petitioner, due to which he was making brutal attempt to do away with the life of late Col. Shyam Lal Khanna. Since Smt. Rama Khanna had held herself bolted in the bathroom, out of fear created due to the ghastly scene of her home, due to murders committed by the petitioner, murdering her son and then sister in law, Mrs. Bishna Mathur and from there, she could only hear the voice of her late husband, during the commission of offence of murdering the 3rd person, he i.e. the petitioner had after killing three persons of the family in a single day tried to attack upon Smt. Rama Khanna too who held herself in the bathroom by attacking her with a bamboo stick, but somehow she was able to

managed to save herself from the attack made by the petitioner on her.

12. The petitioner thereafter, after committing 3 murders on the same day, before leaving the home in his attempt to flee, he had un-bolted the bathroom which was bolted by him from outside to resist the wife of late Col. Shyam Lal Khanna from coming out of it, and since Smt. Rama Khanna had tried to come out, he had thrown the chilly powder in her eyes so that she may not see the incident and also made an attempt by attacking her with the sword but some how, luckily the sword hit her left hand on her golden bangles, which she was putting on and because of which i.e. the intensity of the attack was thwarted by the golden bangle, which she was wearing, which has suffered a dent and because of the intensity of the attack and even her left ulna had also suffered a joint fracture due to the intensity of the blow in an attempt of the petitioner to kill her too.

13. After commission of the aforesaid offence, the accused Om Prakash i.e. the petitioner herein being the servant of the family, since he knew about the internal layout of the house as he knew that the house had 3 exists, he had already closed the 2 exists from inside the house, and at the time when the police reached the premises, only one exist was found opened and the accused by that time had already escaped from the third exit door of the residence, after committing triple murder. In the meantime, Rama Khanna wife of the slained late Col. Shyam Lal Khanna, when she came out of bathroom, she found chilly powder spread all around the places and her husband was gasping for breath as sufficient blood had oozed out from his body because of the injuries caused by the attacks made by the petitioner. In the meantime, while the complainant Smt. Rama Khanna was taking care of her husband, another inmate servant

named as Hari Chand, who used to work as a Sweeper in the House, visited the house in question and he after seeing the ghastly incident and blood all around the place, he raised the voice of alarm and consequently the neighbourers visited the spot in question and they were taken aback by seeing the incident which was committed by the accused petitioner. However, Smt. Rama Khanna, with the help of other neighbourers had taken late Col. Shyam Lal Khanna, who was gasping for his life, to the ONGC Hospital where Col. Shyam Lal Khanna, was also declared as dead as he too succumbed to his injuries due to immense blood loss and injuries caused on his person.

14. The matter was reported to the police on 15.11.1994 itself. The police visited the spot, sealed 3 dead bodies and had sent them for the post-mortem. The complainant Rama Khanna was also given an initial medical treatment to her injuries, which she has suffered on her left hand. But the whereabouts of the petitioner were not known, as after commission of said offence, he had escaped from the spot and was not traceable despite various desperate efforts made by the police and hence he was not arrested for quite a long time. It happens so that the story of the ghastly incident which has happened on 15.11.1994 morning was being telecasted in a popular television show which was commonly then known as 'India's Most Wanted' in which the photograph of Om Prakash the petitioner, was made public by the aforesaid telecast and lastly after he being recognized by the public, the petitioner was arrested after almost 5 years of the commission of the offence, on 15.11.1999 from Jalpaiguri, West Bengal, from where he was arrested by the police.

15. After taking him into custody, he was confined to jail and the trial started. When the trial has reached the stage of proceedings under section 313 Cr.P.C., in the statement thus

recorded by the convict petitioner, he, while answering **Question No.26** posed to him, he had himself stated that on the **date of the incident i.e. 15.11.1994, he was of 20 years of age.** What is more important to be considered at this stage is that during the course of trial too, no question of juvenility of accused petitioner was ever raised or was taken as a defence, when the petitioner was being tried for the commission of offence u/s 302 and 307 IPC before the trial Court.

16. During the course of trial, as many as 19 witnesses were examined and various exhibits including the sword which belongs to late Col. Shyam Lal Khanna, the knife used in the commission of offences, the chilly powder which was spread all across the room, the Silbatta (a block of rock which was found near the dead body of late Mr. Sarit Khanna) and apart from it, various other exhibits were taken into custody by Police, as case articles and were made as an exhibit before the trial Court while conducting the trial. Question of juvenility was heard by the trial Court which was raised later by the petitioner but was rejected on the ground that petitioner admittedly had a bank account and which was operated by him and which was standing in his name, hence the presumption of he being major was quite obvious. Ultimately, the trial concluded on 12.04.2001 and the next date fixed was 18.04.2001 for hearing on sentence. The convict was heard on the question of sentence. Learned Trial Court after hearing the convict petitioner on the sentence to be imposed and after scrutinizing the exhibits and respective evidence placed before it, had awarded the following sentence :-

> "Accused Om Prakash @ Nazrul @ Raju @ Raju Dass @ Raju Chaudhary @ Saiful Islam was convicted for the commission of offence u/s 302 IPC and he was sentenced to be hanged to death by his neck till he dies and to pay a

fine of Rs.5,000/- and in an event of failure to deposit the fine of Rs.5,000/-, he was sentenced to R.I. for one year.

The convict petitioner was also sentenced for R.I. of 7 years for an offence u/s 307 IPC and fine of Rs.2,000/- and in an event of default in payment of fine, he was further directed to undergo R.I. for a period of one year."

17. After convicting the petitioner with death sentence by judgment dated 18.04.2001, learned Sessions Court made a reference u/s 366 Cr.P.C. to the High Court which was registered as being Reference No. 2 of 2001, and ultimately in the meantime, the Jail Appeal No.108 of 2001, Om Prakash @ Raju v. State of Uttaranchal was also filed by the petitioner before the Division Bench of this Court. The said Criminal Jail Appeal, as well as the Reference No. 2 of 2001, which were connected, came up for consideration before the Division Bench of this Court and the Division Bench too after considering the entire evidence on record, including the fact that the slained late Col. Shyam Lal Khanna who was 62 years of age, he had suffered as many as 10 injuries out of which 2 were incised wounds, 6 lacerated wounds and 1 sub-conjuvental hemorrhage on the right eye which has resulted into an ante-mortem death. As far as son late Sarit Khanna was concerned, as per the post mortem report he suffered 4 lacerated wounds around his neck, ear and it was so severe that it was entering to the neck, muscle deep, tissues were exposed, air pipe was exposed and reached up to the spinal cord and it was almost a beheaded body of late Sarit Khanna which was recovered from his room, where he was sleeping and the body was sent for the post-mortem. As far as deceased Bishna Mathur is concerned, as already stated, she succumbed due to 8 injuries which she has suffered due to the blows made upon her by the petitioner by sharp edged weapon which was used by the convict and the death was caused of her due to ante mortem injuries and extreme blood loss.

Petitioner had inflicted injuries on her neck and she too has died because of hemorrhage and ante-mortem injuries.

18. The Division Bench of this Court vide its judgement dated 19.09.2001 in the appeal after considering the findings and also the fact that the petitioner was absconding for almost five years and was arrested at a later stage, after 5 years of the ill fated date of the incident i.e. 15.11.1994 from New Jalpaiguri, West Bengal and considering the finding with regards to the use of weapon Ex.15 sword, Ex.16 Khukhri, Ex.18 grumping stone, Ex.19 a bloodstained knife and also recovered materials from the spot i.e. the container of the chilly powder which was used in the commission of offence. At the stage of appeal and particularly when the petitioner-convict was being examined before the trial court on a question as posed to the petitioner u/s 313, under which it was revealed by him only that on the date of commission of offence, and even prior to it, the petitioner, who later on had claimed himself to be a juvenile, in fact, was a holder of a Bank Account No.7855, which was standing in Vasant Vihar Branch of The Punjab National Bank, of which a passbook and cheque book were placed before the trial court as Ex.50 and 51.

19. Though not necessary at this stage to deal with other vitalities of the matter in question but the only aspect which is relevant to be pointed out at this stage is that the fact of opening of bank account prior to the date of commission of offence, which in itself goes to show that and as per the admitted version of the accused Om Prakash himself shows that he was major person of 20 years of age on the date of incident and thus the question of juvenility, which was raised by him for the first time on the date when hearing on the sentence was going on i.e. on 18.04.2001, the said issue raised couldn’t have been considered in his favour because

he himself had conceded before S.T. No.149/1999, *State vs. Om Prakash* that he was holding the bank account on the date of incident and he was major of 20 years of age at the time when the offence was committed. Even the appellate court has held that since there was no evidence produced by the petitioner and no efforts was ever made by the accused Om Prakash to substantiate his stand and produce any defense about his juvenility by producing evidence and as no evidence was produced by him regarding his proof of age, even upto the appellate stage proceedings, the appellate court too held that the fact of the convict being major was settled and established before the trial court at the time when the trial court has imposed the punishment and death sentence was awarded to the accused as evidence which were considered and which was produced by him i.e. the petitioner only showed unrebuttedly that he was major on the date of incident that is 15.11.1994.

20. Petitioner was arrested and he remained in custody later on till after being sentenced with death penalty. He was initially placed in the Dehradun jail and later on, he was shifted to Haridwar Jail and was placed in an isolated Cell under a high security.

21. The appeal Jail Appeal as preferred before the Division Bench of this Court came up for hearing before the Division Bench of this Court which had after a detailed hearing, rendered the judgment on 19.09.2001, whereby the sentence imposed by the S.T. No.149/1999, of imposing the death sentence on the petitioner was affirmed and a reference made u/s 366 Cr.P.C. was answered accordingly. Even as per the findings recorded by the appellate Court on the question of juvenility, which were raised before the appellate court also, the D.B. has held that the question of juvenility which was raised was untenable and the concept and defense of

juvenility cannot be accepted in view of his own statement which was recorded u/s 313 Cr.P.C. and also in view of his own statement and admission made pertaining to the opening of bank account on 09.03.1994 i.e. much prior to be commissioning of an offence on 15.11.1994 i.e. S/B Account No.7855 in the branch in question, hence while affirming the death sentence, the appeal of the petitioner was dismissed by the Division Bench of this Court on 19.09.2001. Para 29 of the said judgement reads as under:-

> "29. It has lastly been argued by the learned Amicus Curiae that in this statement under Section 313, Code of Criminal Procedure recorded on 7-3-2001, he gave his age as 20 years, meaning thereby that the accused was a juvenile at the time of commission of the crime on 15-11-1994. He was required to be tried by a Juvenile Court and to be given benefit of being juvenile. We do not agree. It may be pointed out that in answer to question No. 26 Under Section 313, Code of Criminal Procedure the accused admitted that he had opened S/B a/c No. 7855 of Indira Nagar, Vasant Vihar Branch of Punjab National Bank, Dehradun. The cheque book issued to him is Ex. 50 and pass book is Ex. 51. It is found that the said account was opened on 9-3-1994.
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> Indeed, a savings bank account could be opened in the Bank only by a major. It is thus apparent that he was a major even on 9-3-1994 when Savings Bank account was opened. The present crime was committed by him on 15-11-1994. Therefore, there could be no question of accused being a juvenile on the date of the commission of this crime. Thus, there is concrete evidence that he was a major when he committed this crime. The argument in this behalf is not worthy of a moment's attention otherwise also in view of the law laid down by the apex Court in a case of Abdul Mannan v. State of West Bengal MANU/SC/0239/1996: (1996) 1 S.C.C. 665. In the present case, the accused absconded after the commission of crime and could be apprehended from West Bengal after five years. It has been ruled by the Apex Court in the case referred to above that the benefit of being juvenile could not be extended to the person who had caused the trial to be protracted. The facts of the present case voluminously speak against the accused otherwise also that actually he was major when he committed the crime. The argument advanced by the learned Amicus Curiae is rejected."

22. It was thereafter that the petitioner had preferred a Jail Appeal (SLP Criminal) No.6919/2001, *Om Prakash @ Raja v. State of Uttaranchal*, before the Hon'ble Apex Court. Even in the

proceedings before the Hon'ble Apex Court too and also in the judgment which was rendered by the Hon'ble Apex Court, it had affirmed the decision of the Division Bench of this Court rendered on 19.09.2001 and consequently, the death sentence imposed upon the petitioner was confirmed by the judgement of Hon'ble Apex Court dated 05.12.2002 and the plea of juvenility which was raised was rejected. It was even at that stage when the Hon'ble Apex Court was seized with the SLP Criminal No.6919 of 2001, *Om Prakash @ Raja v. State of Uttaranchal,* it was at that stage that for the first time the petitioner in order to save himself from the capital punishment has placed reliance on the school leaving certificate, in order to show that on the date of commissioning of offence i.e. 15.11.1994, he was a juvenile since the date of birth of his, which has been recorded in the school records of New Jalpaiguri was shown as to be 04.01.1980 and in that regard, he was issued with the certificate only on 28.04.2001 by the School Authorities. The reference to the certificate said to have been issued on 28.04.2001, on which the reliance has been placed by the learned counsel for the petitioner before Hon'ble Apex Court, in order to show that the date of birth of the petitioner on the date of commission of the offence was 04.01.1980, so as to take the defence and benefit of juvenility, in fact, it was a document, which already stood issued in favour of the petitioner at the stage when the proceedings were pending by way of Criminal Jail Appeal before the Division Bench of this Court, which was finally adjudicated by the Division Bench of this Court only on 19.09.2001. If the judgement of the Division Bench of this Court which was later on affirmed by the Hon'ble Apex Court vide its judgement dated 05.12.2012, is taken into consideration and scrutinized the fact which is revealed from it is that though the certificate was claimed to have been issued to the parents of petitioner on 28.04.2001, but the

petitioner had never made any reference of it at the stage when the Jail Appeal was pending consideration before the Division Bench of this Court, because of the judgement dated 19.09.2001, which was rendered subsequently by the Division Bench of this Court affirming the death penalty, the said birth certificate dated 28.04.2001, it does not find any reference in the pleading raised by the petitioner or in the findings which was recorded by the Division Bench and nor at any point of time, the petitioner had placed \reliance on the certificate dated 28.04.2001 before the Division Bench. Meaning thereby, the theory of the certificate dated 28.04.2001 was generated after the judgement was delivered by the Division Bench of this Court on 19.09.2001, hence there is a *bona fide* doubt pertaining to the sustainability of the certificate dated 28.04.2001, which was relied by the petitioner, at a later stage as it was never placed on record or relied by the petitioner in proceedings of Jail Appeal and Reference Proceedings, before the Division Bench. For the first time to show and seek the protection of juvenility to safeguard himself from the conviction of capital punishment, which has been affirmed by the judgement of Division Bench of this Court on 19.09.2001.

23. The Hon'ble Apex Court too after hearing the petitioner on the question of juvenility had dismissed the Criminal Appeal No. 824 of 2002, *Om Prakash v. State of Uttaranchal* vide its judgment dated 05.12.2002 and had affirmed the death sentence awarded to the petitioner. The Hon'ble Apex Court on a plea being raised pertaining to the question of juvenility in light of the provisions contained u/s 2(h) to be read with Section 8(1) of the Juvenile Justice Act, had recorded a finding in paragraph nos.12 of the judgment of the Hon'ble Apex Court dated 05.12.2002, which is quoted hereunder: -

> "Regarding the age of the appellant, a contention has been raised that he was juvenile at the time of commission of crime on

> 15.11.1994 because he gave the age as 20 years in his statement recorded under Section 313 Cr.P.C. on 07.03.2001. Apart from the fact that on behalf of the appellant no proof was adduced regarding his age, the High Court noted that he admittedly opened the bank account in Punjab National Bank at Dehradun on 9.3.1994. Pass book and cheque book were exhibited in trial . The High Court observed that the appellant would not have been in a position to open the account unless he was a major and declared himself to be so. That was also the view taken by the trial Court. The approach of the Trial Court as well as the High Court on this aspect cannot be faulted.".

24. The Hon'ble Apex Court in furtherance of the judgment rendered by the Hon'ble Apex Court on 5.12.2002 upholding the death sentence rendered by both the Courts, that is, Sessions Court and High Court in Jail Appeal, the Hon'ble Apex Court had directed the issuance of Form 42 under the Cr.P.C. u/s 413 and 414 on 28.4.2003, and had issued a warrant for execution of death sentence, which was to be executed in the Central Jail of Meerut between 5-5:30 AM. In the meantime, the petitioner had preferred a criminal review petition being Review Petition (Criminal) No.273/2003 before the Hon'ble Apex Court by filing the same on 10.01.2003, seeking review of judgment dated 5.12.2002, which too was dismissed by the Hon'ble Apex Court on 04.03.2003 by upholding the sentence of capital punishment against the petitioner, and has upheld by the judgement of Hon'ble Apex Court dated 05.12.2002.

25. While these proceedings were going on and after the sentence being affirmed by the Apex Court by judgment dated 5.12.2002 and with the dismissal of review petition on 04.03.2003, the petitioner had moved an application before the President of India invoking the provisions contained under Article 72 (1) (c) of the Constitution of India by filing a mercy petition for pardon on 30.04.2003, for seeking mercy as against imposition of sentence of capital punishment after the culmination of Judicial Proceedings with the dismissal of Review by Hon'ble Apex Court on 04.03.2003.

However, in the meantime, while the warrant of execution which was stayed on 28.4.2003, the petitioner was shifted from Haridwar to Meerut Jail for execution of the sentence on the date already fixed by the Judgement of Hon'ble Apex Court dated 05.12.2002.

26. While on the other hand, there was yet another set of proceedings which was drawn by the parents of the convict petitioner after dismissal of Review Petition on 04.03.2003 and one Mr. Tarak Majumdar on 11.09.2004, who had filed a writ petition before the Hon'ble Apex Court by invoking Article 32 of the Constitution of India, which was numbered as Writ Petition No. Criminal (D) 134-36 of 2005, *Zakarius Lakra and others v. Union of India and another*, wherein under Article 32 of the Constitution of India, in this writ petition too despite of the fact that the question of juvenility already stood decided by the Division Bench of this Court in its judgment dated 19.9.2001, as well as despite the fact that in its judgment dated 5.12.2002 rendered by the Hon'ble Apex Court in para 12 of the judgement the question of juvenility stood decided and affirmed the findings on it by the Courts, yet by filing writ petition invoking Article 32 of the Constitution of India, once again the parents of the convict petitioner had sought to reagitate the question to be determined pertaining to the juvenility of the petitioner based on the school certificate of birth which was claimed to have been issued on 28.04.2001 though the issue stood settled upto the Hon'ble Apex Court with dismissal of Review Petition on 04.03.2003. The Hon'ble Apex Court vide its judgment dated 16.2.2005 (page no.189) rendered in Writ Petition (Crl.) No. D20026/2004, *Zakarius Lakra & Ors. V. Union of India & Anr.* had dismissed the writ petition holding thereof that once the conviction has been affirmed by the decision of the Hon'ble Apex Court on 05.12.2002, and once again when the review petition arising out of it has been dismissed

by the Hon'ble Apex Court on 04.03.2003, the subsequent writ petition filed by the parents of the convict petitioner invoking powers of the Hon'ble Apex Court vested in it under Article 32 of the Constitution of India was held by the Hon'ble Apex Court that it would not be maintainable. Because it would amount to conduct a re-trial of a convict who has already been sentenced to undergo for a capital punishment by the courts of law, and as such, the Hon'ble Apex Court in its decision dated 16.2.2005 as rendered in the writ petition filed at a subsequent stage by the parents of the petitioner, held that at the most, if at all the petitioner of the writ petition could seek any remedy, that would be only by way of preferring a curative petition, as against the decision dated 5.12.2002 and 04.03.2003, as rendered by the Hon'ble Apex Court, in the review petition and held that subsequent writ petition under Article 32 would not be maintainable, whereby the death sentence inflicted by the trial court and affirmed by the appellate court was affirmed by the Hon'ble Apex Court. The Hon'ble Apex Court while dismissing the writ petition directed that the Writ Petition No. D 20026/2004, would itself be treated as to be a curative petition against order of review dated 04.03.2003 and the same was directed to be placed before the regular Court, which has decided the matter confirming the death sentence of the petitioner by dismissing the SLP on 05.12.2002 and finally the review petition too was dismissed on 04.03.2003 with the following findings were recorded while dismissing the writ petition, by Hon'ble Apex Court vide its judgement dated 16.02.2005:-

> "Before closing, we may point out that the trial Court while hearing the accused on the question of sentence noted the submission of the accused that his age was 17 years on the date of occurrence and then answered the same as follows:

"His attention was drawn to the pass-book and the cheque-book and was apprised of the fact that the account could have been opened by him only if he had been major. Then he conceded the factum of majority on the date of occurrence."

The contention regarding age of appellant was also dealt with by this Court which reads as follows:

"12 Regarding the age of the appellant, a contention has been raised that he was juvenile at the time of commission of crime on 15.11.1994 because he gave the age as 20 years in his statement recorded under Section 313 Cr.P.C. on 7.3.2001. Apart from the fact that on behalf of the appellant no proof was adduced regarding his age, the High Court noted that he admittedly opened the bank account in Punjab National Bank at Dehradun on 9.3.1994. The passbook and the cheque book were exhibited in trial. The High Court observed that the appellant would not have been in a position to open the account unless he was a major and declared himself to be so. That was also the view taken by the trial Court. The approach of the trial Court as well as the High Court on this aspect cannot be faulted."

As already noted, the said conclusion was reached by the Bench (of which one of us was a member) without looking into the school certificate annexed to the memorandum of appeal.

We may also mention that the learned counsel for the petitioners has referred to the decisions of this Court in Raj Singh v. State of Haryana and Gopinath Ghosh v. State of West Bengal, 1984 (Supp) SCC 228 wherein the plea of the offender being juvenile was entertained for the first time in this Court and appropriate relief was given. The learned counsel has also drawn our attention to the observations in Ramdeo Chauhan v. State of Assam wherein R.P. Sethi, J. with whom Phukan, J. concurred observed as follows in paragraph 6:

> "The contentions raised and the prayer made are admittedly beyond the scope of review. This petition can be dismissed only on this ground. However, being the case of death sentence, we have decided to consider the whole matter in depth to ascertain as to whether the petitioner is entitled to the benefit of the

> Act or not. We have further opted to consider that even if he is not proved to be juvenile, can he be given the benefit of his age on the ground of his allegedly being on the borders of the age contemplated under the Act for the purposes of awarding him the alternative sentence of imprisonment for life."

Thomas, J. in his dissenting opinion, after referring to the doctor's opinion of age in paragraphs 52 and 53 observed as follows:

> "When the possibility of the petitioner having been a juvenile on the relevant date cannot be excluded from the conclusion by adopting such reasonable standards, the interdict contained in Section 22(1) of the Juvenile Act cannot be bypassed for awarding death penalty to the petitioner so long as the death penalty is permitted to survive Article 21 only if the lesser alternative can be foreclosed unquestionably. In other words, if the age of the petitioner cannot be held to be unquestionably above 16 on the relevant date its corollary is that the lesser sentence also cannot unquestionably be foreclosed. We have to abide by the declaration of law made by the majority of Judges of the Constitution Bench in Bachan Singh case.
>
> For the aforesaid reasons I am persuaded to allow this review petition and alter the sentence of death to imprisonment for life."

That case arose out of the review petition filed by the accused-appellant.

We have only considered it appropriate to refer to the contentions raised and citations given by the learned counsel so that they may receive due consideration when the curative petition is taken up for consideration by the larger Bench.

The Writ Petition is dismissed subject to the observations made above, without prejudice to the remedy left open to the petitioners to file curative petition."

27. Consequently, the writ petition was treated as Curative Petition No. 200/2005. The question of juvenility was yet again

raised in the curative petition on the basis of school certificate which Mr. Tarak Majumdar is said to have received from the school only on 7.1.2005 apart from earlier certificate of 28.04.2001, showing the date of birth of the convict petitioner as to be 4.1.1980. Initially, the Hon'ble Apex Court has issued notice to the opposite parties on the curative petition, on issuance of notice. The State had filed a counter affidavit to the curative petition and has questioned the propriety of the maintainability of the curative petition itself on the ground of redetermination of juvenility which was an issue which has already been settled by the judgments rendered by the Hon'ble Apex Court and by the Division Bench of High Court, as well as by the Hon'ble Apex Court while considering the writ petition. Consequently, the **curative petition too was dismissed on 06.02.2006.** In the curative petition too, the Hon'ble Apex Court considered the plea of juvenility which was raised based on the school certificate procured on 28.04.2001 and 07.01.2005 (procured later) i.e. the certificate which was admittedly procured by parents of the petitioner, at the time when the appeal itself was pending consideration before the Division Bench of the High Court. The plea based on certificate procured on 28.04.2001 was ever raised in appeal before the High Court which was decided on 19.09.2001 by the Division Bench, i.e. much thereafter, the receipt or issuance of birth certificate dated 28.04.2001. But the said certificate was never placed on record or pleaded in Jail Appeal before High Court.

28. In the meantime, petitioner who had filed an application under **Article 72(1) (c) before the President of India,** which came up for consideration before the Hon'ble President of India and His Highness vide his order dated 08.05.2012, passed on Mercy Petition had passed an order on the mercy petition by virtue of which the President of India had modified the sentence from death penalty to

the life imprisonment which was to be carried by the petitioner up to the attainment of the age of 60 years. It has also come on record that so far as the proceedings which as contended by the petitioner that he has also approached the Governor by invoking Article 161 of the Constitution of India, it has been informed by the office of the Governor of the State that so called mercy petition which is said to have been submitted by the convict petitioner, has not reached the office of the Governor and a response to the said effect was issued on 15.11.1999.

29. In the cases which fall within the ambit of Article 72 (1) (c) of the Constitution of India, where the President of India has been given an exclusive constitutional and executive power to give pardon or commute the offence by way of a mercy, it has been the consistent view taken and held by the various pronouncements of the Hon'ble Apex Court that the stage of Article 72 of the Constitution of India, is not the stage of the proceedings which could be said to be part of a judicial appreciation with regard to the propriety of commission of an offence, but rather it is the stage which is resorted to after the culmination of the proceedings which are to be held before the Court as per the procedural law and it's the stage when the finality is attached to it and a convict is levied with a sentence. The proceedings under Article 72 (1) (c) of the Constitution of India before President of India comes into picture at that point of time where the judicial proceedings end and a finality is attached to it and that is why it has been held by the Hon'ble Apex Court that the exercise of powers by the President of India under Article 72 (1) (c) of the Constitution is not a part of proceedings in an exercise of a judicial power, but rather it is an exclusive executive power, which can be exercised by way of a pity and hence it has been held that once the President of India exercises the power of pardoning a

convict under Article 72 of the Constitution of India, it has been held that the said executive power cannot be made a subject matter to a judicial review as after the exercise of power by the President of India under Article 72 of the Constitution of India, since it is after the culmination of all the judicial proceedings upto the Hon'ble Apex Court, hence it is an exclusive executive power of the President i.e. post judicial determination, which cannot be *de novo* subjected to a judicial review by the Courts at the behest of convict petitioner except before the Hon'ble Apex Court, under its power vested under Article 32 of the Constitution of India.

30. The aforesaid proposition stands affirmed by judicial pronouncement as rendered by the Hon'ble Apex Court in the judgement reported in **AIR 1991 SC 1792, *Ashok Kumar v. Union of India,*** which after taking into consideration a judgement reported in **D Freitas v. Benny 1976 (AC) 239** and also considering the judgement of **Hanratty v Lord Butler of Saffron Walden, (1971) 115 SJ 386** has held that the powers of the President of India under Article 72 (1) (c) since being an executive power cannot be made as a subject matter of judicial review. The relevant paragraphs of the said judgement are quoted hereunder:-

> "8. The law governing suspension, remission and commutation of sentence is both statutory and constitutional. The stage for the exercise of this power generally speaking is post- judicial, i.e., after the judicial process has come to an end. The duty to judge and to award the appropriate punishment to the guilty is a judicial function which culminates by a judgment pronounced in accordance with law. After the judicial function thus ends the executive function of giving effect to the judicial verdict commences. We first refer to the statutory provisions. Chapter III of IPC deals with punishments. The punishments to which the offenders can be liable are enumerated in section 53, namely, (i) death (ii) imprisonment for life (iii) imprisonment of either description, namely, rigorous or simple (iv) forfeiture of property and (v) fine. Section 54 empowers the appropriate government to commute the punishment of death for any other punishment. Similarly section 55 empowers the appropriate government to commute the sentence of imprisonment for life for imprisonment of either description for a term not exceeding 14 years.

Chapter XXXII of the Code, to which section 433A was added, entitled `Execution, Suspension, Remission and Commutation of sentences' contains sections 432 and 433which have relevance; the former confers power on the appropriate government to suspend the execution of an offender's sentence or to remit the whole or any part of the punishment to which he has been sentenced while the latter confers power on such Government to commute (a) a sentence of death for any other punishment (b) a sentence of imprisonment for life, for imprisonment for a term not exceeding 14 years of for fine (c) a sentence of rigorus imprisonment for simple imprisonment or for fine and (d) a sentence of simple imprisonment for fine. It is in the context of the aforesaid provisions that we must read section 433A which runs as under:

> "433A. Restriction on powers of remission or commutation in certain cases-Notwithstanding anything contained in Section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law, or where a sentence of death imposed on a person has been commutted under section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment."

The section begins with a non-obstante clause notwithstanding anything contained in section 432 and proceeds to say that where a person is convicted for an offence for which death is one of the punishments and has been visited with the lesser sentence of imprisonment for life or where the punishment of an offender sentenced to death has been commuted under section 433 into one of imprisonment for life, such offender will not be released unless he has served at least 14 years of imprisonment. The reason which impelled the legislature to insert this provision has been stated earlier. Therefore, one who could have been visited with the extreme punishment of death but on account of the sentencing court's generosity was sentenced to the lesser punishment of imprisonment for life and another who actually was sentenced to death but on account of executive generosity his sentence was commutted under section 433(a) for imprisonment for life have been treated under section 433A as belonging to that class of prisoners who do not deserve to be released unless they have completed 14 years of actual incarceration. Thus the effect of section 433A is to restrict the exercise of power under sections 432 and 433 by the stipulation that the power will not be so exercised as would enable the two categories of convicts referred to in section 433A to freedom before they have completed 14 years of actual imprisonment. This is the legislative policy which is clearly discernible from the plain language of section 433A of the Code. Such prisoners constitute a single class and have, therefore, been subjected to the uniform requirement of suffering atleast 14 years of internment.

13. Under the Constitutional Scheme the President is the Chief Executive of the Union of India in whom the executive power of the Union vests. Similarly, the Governor is the Chief Executive of the concerned State and in him vests the executive power of that State. Articles 72 and 161 confer the clemency power of pardon, etc., on the President and the State Governors, respectively. Needless to say that this constitutional power would override the statutory power contained

in sections 432 and 433and the limitation of section 433A of the Code as well as the power conferred by sections 54 and 55,IPC. No doubt, this power has to be exercised by the President/Governor on the advice of his Council of Ministers. How this power can be exercised consistently with Article 14 of the Constitution was one of the Questions which this Court was invited to decide in Maru Ram's case. In order that there may not be allegations of arbitrary exercise of this power this Court observed at pages 1243-44 as under:

"The proper thing to do, if Government is to keep faith with the founding fathers, is to make rules for its own guidance in the exercise of the pardon power keeping, ofcourse, a large residuary power to meet special situations or sudden developments. This will exclude the vice of discrimination such as may arise where two persons have been convicted and sentenced in the same case for the same degree of guilt but one is released and the other refused, for such irrelevant reasons as religion, caste, color or political loyalty."

Till such rules are framed this Court thought that extant remission rules framed under the Prisons Actor under any other similar legislation by the State Governments may provide effective guidelines of a recommendatory nature helpful to the Government to release the prisoner by remitting the remaining term. It was, therefore, suggested that the said rules and remission schemes be continued and benefit thereof be extended to all those who come within their purview. At the same time the Court was aware that special cases may require different considerations and `the wide power of executive clemency cannot be bound down even by self-created rules'. Summing up its findings in paragraph 10 at page 1249, this Court observed: "We regard it as fair that until fresh rules are made in keeping with the experience gathered, current social conditions and accepted penological thinking-a desirable step, in our view-the present remissions and release schemes may usefully be taken as guidelines under ARticles 72/161 and orders for release passed. We cannot fault the Government, if in some intractably savage delinquents, section 433A is itself treated as a guideline for exercise of Articles 72/161. These observations of ours are recommendatory to avoid a hiatus, but it is for Government, Central or State, to decide whether and why the current Remission Rules should not survive until replaced by a more wholesome scheme." It will be obvious from the above that the observations were purely recommendatory in nature."

31. Another argument which was raised by the learned counsel for the petitioner was from the viewpoint that after the affirmation of a sentence of capital punishment on judicial side by the law Courts, when the petitioner-convict was sent to the Meerut Jail for carrying out the sentence, a Medical Jail Report dated 21.07.2008, was relied by the counsel for the petitioner to show that the age of the petitioner, at the time of commission of offence on 15.11.1994, was less than 18 years, it would be absolutely a futile

exercise for the reason that based on the said premise of claim of juvenility, the Curative Petition, as well as writ petition filed before the Hon'ble Apex Court, it was the aspect based on the school certificate dated 28.04.2001, which had been taken into consideration and thereafter the Curative Petition was also dismissed by the Hon'ble Apex Court on 06.02.2006. In that view of the matter, and in view of the concurrent findings, which have been recorded pertaining to the juvenility of the petitioner by the Courts, cannot be testified on the basis of any pleading which is on the basis of a Medical Jail Report dated 21.07.2008, in the light of the subsequent order rendered by the President of India dated 08.05.2012 under Article 72(1)(c) of the Constitution of India, wherein the death penalty was commuted to a life imprisonment.

32. In view of what has been observed in the ratio propounded by the Hon'ble Apex Court in the judgement reported in **AIR 1991 SC 1792, *Ashok Kumar v. Union of India (Supra),*** it could be conclusively held that once after the President has determined the issue of conferment of commutation of a sentence, the said order cannot be made subject matter of a judicial review, as it would be beyond its ambit of consideration by writ courts under Article 226 of the Constitution of India, and too after the culmination of the proceedings of conviction by the dismissal of the curative petition and after the decision of President of India under Article 72(1)(c) on 08.05.2012.

33. It is relevant to submit at this stage itself that (1) after the dismissal of Jail Appeal No.108/2010 by the judgment dated 19.9.2001 by the Division Bench of this Court, and affirming of the death sentence imposed by learned Trial Court on 12.04.2001, (2) after the dismissal of SLP by the Hon'ble Apex Court on 5.12.2002,

(3) After dismissal of review petition by Hon'ble Apex Court on 04.03.2003, (4) after the dismissal of Writ Petition (Crl.) by Hon'ble Apex Court under Article 32 of the Constitution of India on 16.02.2005, and (5) after the rejection of Curative Petition by the Hon'ble Apex Court on 06.02.2006. This Court is of considered view that as far as the proceedings before the Court is concerned in relation to all the aspects of the case, that has attained its judicial finality and only the proceedings which were pending consideration were the proceedings constitutionally contemplated under Article 72 (1) (c) before the President of India, which was filed on 30.04.2003 or at the most under Article 161 before the Governor of the State, which this Court is of the considered view that it is an extraordinary executive power which has been conferred upon the President of India and Governor of the State, respectively under the Constitution of India, to exercise its powers for pardoning an offence, which otherwise stands settled after the conclusion of trial and after appreciation of evidence which was brought on record. Meaning thereby, the judicial proceedings before the Courts created under law has exhausted all its conceptualized stage with the dismissal of curative petition on 06.02.2006. Thus, this Court is of the view that the proceedings at the stage of Article 161 or at the stage of Article 72(1) (c) cannot be said to be the proceedings which are pending before the "Court" for considering of the case on consideration of the vitalities of evidence or law. The proceedings before the Court, if at all it can be said to be under consideration it was only upto the stage when it had culminated finally with the dismissal of the curative petition on 06.02.2006 filed by the petitioner.

34. What has been consistently harped upon by the petitioner in the body of the writ petition is that the proceeding for determination of an offence and conviction, in relation to a juvenile

has been subject matter of scrutiny in pursuance to the provisions of the Act initially called as the Juvenile Justice Act, 1986. The said Act under Section 5, it has defined as to what the constitution of Juvenile Courts, would mean under a special statute. Hence, reference to Section 5 of the Act is quoted hereunder, because that would be relevant for the purposes of consideration of the status of the Courts, when defined under the Special Statue as it was contained in the said provision which was prevailing at the time when the offence was committed on 15.11.1994.

> **"Section 5 - Juvenile Courts**
> (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the State Government may, by notification in the Official Gazette, constitute for any area specified in the notification, one or more Juvenile Courts for exercising the powers and discharging the duties conferred or imposed on such Court in relation to delinquent juveniles under this Act.
>
> (2) A Juvenile Court shall consist of such number of Metropolitan Magistrates or Judicial Magistrates of the first class, as the case may be, forming a Bench as the State Government thinks fit to appoint, of whom one shall be designated as the Principal Magistrate; and every such Bench shall have the powers conferred by the Code of Criminal Procedure, 1973 (2 of 1974), on a Metropolitan Magistrate or, as the case may be, Judicial Magistrate of the first class.
>
> (3) Every Juvenile Court shall be assisted by a panel of two honorary social workers possessing such qualifications as may be prescribed, of whom at least one shall be a woman, and such panel shall be appointed by the State Government."

35. In order to define the Court as contained in Section 5, it defines that it would be a Court which is specially created by publication in an Official Gazette by Notification to function and act as Juvenile Court for exercising the powers conferred under the Act of 1986 to deal with cases of the juvenile as covered under the definition of juvenile under the Act of 1986. Later on, the Juvenile Justice Act of 1986 was repealed by Section 69 of Juvenile Justice

(Care and Protection of Children) Act, 2000. In the said Act of 2000, the Courts, which is conferred with the power to deal with the offences under the Act has not been defined in its specific terms, as the said Act does not carry any definition of Court which will govern the proceedings in relation to a juvenile under the Act of 2000.

36. The said Act of 2000 does not deal with the definition of Court, as to what its constitution would be, as to after the decision being rendered by the Juvenile Justice Board in relation to a Juvenile, who is accused of having committed an offence, as per the enactment the same would be referred to as per the procedure contemplated pertaining to the Appeals and Revisions as provided under the Code of Criminal Procedure as per the provisions contained under Section 54 of the Act of 2000. However, this issue may not hold us long, for the reason being that in the meantime the Act of 2000 also stood repealed by virtue of an enforcement of the Juvenile Justice (Care and Protection of Children) Act, 2015, under the garb of which the present writ petition has been filed by the petitioner contending thereof that the issue pertaining to determination of juvenility has to be based upon the procedure as provided therein under the said new enactment of Act No. 2 of 2016 and the basic argument as raised by the petitioner was from the viewpoint that once the Act has been made applicable retrospectively, the issue of determination of juvenility, could be scrutinized by the Courts *de novo* in exercise of its powers under Article 226 of the Constitution of India to be read with Section 482 of the Code of Criminal Procedure, even after the culmination of the proceedings under Article 72 (1) (c) of the Constitution of India of commutation of offence after its judicial finality before the President of India.

37. As already referred that the Act of 2000, was repealed by virtue of the provisions of Section 111 of the Act of 2015 and for first time the Act of 2015 had defined the term "Court" under sub Section (23) of Section 2 of the Act, which is quoted hereunder:-

> "23. "court" means a civil court, which has jurisdiction in matters of adoption and guardianship and may include the District Court, Family Court and City Civil Courts;"

38. Under the said Act, the Court as defined would mean a Civil Court which has jurisdiction in the matter of an adoption and guardianship or may include any District Court or any Civil Court for the said purposes. Even, if the implications of the effect of constitution of Court over the proceedings under the provisions of any of the Act of Juvenile Justice Act, right from 1986, 2000 or 2015 is taken into consideration in the light of the provisions contained under the Code of Criminal Procedure, particularly, as contained under Chapter II, which deals with the constitution of the Criminal Courts and offices entrusted with authority to deal with cases of criminal offences. What is important to be referred herein is that even under Chapter II of the Cr.P.C., which deals with the constitution of the Criminal Courts created under law, it is a Court of Magistrate as provided under Section 6 of the Code of Criminal Procedure, the Sessions Court, as provided under Section 9 and the Court of Judicial Magistrates, as contained under Section 11 of the Code of Criminal Procedure, the reference to the Courts as made under light of the provisions contained under Chapter II of the Code of Criminal Procedure is from the viewpoint that when the Code of Criminal Procedure was specifically dealing with the constitution and stature of Criminal Courts defining their stature, their area of operation and their procedure to be followed. Either the Juvenile Justice Acts of 1986, 2000 or 2015 or the Chapter II of the Code of

Criminal Procedure it has not at any point of time, included within its ambit of Courts under Chapter II, the executive power which is being exercised by the President of India under the special executive power vested in him under Article 72 (1) (c) of the Constitution of India and hence if the definition of Court as contained under sub Section (23) of Section 2 of the Act is read in the light of the provisions contained under Chapter II of the Code of Criminal Procedure since the executive power of the President under Article 72 (1) (c) is not a judicial power entailing an appreciation of evidence or scrutiny of an evidence but rather it is a superfluous special executive power given to the President of India by the Constitution, it cannot be said that the President of India, while exercising his powers under Article 72 (1) (c) had functioned as a Court, and consequently the decision of his cannot be scrutinized by the High Court under Article 226 of the Constitution of India or while exercising the powers under Section 482 of the Code of Criminal Procedure, because in either of the circumstances, the power vested with the High Courts in the aforesaid two provisions only relates to the scrutinisation of the decision or the judgements rendered by the Courts subordinate to it. The extraordinary powers under Article 226 of the Constitution of India will not have an effect of a judicial review of an executive decision by the President of India who has been held not to be a Court whose decision taken under Article 72 (1)(c) of the Constitution of India as it is outside the purview of judicial review, or if at all it can be, if there is an bleak possibility of challenge to decision of President of India under Article 72(1)(c) of the Constitution of India it could be only by the Hon'ble Apex Court under Article 32 of the Constitution of India only and not by the writ Courts under Article 226 of the Constitution of India.

39. The controversy, as raised above can also be dealt with from another perspective with regard to the effect of insertion made under Section 7A of Section 7 of the Juvenile Justice (Care and Protection of Children) Act, 2000. The newly introduced Section 7A provided with the procedure required to be followed by the Courts in determination of juvenility in those eventuality where the child is accused for commission of criminal offence and the manner it has to be determined and the manner in which it has been determined in the present case pertaining to the aspect of his juvenility on the date of commission of an offence. Even if Section 7A of the Act of 2000 is taken into consideration, which has laid down the procedure required to be followed for the purposes of determining the claim of juvenility, it only refers to the powers of determination to be exercised by the "Courts" obviously, in view of the reasons which has been assigned above, the implications of Section 7A, apart from the fact that it has been overridden by the Act of 2015, but still the implications of Section 7A will not bind the act of the President of India who has exercised his powers vested in him constitutionally on an executive side under Article 72 (1) (c) of the Constitution of India and doesn't function as a Court. Meaning thereby, the prospects of determination of juvenility is only confined up to the level so far it relates to its determination to be by the Courts only and not after the stage held by the authorities who exercise their executive power and are not falling in the definition of Court on whom the provisions of Act would be applicable. As its post judicial determination which has been sought by the petitioner by virtue of the present writ petition.

40. In the writ petition, which has been instituted before the Hon'ble Apex Court in 2017, after the dismissal of the Curative Petition by the Hon'ble Apex Court on 06.02.2006, it has to be considered from the prospect that the document which has been

sought to be placed reliance was a copy of the school details which had been procured by family members of petitioner in 2001, in relation to an admission, which was made, which was running for a period as back beyond 30 years, and in such an eventuality, the exception carved out from the view point pertaining to Section 90 of the Indian Evidence Act, for treating the documents pertaining to the presumption of its genuineness will not be available to the person claiming it to be true until and unless the foundation of the same has been laid down on the said document in the pleadings or in defense at the stage when initially the issue or the benefit out of it, it was being sought to be derived based on a document which was about more than 30 years old. This document was not made as foundation upto the proceedings before Division Bench till 19.09.2001, despite of the fact that it was a document which was otherwise admittedly was procured in 2001. For the first time, it was made as foundation in the writ petition filed before the Hon'ble Apex Court in 2017 i.e. almost after about 16 years of procurement of document, and two years after the Amended Act No. 2 of 2016 of Juvenile Justice came into force

41. In the present case, since right from the inception of the proceedings before the Sessions Court or till it's culmination by the judgement of the Division Bench of this Court on 19.09.2001, the document was never made as a foundation of the pleading and hence in view of the ratio as propounded in the judgement as reported in **AIR 1996 SC 1253, *Sri Lakhi Baruah and others v. Sri Padma Kanta Kalia and others*** in view of its para 17 of the said judgement which is quoted hereunder that the benefit of a document being more than 30 years old, the presumption of its genuineness cannot be taken and derived until and unless the foundation for the same is laid in view of the pleadings raised in defence before the Court of law.

> "17. The position since the aforesaid Privy Council decisions being followed by later decisions of different High Courts is that presumption under Section 90 does not apply to a copy or a certified copy even though thirty years old; but if a foundation is laid for the admission of secondary evidence under Section 65 of the Evidence Act by proof of loss or destruction of the original and the copy which is thirty years old is produced from proper custody, then only the signature authenticating the copy may under Section 90 be presumed to be genuine."

42. The learned counsel for the petitioner had made reference to a judgement reported in **2000 (6) SCC 759*, Raj Singh v. State of Haryana*** and particularly a reference which is made is to para 3 of the judgement which as per the argument extended by the learned counsel for the petitioner, it was to the effect that the determination of juvenility of an accused or convict of being of less than 18 years of age, on the date of the commission of offence, this Court is of the considered view that this determination of juvenility could be made the basis only till the proceedings are pending before the Court and not thereafter the culmination of judicial proceedings. That means that it could have been held either by the Juvenile Board or the Appellate Court, where the conviction was being judicially considered based on consideration of evidence and on the culmination of the trial. The ratio propounded in para 3 on which the reliance has been placed, is yet again of no avail for the petitioner for the reason that the said stage of determination by the Courts regarding the aspect of juvenility of the petitioner has attained its finality, because the proceedings pending before the Court was over and it has crossed over the stage of Article 72 (1) (c) of the Constitution of India by the President of India, who is not the Court as defined under the Act of 2015, or under Chapter II of the Code of Criminal Procedure, he exercises only mercy or pity which is not a determination of merits of the case, which has already culminated upto the Hon'ble Apex Court. Hence, as already held above, since

the President of India exercises an executive power and is not a Court, created under law, hence the same cannot be permitted to be re-agitated with the change of law as the stage of determination of age by the Court was over, hence the retrospective applicability of the Act after the determination which has been made by the Court which has ultimately culminated on 06.02.2006 with dismissal of curative petition prior to enforcement of Act of 2015, and ultimately by the President of India's order dated 08.05.2012, it was no more open for its re-determination to be made with the change of law, because the proceedings have been laid to rest by the determination made by the President of India on 08.05.2012 and amended provision was made effective by Act of 2015, much thereafter the determinative by the President of India, under the executive powers under Article 72(1)(c) of the Constitution of India.

> "3. It is on record that the Appellant's date of birth is 9-12-1974 as per the certificate issued by the Board of School Education, Haryana. This certificate stands reaffirmed by another certificate produced today before the Court verifying the said fact. In the circumstances, there cannot be any serious dispute about the date of birth of the Appellant i.e. 9-12-1974. If that is so, the trial should have been held only as provided Under Section 22 of the Act so a different procedure followed leading to conviction of the Appellant is vitiated."

In the said case, it was the aspect of juvenility which was being considered by the Court, the judicial process of its determination was yet not over, as it is in the instant case.

43. The learned counsel for the petitioner tried to support his plea by deriving an inference from the judgement as reported in **1984 (Supp) SCC 228, *Gopinath Ghosh v. State of West Bengal,*** the relevant paragraph is quoted hereunder:-

> "13. Before we part with this judgment, we must take notice of a developing situation in recent months in this Court that the contention about age of a convict and claiming the benefit of the

> relevant provisions of the Act dealing with juvenile delinquents prevalent in various States is raised for the first time in this Court and this Court is required to start the inquiry afresh. Ordinarily this Court would be reluctant to entertain a contention based on factual averments raised for the first time before it. However, the Court is equally reluctant to ignore, overlook or nullify the beneficial provisions of a very socially progressive statute by taking shield behind the technicality of the contention being raised for the first time in this Court. A way has therefore, to be found from this situation not conducive to speedy disposal of cases and yet giving effect to the letter and the spirit of such socially beneficial legislation. We are of the opinion that whenever a case is brought before the Magistrate and the accused appears to be aged 21 years or below, before proceeding with the trial or undertaking an inquiry, an inquiry must be made about the age of the accused on the date of the occurrence. This ought to be more so where special acts dealing with juvenile delinquent are in force. If necessary, the Magistrate may refer theaccused to the Medical Board or the Civil Surgeon, as the case may be, for obtaining credit worthy evidence about age. The Magistrate may as well call upon accused also to lead evidence about his age. Thereafter, the learned Magistrate may proceed in accordance with law. This procedure, if properly followed, would avoid a journey upto the Apex Court and the return journey to the grass-root court. If necessary and found expedient, the High Court may on its administrative side issue necessary instructions to cope with the situation herein indicated."

In the said judgement, the Hon'ble Apex Court has held that when in the proceedings during its pendency before the Court, it is ultimately found that the accused was juvenile on the date of the commission of an offence, in such an eventuality, the proceedings before the Sessions Court was held to be vitiated. This judgement will be yet again be of no help to the petitioner, because it was considering the fact of commission of offence under Section 302 of Cr.P.C., where the determination was limited before the Courts only as defined under Chapter II of the Code of Criminal Procedure and the said procedure has not yet been exhausted, hence the scope of its determination was still left open by the Court, which is not the stage, which is prevailing in the instant case as proceedings in the present case was judicially over, even much before the

enforcement of Juvenile Justice Act, 2015. Hence, no credence can be placed to the said argument, as extended by the learned counsel for the petitioner.

44. It was thereafter that the petitioner has filed the present writ petition raising a very peculiar plea seeking a declaration by invoking the provisions contained under Article 226 of the Constitution of India to be r/w Section 482 Cr.P.C. by invoking the writ jurisdiction in order to establish that the convict petitioner was juvenile on the date when the offence which was committed by him on 15.11.1994. Secondly, a relief which has been sought for was with regards to the judicially review of the judgment/decision of the President of India dated 08.05.2012 and to quash the same and direct the petitioner to be released from the custody. The prayer as sought in the writ petition was modulated in the following manner:-

> "Prayer
> It is most respectfully prayed that in light of the facts of this case this Hon'ble Court may be pleased to:
>
> I. Allow the present writ petition; invoking powers under Article 226 of the Constitution and section 482 Cr.P.C. read with Section 9(2) of the Juvenile Justice Act, 2015, and declare that the petitioner was a juvenile on the date of the offence; and he having served more than the maximum punishment permissible under the Juvenile Justice Act, direct that he be released from custody forthwith.
>
> II. Alternatively, judicially review the decision of the President and Governor under Article 226 of the Constitution and quash those decisions and direct that the petitioner be released from custody forthwith.
>
> III. Alternatively, set aside the communication dated 28.09.2012 and direct that the petitioner be released from custody forthwith; and

IV. Pass such other orders and this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

45. The aforesaid plea which has been raised by the petitioner in the present petition was under the pretext that while the proceedings, as already observed above already stood culminated before the courts ultimately on 06.02.2006 with the dismissal of curative petition, the proceedings which was pending before the President of India has been decided on 08.05.2012, it cannot be said to be a proceeding which was pending consideration anymore before the Court of law which could have determined the issue of juvenility, and now under the garb of its pendency, the petitioner cannot be permitted to raise a plea in the light of the amendment which has been carried under the Juvenile Justice Act, 2015. After the President had considered Article 72(1)(c) and on 08.05.2012 had commuted the sentence of death penalty to life imprisonment and that too by belated filing of the writ petition in 2017, without annexing the copy of President's decision dated 08.05.2012 which has sought to be quashed under Article 226 of the Constitution of India.

46. Section 9(2) of the Juvenile Justice Act of 2015, it has been provided that if a person who is alleged to have committed an offence and he claims **"before a", "Court"** or "**Board",** that at the time of commission of offence, he was a child, as defined u/s 2(13), he could raise the plea of its determination of juvenility, **of the same at any stage of proceedings before the 'Court' or the 'Board'.** The reference of 'Board' herein would mean the Board as defined under sub-section 2 of Section 9 of the Act would mean the 'Board' as defined under sub-section (10) of Section 2 of the Act, which reads as under:-

> "9(2) In case a person alleged to have committed an offence claims before a court other than a Board, that the person is a child or was a child on the date of commission of the offence, or if the court itself is of the opinion that the person was a child on the date of commission of the offence, the said court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) to determine the age of such person, and shall record a finding on the matter, stating the age of the person as nearly as may be:
>
> > Provided that such a claim may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such a claim shall be determined in accordance with the provisions contained in this Act and the rules made thereunder even if the person has ceased to be a child on or before the date of commencement of this Act.
>
> (10) "Board" means a Juvenile Justice Board constituted under section 4;

47. Under the Juvenile Justice Act, the word 'Court' has been independently defined under sub-section (23) of Section 2 of the Act of 2015 which reads as under: -

> "Court here means a civil court within whose jurisdiction the offence has been committed against a juvenile and it may include the district court, family or any civil court trying the offence."

Logically the definition herein under the Act will not bring within its ambit the proceedings of mercy/pity under Article 72(1)(c) of the Constitution of India as President of India does it fall in the definition of Court either Section 2(23) of Act of 2015 or under Chapter 2 of the Code of Criminal Procedure.

48. In the light of the amendment which has been made and quoted hereinabove under sub-section (9) of Section 2 of the Act, and that the determination of question of juvenility could be raised at "any stage" would mean the stages contemplated under law before the Court, i.e. when the proceedings are pending consideration before the 'Court' or a 'Board' as defined above. This reference to

determination of juvenility under the Act is limited to its consideration before the forum created by the Act itself, which could be considered and determined only upto the stage of determination of proceedings before the Board or the Court, before which the offence committed by the juvenile is to be tried. The legislature under the Act has not included the determination of juvenility when the proceedings reaches the stage of mercy/pity after the order of conviction has attained its finality on the culmination of proceedings before the Court, which would obviously include the determination by the Hon'ble Apex Court. This Court is of the view that proceedings before Court ceases its legal existence when finality is attained to it by the judgement of Hon'ble Apex Court. Thus quite obviously the proceedings before the President of India under Article 72(1)(c) will not be included under the definition of "the stage", when the President of India or the Governor, after the conviction is upheld up to the Hon'ble Apex Court by dismissal of curative petition on 06.02.2005 and attained judicial finality on culmination of proceedings before the Court. The amendment which has been made subsequently in the principal Act in 2015, will not be applicable in the instant case because at that relevant point of time, when the Act was enforced, there was no proceedings pending as such at any stage of consideration before the Court, wherein the implications of the amended Act made under the Juvenile Justice Act of 2015, will not come into play or could be considered and that too after culmination of proceedings under Article 72(1)(c) of the Constitution of India before the President of India.

49. Learned Counsel for the petitioner has tried to assert upon the implications which were flowing from the provisions contained under Section 9(2) of the Juvenile Justice Act which provides that the question of juvenility can be raised **"at any stage**

before any Court". Both the ingredients of raising the plea of determination of juvenility at "**any stage"** or before any **"Court"** is not available in the present case to the petitioner, because at the time when the Act was enforced, may be even with the retrospective effect, it will not include within its ambit the proceedings which stood decided on 08.05.2012, by the President of India under Article 72(1)(c) and it could not also be raised rationally, because as such that the proceedings before the President of India are not, the proceedings were not included at any stage of consideration for determination of veracity of offence and its intricacies as it already stood concluded. The literal meaning of the word 'stage' used in the Act would mean the stage which has to read in reference to the stage or proceedings provided by Act before the Courts, where the act of commission of offence is a subject matter of scrutiny by appreciation of evidence to be led by the parties on appreciation of evidence, it would not at any stretch of considering could be enlarged the impact of words, "any stage before any court", the meaning cannot bring the proceedings within the meaning of "stage" when the proceedings had finally been decided by the Hon'ble Apex Court on 06.02.2005.

50. This Court is of the definite and considered view that the stage at which this question was sought to be pressed in the light of the amendment made Act of 2015, it will not include within its determination the proceedings, which after the determination has been made the President of India on 08.05.2012, which cannot be made subject to judicial review, except before the Hon'ble Apex Court if at all permissible and not under Article 226 of the Constitution of India. Because it is not those one of the stages which has been contemplated under the Act, nor it is the Court before which the proceedings as against a perpetuated juvenility was pending consideration on the judicial side for its determination.

51. Thus, the amendment though might be having a laudable social object to be achieved at, it had from the view point that the juvenile who is in conflict with law, should not be subjected to the punishment for the commission of offence during his era of juvenility at the time of commission of offence, but that concept and the principle enunciated by the Act would not apply in the instant case and particularly in the present circumstances for the reason being that as already observed above that it can be only during the pendency of the proceedings before the Sessions Court and up to the Hon'ble Apex Court, the question of juvenility has been consistently raised, considered, appreciated and decided by the Courts against the petitioner and it has already been rendered otherwise and also because even before the Court of evidence, the evidence which was admittedly adduced by him before the courts of law and even according to his own statement which was recorded u/s 313 Cr.P.C. before the trial Court, he has admitted the fact that as on the date of commission of offence i.e. on 15.11.1994, he was of 20 years of age and coupled with it the fact which remained undisputed was that even prior to the commission of offence on 15.11.1994, he was already having an operational bank account opened in his name even prior to it w.e.f. 09.03.1994 and thus as per banking law, the bank account could only be opened by a major person it was not amongst those class of account which was opened by a minor under the guardian rather as per evidence considered by the Courts, it was an independently operated account of the petitioner nor it had been his case that the said account with the bank was opened under the guardianship of any adult. By these admitted facts itself it is quit apparent that the issue pertaining to juvenility had already stood decided up to the Hon'ble Apex Court and hence under the grab of the amendment which has been carried much thereafter in 2015,

upon the culmination of the proceedings before the Court resulting to conviction by death penalty it cannot be permitted to be reopened by invoking the writ jurisdiction by way of seeking a declaration of juvenility under Article 226 of the Constitution of India under the garb of amendment made in the Act much thereafter or by challenging the President's order rendered under Article 72(1)(c) of the Constitution of India which was rather allowed by the President of India in his favour by commuting the death sentence to life imprisonment.

52. Apart from it, the second relief which has been sought by the petitioner is also not tenable before this Court for the reason that the President's decision under Article 72(1) (c) which is absolutely the prerogative of the President to take cognizance for prayer made by way of a mercy/pity petition filed by a person who has already been determined a convict by the Court of law, it cannot be said that the proceedings held before the President of India were the proceedings, which were held before or under an authority or Court as provided under the Act of 2015 or it was a "stage" of the proceedings contemplated under the Act for determination of a commission of offence, for the reason being that the aspect of juvenility prior to the commission of offence has already attained finality and as such, the Amended Act of 2015, can not be taken as to be a shield now for declaration as sought for by the petitioner with regards to his juvenility as on 15.11.1994, in the present writ petition alleging that it would be having a retrospective effect, and under the said interpretation and that too after the President of India judgement which could not also be considered for judicial review by the Courts, at least by the writ courts under Article 226 of the Constitution of India or under Section 482 of Cr.P.C. as it was no more open for its judicial review, particularly when it was exercise of sovereign

constitutional power of the President of India, after close of judicial proceedings

53. After the culmination of the proceedings by the order of President of India on 08.05.2012, it was after about 2 years thereafter the petitioner has made effort to get the account details from Punjab National Bank by filing an application in that regard for the first time only on 14.11.2014, after the order of President of India, whereby the bank informed that the account details of petitioners are not available. The petitioner even thereafter on 11.03.2015, attempted to file yet another curative petition before the Hon'ble Apex Court, but the same was refused by the Registry of the Hon'ble Apex Court from being accepted and rightly so as earlier curative petition already stood rejected by the Hon'ble Apex Court on 06.02.2006, hence second curative petition was not maintainable under the percepts of law.

54. The petitioners even much thereafter admittedly as per pleadings on record i.e. on 14.12.2015 when parents of the petitoner are said to have visited the school of the petitioner at New Jalpaigudi to obtain the details and certificate of date of birth of the petitioner, according to them he was juvenile at the time of commission of offence on 15.11.1994, because at that time his date of birth is claimed to be recorded in School records it was proclaimed to be 04.01.1980, that too those efforts were allegedly made:-

(1) After 21 years of date of commission of offence

(2) After 9 years from dismissal of curative petition

(3) After 3 years of passing of commutation order by the President of India on 08.05.2012. This aspect has also be visualized on the basis of relief too claimed in the writ petition, which was without annexing the order of President of India dated 08.05.2012.

(4) The present writ petition had been filed even after 2 years of Amended Act of 2015, by filing the same before this Court only on 18.09.2017

55. The learned counsel for the petitioner, in the light of the aforesaid backdrop, which has already been discussed above, had attempted to submit that the status of the petitioner with regard to his juvenility has to be considered as it existed at the time of the incident i.e. 15.11.1994 under the amended provisions of Act of 2015, as it provided that it could be considered at any stage. There cannot be any dispute as far as the said interpretation, pertaining to the determination of juvenility has been given in the light of the provisions, which were initially constituted as to be part of the provisions contained under the provisions of Juvenile Justice Act, 1986, and thereafter, followed with the enforcement of the Juvenile Justice Act, 2000, and ultimately, the shelter which has been taken by the petitioner is derived in order to determine the juvenility, and the applicability of the Act of 2015 is in the light of the provisions, which has been enforced by the Juvenile Justice Act, 2015, as enforced by the legislature with effect from its publication the Gazette Notification as made on 01.01.2016 i.e. it was at the stage when all judicial proceedings were over upto the Hon'ble Apex Court way back in 06.02.2006 i.e. much prior to the enforcement of Act of 2015.

56. What he intends to submit that in view of the provisions contained under the said Act, the determination of an accused or a convict, whether he had been a juvenile at the time of the incident or not could be considered, **'at any stage of the proceeding'.** In order to further clarify and elucidate his argument, the learned counsel for the petitioner has submitted that the steps for determination of the question of juvenility under any of the Acts and amended Acts as

referred aforesaid could be made in the proceeding which is drawn before the Board or before the Court, as defined under the Act. In order to better elucidate the word stage and its interpretation of word **"stage"**, it would be necessary for this Court to refer to the definition of, 'Court' and the 'Board', as it has been dealt with under the Act of 2000. Under the Act of 2000, the Board has been defined as to be a Board as constituted under Section 4 of the Act as included in the definition of sub Clause (c) of Section 2 of the Juvenile Justice (Care and Protection of Children) Act, 2000.

57. As it has been already held and considered by this Court that under the said Act of 2000, it does not provide the definition of Court; but, as far as the definition of Juvenile is concerned, that has been provided in it under sub clause (k) of Section 2 of the Act. But under the Act of 2015 which, by virtue of its provisions contained under Section 111 of the Act, has repealed the Juvenile Justice (Care and Protection of Children) Act, 2000 meaning thereby the Act of 2000, was no more exists in the books of Statute. It was only after the repealment of the said Act and with the enforcement of the Act of 2015 w.e.f. 01.01.2016, that the present writ petition is filed and that too only by filing it on 16.09.2017, in order to make an attempt for re-determination of the age of the juvenile i.e. the petitioner involved in the instant case in commission of crime under Section 302 and 307 of I.P.C. as held on 15.11.1994. What is relevant herein is that there is slight distinction in the definition which has been provided under the Act, herein, 'the Board', which is the initial Authority created under the Act, before whom the proceedings are taken as against the juvenile, who is conflict with law and an accused of commission of an offence it would mean a Board as detailed and defined under Section 4 of the Act, which is the Body created under the Act, which is entitled and empowered to determine the prime question about the

juvenility as to whether the accused of an offence was a juvenile on whom the Act of 2015, could be made applicable. What is important herein is that under sub-Section (23) of Section 2 of the Act, it defines the Court. The definition of a Board, is given under sub Section (10) of Section 2 and that of Court has defined sub Section (23) of Section 2 of the Act of 2015, both the definition are distinct and independent to one another, and has different purpose and object to be achieved, under the provisions of the Act of 2015, the same are quoted hereunder:-

> "10. "Board" means a Juvenile Justice Board constituted under section 4;
>
> 23. "court" means a civil court, which has jurisdiction in matters of adoption and guardianship and may include the District Court, Family Court and City Civil Courts;"

58. The argument of the learned counsel for the petitioner is from the view point that even after the enforcement of the Act of 2015, even if a person has already been convicted for commission of an offence by the Court, in that eventuality, also, the provisions of the Juvenile Justice Act will still continue to apply for its determination as if it means that the Court or the Board may, at any stage, may determine the question of juvenility. What is important herein is the implications which would be flowing from words used by legislature i.e. **"at any stage".** This Court is of the considered view that the stage of determination of juvenility, as envisaged by the provisions of the Act, would only mean a stage, where the proceedings for determination of juvenility is on merits of the case are pending consideration for determination of the punishment on commission of offence before the Court defined under the Act, and that would logically mean that it should be a stage prior to a final

determination which has to be made by the Superior Court i.e. upto the Hon'ble Apex Court.

59. In the instant case, since the finality of the determination of juvenility with regards to the offence committed by the petitioner has already attain finality after the imposition of the death penalty by the trial Court by its judgement dated 18.04.2001, and up till ultimately after the dismissal of the curative petition filed by the petitioner by the judgement dated 06.02.2006, passed by the Hon'ble Apex Court. As soon as the curative petition after the confirmation of a death penalty by the Hon'ble Apex Court has been dismissed on 06.02.2006, this Court is of the view that the right of determination of juvenility vested under the Act with the Courts or the Board under the Act, at any stage, would only imply to the stages, where the matter is a subject matter of adjudication before Courts and defined under Chapter II of the Code of Criminal Procedure or under the Juvenile Justice Act itself and where the factual aspects as well as the consideration of evidences requiring for determination of an incident has ended and attained finality.

60. The term "at any stage", this Court is of the view that it cannot be enlarged preposterously to include within its ambit. The stage when after the confirmation of an order of conviction, and when the matter has traveled before the President of India under Article 72 (1) (c) by filing a petition for pardon or mercy on 30.04.2003, which was dealt with by the President of India on 08.06.2012, and ultimately the mercy petition for pardon was decided, which was filed by the petitioner was considered by the President of India, converting the death sentence into a life imprisonment upto the attainment of age of 60 years.

61. In order to consider the implications as to whether the provisions of Juvenile Justice (Care and Protection of Children) Act

2015, at all would come into play now for consideration in the instant case, more particularly, when the proceedings before the Court has already culminated and more particularly, when the President of India, while exercising his executive powers given under Article 72 (1) (c) has already expressed his mercy by his order dated 08.06.2012 and has converted the death sentence into a life imprisonment, the stage of Article 72(1)(c) of the Constitution of India before the President of India or stage Article 161 of the Constitution of India, before the Governor of a State, this Court is of considered view that it will not fall to be within the ambit of proceedings contemplated under the Act or law for the purposes of determination of juvenility as contemplated under the Act of 2015, because the claim of mercy or pardon under Article 72 (1) (c) before the President of India or before the Governor of a State under Article 161 of the Constitution of India, will and can never be treated as to be one of the stage of proceedings for being considered by Court has dealt with above defined under the Act itself or Courts under the Code of Criminal Procedure under Chapter II, where a claim of mercy or pity is to be determined by the President of India or by the Governor of State on consideration of evidence and on its appreciation, because that stage got over as soon as the curative petition was dismissed by the Hon'ble Apex Court on 6th April 2006, and thereafter the Act of 2015 was enforced for the first time on 31.12.2015, at that point of time when the Act was enforced there was no pending proceedings before the Court or even before the Constitutional Authorities contemplated under Article 72 or Article 161 of the Constitution of India.

62. The provisions of determination of juvenility as contemplated under the Act of 2015, will not be applicable in those circumstances, where the conviction of an accused has attained its

finality upto the Hon'ble Apex Court and thereafter on its consideration under Article 72(1)(c) of the Constitution of India by the President of India and hence it is hereby held that Act of 2015 it will not apply on those proceedings where the sentence has already been imposed and affirmed by the Hon'ble Apex Court and thereafter by an expression of mercy/pardon by the President of India. For the said purpose, to apply the Act of 2015 for determining juvenility, it become necessary for the Court to consider the specific logic as to what would be the implications, which would be flowing from considerations made under Article 72(1)(c) of the Constitution, as it has been already held that it is an exclusive executive power which is to be exercised by the President of India and that too after determination has been made by Court of law. Whether it is a part of the proceedings pending before the Court or whether its a stage of proceedings contemplated under where the offence has to be determined on appreciation of an evidence, this Court is of the confirmed and considered opinion that when the Constitution has used the word "mercy" and "pardon" under Article 72 (1) (c), it would not fall to be within the ambit of "a stage of proceedings" for consideration by "the Courts", as contemplated under the Act, because mercy herein would only mean a compassion, or pity by grace of President of India which is being shown to the accused person by an exclusive executive discretion, which has been vested with the President of the Country which has a superseding effect over the judicial pronouncement of conviction by the Courts created under law, its an Act post judicial proceedings. Hence the action taken by the President of India under Article 72 (1) (c) of the Constitution, it is hereby held that it can never be interpreted as to be a stage of proceeding held before the Court in pursuance to the provisions of the statute. Hence it is hereby held that once the

sentence has been affirmed with the dismissal of the curative petition, and the proceeding for determination of an offence has attained its finality in these circumstances, as already narrated above and with the grant of mercy/pardon by the President of India, the entire issue from any aspect has been closed for all times to come and it cannot be reopened with change of law of land which is made at subsequent stage, because logically proceedings have to be given a finality at some stage. In the light of the nature of the argument, which has been extended by the learned counsel for the petitioner, rather it intends to propagate as if the effect of the amendment brought into by enforcement by Act on 31.12.2015 Act, would yet again enable the petitioner to re-open all the cases of juvenility which have attained finality by an order of conviction and under the concept of the retrospective application of the Act of 2015, cannot be extended to such an extent, as it would be a far fetched interpretation which has been given on the culmination of the proceedings before the Court, hence the proposition as argued by the learned counsel for the petitioner is not acceptable by this Court. Because the scope of determination by Courts under the Act either of 1986 or of 2000, or of 2015, it only gives a power of determination of juvenility to the Courts defined therein and hence this Court is of the considered view that a mercy expressed by the President of India under Article 72 (1)(c) will not fall to be within the domain of a definition of Court as defined under the Act and on its award, there is a closure of the proceedings for all times to come which cannot be reopened with the amendment of the Act made later thereto, which has been carried later on in 2015 or by any amendment made thereafter under law after 08.05.2012 i.e. decision on mercy petition of the petitioner, under Article 72(1)(c) of the Constitution of India.

63. For a better elucidation of the impact of the term "mercy" as expressed and contained under Article 72 (1) (c), it would mean, that it is a compassion or a pity that means it is a power which could be exclusively exercised by way of a generosity or grace as against or in favour of the person who had already been convicted under law by the Courts created for the said purpose, and that too exclusively by the President of India, which is not within the ambit of any legal procedure laid down or to be followed, but rather based on exclusively on the discretion of the President of India. Hence, the term mercy/pardon, once it has already been considered it is a pity or compassion and since that being so it would be presumed that the stages as contemplated under the Act, may it be Act of 1986 or Act of 2000 or 2015 Act, that in fact stands closed and was over even prior to the enforcement of the Act of 2015 the shelter of which is being sought to be derived. This Court is of the view that the question of the retrospective applicability of the Act will only apply in those circumstances when the proceedings are not pending consideration on merits before the Court as defined under sub Section (23) of Section 2 of the Act of 2015 and not thereafter when the proceedings have been finally determined by Courts, and in the present case by the President of India.

64. The term stage of the proceedings which has been used under the Act would mean a stage of the proceedings which obviously postulates the proceedings which are pending determination of a claim or determination of an offence committed by an accused person on an appreciation of evidence and considering an appreciation of evidence both documentary and oral both. Stage means the stage of the proceedings before it attains finality and as soon as a finality is attached to the proceedings and it has reached to the stage of expression of mercy, and that too in exercise of

executive power under Article 72 (1) (c), the stage of question of determination of juvenility so far it related to the petitioner has ended and exhausted and could not be reopened with the enforceability of subsequent legislation, more particularly, when the question of juvenility had been consecutively considered and raised by the petitioner in the proceedings of an appeal against an judgement of capital sentence, before the Division Bench of High Court by its judgement dated 19.09.2001 and even in the Jail Appeal before the Hon'ble Apex Court when it was decided finally on 05.12.2002 and in the subsequent writ petition preferred by the parents of the petitioner before the Hon'ble Apex Court invoking Article 32 of the Constitution of India which was later on dismissed on 16.02.2005 as not maintainable, and was directed to be treated as to be a curative petition, wherein also before the Courts the question was raised of juvenility and the same has been considered and turned down as to what would be the term juvenility, so far it relates to the instant case which has crossed over all the stages of the proceedings before the Court, which are contemplated under law for determination of the juvenility of a person at the time of commission of an offence.

65. Thus the argument as extended by the learned counsel for the petitioner that it could be determined even at any stage, quite obviously and logically too it will not include within its ambit the stage contemplated under Article 72 (1) (c) of the Constitution of India, because its not a proceedings contemplated under an Act, rather it's a power in exercise of extraordinary constitutional power vested with the President of India to be exercised in the exercise of its executive power and its not a part of judicial proceedings because it does not involve a stage for determination, but rather it is only a stage where the President of India, who has been conferred with a special power under the Constitution can express his discretion over

the order of conviction finalized by the Courts. Even if we consider this controversy from the aspect of the use of word Court used under the Act of 2015, its specifically means the Courts which has got a right of an adjudication or has a right to deliberate on evidence of a dispute, placed before it. Since at the stage under Article 72 (1) (c) is concerned, it is not a stage where the President of India is exercising his powers as that of a Court as vested under the Act as it does not involve any element of adjudication by it, rather its a discretion after conviction and thus at the stage of Article 72 (1) (c), or even thereafter the applicability of the subsequent amendments made by the Act of 2015, will not be included, because the controversy has crossed over all the stages of determination of a liability on merits by a judicial action to be taken by the Courts as defined under the Act.

66. In order to better consider the scope of the exercise of power by the Court, it would be necessary to refer to the definition of Court as it has been laid down by the judgement of the constitution Bench of the Hon'ble Apex Court reported in **AIR 1974 SC 710, *Baradakanta Mishra v. the Registrar of Orissa High Court and another,*** which has defined the Court as to be a sovereign body which is created under a given law, which is created directly or indirectly authorising the Presiding Officer which may consists of one or more officers thus established under law who could exercise the powers of determination of a liability or of a right upon hearing the rival parties and after considering the evidences. Thus looking to the scope of definition of Court as dealt in the aforesaid judgements, it is quite obviously it does not include within its ambit the powers exercised by the President of India under Article 72 (1) (c), cannot be said to be a power which is exercised by the President of India in the capacity of power of being a Court of law, where a liability or a right

is determined on appreciation of evidences is involved. Rather it's the proceedings which start after final conviction by the Court. The relevant paragraph of the said judgement is quoted here under:-

> "47. We thus reach the conclusion that the courts of justice in a State from the highest to the lowest are by their constitution entrusted with functions directly connected with the administration of justice, and it is the expectation and confidence of all those who have or likely to have business therein that the courts perform all their functions on a high level of rectitude without fear or favour, affection or ill-will.
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> 48. And it is this traditional confidence in the courts that justice will be administered in them which is sought to be, protected by proceedings in contempt. The object, as already stated, is not to vindicate the Judge personally but to protect the public against any undermining of their accustomed confidence in the Judges' authority. Wilmot C.J. in his opinoin in the case of Rex v. Almon already referred to says :
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> "The arraignment of the justice of the Judges, is arraigning the King's justice, it is an impeachment of his wisdom and goodness in the choice of his Judges, and excites in the minds of the people a general dissatisfaction with all judicial determination, and indisposes their minds to obey them; and whenever men's allegiance to the laws is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice, and in my opinion, calls out for a more rapid and immediate redress than any other obstructing whatsoever; not for the sake of. the Judges, as private individuals, but because they are the channels by which the King's justice is conveyed to the people. To be, impartial, and to be universally thought so, are both absolutely necessary for the giving justice that free, open, and uninterrupted current, which it has, for many ages,' found all over this kingdom.....
>
> Further explaining what be meant by the words "authority of the court", he observed
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> "the word "authority" is frequently used to express both the right of declaring the law, which is properly called jurisdiction, and of enforcing obedience to it, in which sense it is equivalent to the word power : but by the word "authority", I do not mean that coercive power of the Judges, but the deference and respect which is paid to them and their acts, from an opinion of their justice and integrity."

67. In the instant case, in order to widely determine as to what the Court would mean under the Code of Criminal Procedure as contained under Section 195, it was widely dealt with by the Hon'ble Apex Court in a judgement as reported in **AIR 1969 SC 724, *Rama Rao v. Narayan and Others,*** wherein the Hon'ble Apex Court has held that the Courts under the criminal law in common paralance is a

generic expression which is given in context in which it occurs under an Act and it is a body or an organisation which is statutorily created under a statute which is being vested with the power, authority or the dignity to adjudicate, and which is meant only for the purposes of exercising a sovereign and independent uninfluenced power to administer justice, after hearing the parties affected or who is likely to be affected by any orders which is to be passed by the Court on consideration of evidence and hearing the parties. Relevant paragraphs of the said judgement read as follows:-

> 10. Section 195(2) of the Code of Criminal Procedure enacts that the term "court" includes a Civil, Revenue or Criminal Court, but does not include a Registrar or Sub-Registrar under the Indian Registration Act, 1877. The expression "court" is not restricted to courts, Civil, Revenue or Criminal, it includes other tribunals. The expression "court" is not defined in the Code of Criminal Procedure. Under Section 3 of the Indian Evidence Act "court" is defined as including "all Judges and Magistrates, and all persons, except arbitrators, legally authorised to take evidence". But this definition is devised for the purpose of the Evidence Act and will not necessarily apply to the Code of Criminal Procedure. The expression "Court of Justice" is defined in the Indian Penal Code by Section 20 as denoting "a Judge who is empowered by law to act judicially as a body, when such Judge or body of Judges is acting judicially". That again is not a definition of the expression "court" as used in the Criminal Procedure. The expression "court" in ordinarily parlance is a generic expression and in the context in which it occurs may mean a "body or organizations" invested with power, authority or dignity. In Halsbury's Laws of England, 3rd Edn., Vol. 9, Article 809, at page 342, it is stated :
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> > "Originally the term "court" meant, among other meanings, the sovereign's place; it has acquired the meaning of the place where justice is administered and, further, has come to mean the persons who exercise judicial functions under authority derived either directly or indirectly from the sovereign. All tribunals, however, are not courts in the sense in which the term is here employed, namely to denote such tribunals as exercise jurisdiction over persons by reason of the sanction of the law, and not merely by reason of voluntary submission to their jurisdiction. Thus, arbitrators, committees of clubs, and the like, although they may be tribunals exercising judicial functions, are not "courts" in this sense of that term. On the other hand, a tribunal may be a court in the strict sense of the term although the chief part of its duties is not judicial. Parliament is a court. Its duties are mainly deliberative and legislative; the judicial duties are only part of its function."
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> In Article 810 it is stated :

> "In determining whether a tribunal is a judicial body the facts that it has been appointed by a non-judicial authority, that it has no power to administer an oath, that the chairman has a casting vote, and that third parties have power to intervene are immaterial, especially if the statute setting it up prescribes a penalty for making false statement; element to be considered are (1) the requirement for a public hearing, subject to a power to exclude the public in a proper case, and (2) a provision that member of the tribunal shall not take part in any decision in which he is personally interested, or unless he has been present throughout the proceedings.
>
> A tribunal is not necessary a court in the strict sense exercising judicial power because (1) it gives a final decision; (2) hears witnesses on oath; (3) two or more contending parties appear before it between whom it has to decide; (4) it gives decisions which affect the rights of subjects; (5) there is an appeal to a court; and (6) it is body to which a matter is referred by another body. Many bodies are not courts, although they have to decide questions, and in so doing have to act judicially, in the sense that the proceedings must be conducted with fairness and impartiality, such as the former assessment committees, the former court of referees which was constituted under the Unemployment Insurance Acts, the benchers of the Inns of Court when considering the conduct of one of their members, the Disciplinary Committee of the General Medical Council when considering question affecting the conduct of a medical man, a trade union when exercising disciplinary jurisdiction over its members, or the chief officer of a force exercising discipline over member of the force."

> A body required to act judicially in the sense that its proceedings must be conducted with fairness and impartiality may not therefore necessarily be regarded as a court.

> 12. By Section 195 of the Code of Criminal Procedure, it is enacted that certain offences amounting to contempt of lawful authority of public servant i.e., offences falling under Sections 172 to 188, I.P. Code offences against public justice under Sections 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, 210, 211 and 228, when such offences are alleged to have been committed in or in relation to, any proceeding in any court, and offences described in Section 463, or punishable under Section 471, 475or 476 when such offences are alleged to have been committed by a party to any proceeding in any court in respect of a document produced or given in evidence in such proceeding, cannot be taken cognizance of by any court, except in the first class of cases on a complaint in writing of the public servant concerned and in the second and third class of cases on the complaint in writing of such court or some other court to which it is subordinate."

68. In other words, it could also be said that the word Court as defined under Section 193 of Cr.PC, if it is to be read in consonance to the provisions contained under Section 3 of the

Evidence Act 1872, it includes a Judge or Magistrate or a person concerned, having an authority who is legally authorised to take evidence draw a conclusion and to determine a dispute devise the purposes of appreciations of evidence as per the procedure prescribed under law and then draw an expression of reasoning to the judgement under the given circumstances of the case. Section 193 of Cr.P.C. reads as under:

> "193. Cognizance of offences by Courts of Session. Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code."

Section 3 of the Indian Evidence Act reads as under:-

> 3. Interpretation clause. —In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:— **"Court".** —"Court" includes all Judges[1] and Magistrates, and all persons, except arbitrators, legally authorized to take evidence. "Fact". —"Fact" means and includes—
> (1) any thing, state of things, or relation of things, capable of being perceived by the senses;
> (2) any mental condition of which any person is conscious. Illustrations
> (a) That there are certain objects arranged in a certain order in a certain place, is a fact.
> (b) That a man heard or saw something, is a fact.
> (c) That a man said certain words, is a fact.
> (d) That a man holds a certain opinion, has a certain intention, acts in good faith, or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.
> (e) That a man has a certain reputation, is a fact. "Relevant". —One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts. "Facts in issue". —The expression

“facts in issue” means and includes— any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature, or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows. Explanation.— Whenever, under the provisions of the law for the time being in force relating to Civil Procedure, [3] any Court records an issue of fact, the fact to be asserted or denied in the answer to such issue, is a fact in issue. Illustrations A is accused of the murder of B. At his trial the following facts may be in issue:— That A caused B's death; That A intended to cause B's death; That A had received grave and sudden provocation from B; That A at the time of doing the act which caused B's death, was, by reason of unsoundness of mind, incapable of knowing its nature. “Document”. —“Document” [4] means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter. Illustrations A writing [5] is a document; Words printed, lithographed or photographed are documents; A map or plan is a document; An inscription on a metal plate or stone is a document; A caricature is a document. “Evidence” .— “ Evidence” means and includes—

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry, such statements are called oral evidence;

(2) [6] [all documents including electronic records produced for the inspection of the Court], such documents are called documentary evidence. “Proved” .—A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. “Disproved”. — A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist. “ Not proved”. — A fact is said not to be proved when it is neither proved nor disproved. [7] [“ India ”. —“ India ” means the territory of India excluding the

> State of Jammu and Kashmir .][8] [the expressions "Certifying Authority", 9 [electronic signature], 9 [Electronic Signature Certificate], "electronic form", "electronic records", "information", "secure electronic record", "secure digital signature" and "subscriber" shall have the meanings respectively assigned to them in the Information Technology Act, 2000 (21 of 2000).]"

69. If the term Court is visualised from the viewpoint of Schedule 7, List II, Entry 3, it has got a very limited interpretation as it has been dealt by the Supreme Court in a judgement reported in **AIR 1951 SC 69*, State of Bombay v. Narothamdas Jethabai and Ors.*,** which has defined it as to be a place where an officer, appointed by the State exercises his judicial powers and adjudicates a controversy so as to ensure the administration of justice amongst all the parties, which have got their vested interests in a *lis* which is placed before it. Thus the constitution of Court necessarily includes its competence and jurisdiction to adjudicate a lis on its independent merits. The relevant paragraphs of the said judgement reads as follow:-

> "48. The learned Attorney-General, on the other hand, contends that the Act is intra vires the Bombay Legislature under entry 1 of List II and under entries 4 and 15 of List III, it having received the assent of the Governor-General. It was urged that the Provincial Legislature had exclusive legislative power on the subject of administration of justice and constitution and organization of all courts and that this power necessarily included the power to make a law in respect to the jurisdiction of courts established and constituted by it and that the impugned legislation in pith and substance being on the subject of administration of justice, it could not be held ultra vires even if it trenched on the field of legislation of the Federal Legislature. In regard to entry 53 of List I, entry 2 of List II and entry 15 of List III of the Schedule, it was said that these conferred legislative power on the respective Legislatures to confer special jurisdiction on established courts in respect of particular subjects only if it was considered necessary to do so. In other words, the argument was that the Provincial Government could create a court of general jurisdiction legislating under entry 1 of List II and that it was then open to both the Central and the Provincial Legislatures to confer special jurisdiction on courts in respect to particular matters that were covered by the respective lists. In my opinion, the contention of the learned Attorney-General that the Act is intra vires the Bombay Legislature under entry 1 of List II is sound

and I am in respectful agreement with the view expressed by the Chief Justice of Bombay on this point in Mulchand Kundanmal Jagtiani v. Raman Hiralal Shah [51 Bom. L.R. 86]. The learned Chief Justice when dealing with this point said as follows :-

"If, therefore, the Act deals with administration of justice and constitutes a court for that purpose and confers ordinary civil jurisdiction upon it, in my opinion, the legislation clearly falls within the legislative competence of the Provincial Legislature and is covered by item 1 of List II of Schedule 7. That item expressly confers upon the Provincial Legislature the power to legislate with regard to the administration of justice and the constitution and organization of all courts except the Federal Court. It is difficult to imagine how a court can be constituted without any jurisdiction, and if Parliament has made the administration of justice exclusively upon the Provincial Legislature the power to constitute and organize all courts, it must follow, that the power is given to the Provincial Legislature to confer the ordinary civil jurisdiction upon the courts to carry on with their work. Item 2 of List II deals with jurisdiction and power of all courts except the Federal Court with respect to any of the matters in this list and Mr. Mistree's argument is that item 1 is limited and conditioned by item 2 and what he contends is that the only power that the Provincial Legislature has is undoubtedly to create courts, but to confer upon them only such jurisdiction as relates to items comprised in List II. I am unable to accept that contention or that interpretation of List II in Schedule 7. Each item in List II is an independent item, supplementary of each other, and not limited by each other in any way. Item 1 having given the general power to the Provincial Legislature with regard to all matters of administration of justice and with regard to the constitution and organization of all courts, further gives the power to the Legislature to confer special jurisdiction, if needs be, and special power, if needs be, to these courts with regard to any of the items mentioned in List II. It is impossible to read item 2 as curtailing and restricting the very wide power with regard to administration of justice given to the Provincial Legislature under item 1. Similarly in List I the Federal Legislature has been given the power under item 53 to confer jurisdiction and power upon any court with regard to matters falling under any of the items in that list, and, therefore, it would be competent to the Federal Legislature to confer any special jurisdiction or power which it thought proper upon any court with regard to suits on promissory notes or matters arising under the Negotiable Instruments Act....". It seems to me that the legislative power conferred on the Provincial legislature by item 1 of List II has been conferred by use of language which is of the widest amplitude (administration of justice and constitution and organization of all courts). It was not denied that the phrase employed would include within its ambit legislative power in respect to jurisdiction and power of courts established for the purpose of administration of justice. Moreover, the words appear to be sufficient to confer upon the Provincial Legislature the right to regulate and provide for the whole machinery connected with the administration of justice in the Province. Legislation on the subject of administration of justice and constitution of courts of justice would be ineffective and incomplete unless and until the courts established under it were clothed with the jurisdiction and power to hear and decide causes. It is difficult to visualise a statute dealing with administration of justice and the subject of constitution and organization of courts without a definition of the

jurisdiction and powers of those courts, as without such definition such a statute would be like a body without a soul. To enact it would be an idle formality. By its own force it would not have power to clothe a court with any power or jurisdiction whatsoever. It would have to look to an outside authority and to another statute to become effective. Such an enactment is, so far as I know, unknown to legislative practice and history. The Parliament by making administration of justice a provincial subject could not be considered to have conferred power of legislation on the Provincial Legislature of an ineffective and useless nature. Following the line of argument taken by Mr. Mistree before the High Court of Bombay, Mr. Seervai strenuously contended that the only legislative power conferred on the Provincial Legislature by entry 1 of List II was in respect to the establishment of a court and its constitution and that no legislative power was given to it to make a law in respect to jurisdiction and power of the court established by it.

94. The argument as to the applicability of the doctrine of pith and substance to the impugned Act can, however, be well maintained in the following modified form. Under entry 2 in List II the Provincial Legislature had power to make laws with respect to the jurisdiction and powers of Courts with respect to any of the matters enumerated in List II; that "administration of justice" in entry 1 is one of the matters in List II; that, therefore, the Provincial Legislature had power to confer the widest general jurisdiction on any new Court or take away the entire jurisdiction from any existing Court and there being this power, the doctrine of pith and substance applies. It is suggested that this argument cannot be formulated in view of the language used in entry 2 in List II. It is pointed out that entry 2 treats "any of the matters in this List" as subject-matter "with respect to" which, i.e., "over" which the Court may be authorised to exercise jurisdiction and power. This construction of entry 2 is obviously fallacious, because jurisdiction and powers of the Court "over" administration of justice as a subject-matter is meaningless and entry 2 can never be read with entry 1. This circumstance alone shows that the words "with respect to" occurring in entry 2 in List II when applied to entry 1 did not mean "over" but really meant "relating to" or "touching" or "concerning" or "for" administration of justice, and so read and understood, entry 2, read with entry 1 in List II, clearly authorised the Provincial Legislature to make a law cornering on or taking away from a Court general jurisdiction and powers relating to or touching or concerning or for administration of justice. This line of reasoning has been so very fully and lucidly dealt with by my brother Sastri J. that I have nothing to add thereto and I respectfully adopt his reasonings and conclusion on the point. This argument, in my opinion, resolves all difficulties by vesting power in the Provincial Legislature to confer general jurisdiction on Court constituted and organised by it or effective administration of justice which was made its special responsibility. Any argument as to deliberate encroachment that might have been founded on the Proviso to Section 3 of Act which enabled the Provincial Government to give to the City Court even Admiralty jurisdiction which was a matter in List I had been set at rest by the amendment of the Proviso by Bombay Act XXVI of 1950. The impugned Bombay Act may, in my judgment, be well supported as a law made by the Provincial Legislature under entry 2 read with entry 1 in List II and I hold accordingly. I, therefore, concur in the order that this appeal be allowed."

70. The Courts, literally that means that it is a person who derives his power to decide a controversy by a power which is vested in it by the State Government, under the prevalent law as defined under Article 13 of the Constitution of India. Meaning thereby, under all circumstances, invariably, if the definition as given by the Courts in the judicial proceedings as laid down by the Hon'ble Apex Court, it does not include within its ambit the President of India when he exercises power which are in the nature of its executive powers under Article 72 (1) (c) or the Governor under Article 161 of the Constitution of India, where it exercises its power of mercy, while exercising his discretionary and extraordinary powers and hence when they are not falling within the definition of the Courts as defined under the Act or any law or statue, the issue which has been already dealt by this Court, they and their actions of determination of offence has already taken will not be affected by any amendment(s) made by the Act of 2015, even if its applicability is made with a retrospective effect. The term "retrospective effect" or the reference to a word of, "any stage of the proceedings', would obviously exclude the stage of mercy/pardon exercised by the President of India, as it is not a stage or a proceeding even which is pending consideration before the Court as it has already been dealt with in the above paragraphs.

71. The learned counsel for the petitioner has also argued the controversy from the viewpoint with regards to the procedure which is to be adhered to under Section 7A of the Act which is to be followed in those cases where an offence is being tried in relation to a juvenile. Section 7A, it only arises into consideration where a question of juvenility is raised at the initial stage, but in the instant case, the said issue is not open to be argued and reagitated by the petitioner under the garb of Amended Act of 2015, for the reason

that as per the findings which has been recorded by the Court below, it has been held that in view of the fact that on the date of commission of offence or even prior to it, the convict/petitioner was already having and opened bank account, standing exclusively in his name in a Nationalised Bank, and particularly when as there was such question raised in his statement recorded under Section 313 of the Code of Criminal Procedure. Hence, in these circumstances, there was no necessity for re-determination of a question of juvenility that to when its an admission about the fact of age at the stage of proceedings under Section 313 of Cr.P.C. and that too in the light of the implications which have been sought to be derived by the amended Act of 2015, for the reason that this question pertaining to the determination of juvenility was a question which was specifically raised by the petitioner in writ petition which was filed before The Hon'ble Apex Court under Article 32 of the Constitution of India and that too after the finalization of the capital sentence and the said question has been laid to rest by the Hon'ble Apex Court, and that to when the Court declined to determine the question of juvenility by dismissing the curative petition filed by the petitioner before the Hon'ble Apex Court vide its order dated 06.02.2006, and also by holding that the writ petition was not maintainable and same was directed to be treated as a curative petition.

72. The said question of re-determination of juvenility even will also not come into play because even otherwise also, the President of India has already exercised his discretion even much prior to the enforcement of the amendment made in the Juvenile Justice (Care and Protection of Children) Act, 2015, by commuting the death sentence into a life imprisonment by an order dated 08.05.2012. Though not relevant, but in view of the above reasons already assigned by this Court with regard to the fact that the

question of juvenility will not be required to be determined at this stage nor after the culmination of the proceedings in 2012 by the President of India by commuting the death sentence into life imprisonment because this order was accepted by the petitioner till it was questioned for the first time by filing writ petition in 2017, but since the learned counsel for the petitioner has relied upon certain judicial pronouncements, it would be apt and necessary for the Court to consider those authorities relied by the counsel in support of his contention.

73. The first in the said chain of authorities relied by the petitioner would be the citations as reported in **2005 (3) SCC 551, *Pratap Singh v. State of Jharkhand,*** which was dealing with the issue pertaining to the reckoning of the juvenility of an accused person and its laid down wider principle, that it would be reckoned pertaining to the age of the accused as it was prevailing at the time of the commission of offence. As it has already been held that this proposition cannot be disputed but the interpretation as given in the said statute for the purposes of attracting the external aids for determining the age herein in the instant case according to the admitted case is not a question which is required or calls for determination, because as per the admission made by the convict/petitioner himself and that too in this case since it is based on all together a different circumstances, where the proceedings have attained finality, the ratio as propounded therein is altogether based upon a distinct fact and circumstances, hence it will not be of any relevance as far as the instant case is concerned. Even if the said judgement is considered in its totality, it was dealing at that stage when the proceedings of determination of juvenility was pending consideration before the Court which was yet to attain finality under the Act of 2000. Hence the basic intention was intended to be

protected with regard to the treatment and care which the Act intended to extend to a juvenile, who was in conflict with law. Hence, the said ratio, as propounded and relied with by the petitioner's counsel would not be attracted in the instant case. The said judgement also considered the issue pertaining to the applicability of the Act, whether it is prospective or retrospective, the Hon'ble Apex Court in its paras 94 and 95, has provided that the subsequent Act, which incorporates a separate or a distinct parameters of determination of juvenility it will always be prospective in operation because it enforces a distinct application of procedural law and that is why in para 94, the Hon'ble Apex Court has held that in spite of the fact that the Juvenile Justice Act has to be construed liberally, but so as to bring it with its all force but the said intention of the legislature has not to be construed in such a fashion which is to be made applicable where the proceedings which have already culminated and it is no more under determination on merits on application of evidence before a Court of law and hence it could be reconsidered or re-tried even upon the final adjudication by the Court. Relevant paragraphs of the said judgement are quoted hereunder:-

> "25. Sub-section (2) postulates that anything done or any action taken under the 1986 Act shall be deemed to have been done or taken under the corresponding provisions of the 2000 Act. Thus, although the 1986 Act was repealed by the 2000 Act, anything done or any action taken under the 1986 Act is saved by Sub-section (2), as if the action has been taken under the provisions of the 2000 Act.
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> 26. Section 20 on which reliance has been placed heavily by the counsel for the appellant deals with the special provision in respect of pending cases. It reads:-
>
> > "20. Special provision in respect of pending cases. - Notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any Court in any area on the date on which this Act comes into force in that area, shall be continued in that Court as if this Act had not been passed and if the Court finds that the juvenile has

committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of this Act as if it had been satisfied on inquiry under this Act that a juvenile has committed the offence."

27. The striking distinction between the 1986 Act and 2000 Act is with regard to the definition of juvenile. Section 2(h) of the 1986 Act defines juvenile as under: -

"2(h) "juvenile" means a boy who has not attained the age of sixteen years or a girl who has not attained the age of eighteen years;"

Section 2(k) of 2000 Act defines juvenile as under:-

"2(k) "juvenile" or "child" means a person who has not completed eighteenth year of age;"

29. Section 3 provides as follows:

"3. Continuation of inquiry in respect of juvenile who has ceased to be a juvenile.- Where an inquiry has been initiated against a juvenile in conflict with law or a child in need of care and protection and during the course of such inquiry the juvenile or the child ceases to be such, then notwithstanding anything contained in this Act or in any other law for the time being in force, the inquiry may be continued and orders may be made in respect of such person as if such person had continued to be a juvenile or a child."

Thus, even where an inquiry has been initiated and the juvenile ceases to be a juvenile i.e. crosses the age of 18 years, the inquiry must be continued and orders made in respect of such person as if such person had continued to be a juvenile.

30. Similarly, under Section 64 where a juvenile is undergoing a sentence of imprisonment at the commencement of the 2000 Act he would, in lieu of undergoing such sentence, be sent to a special home or be kept in a fit institution. These provisions show that even in cases where a mere inquiry has commenced or even where a juvenile has been sentenced the provisions of the 2000 Act would apply. therefore, Section 20 is to be appreciated in the context of the aforesaid provisions.

31. Section 20 of the Act as quoted above deals with the special provision in respect of pending cases and begins with non-obstante clause. The sentence "Notwithstanding anything contained in this Act all proceedings in respect of a juvenile pending in any Court in any area on date of which this Act came into force" has great significance. The proceedings in respect of a juvenile pending in

any court referred to in Section 20 of the Act is relatable to proceedings initiated before the 2000 Act came into force and which are pending when the 2000 Act came into force. The term "any court" would include even ordinary criminal courts. If the person was a "juvenile" under the 1986 Act the proceedings would not be pending in criminal courts. They would be pending in criminal courts only if the boy had crossed 16 years or girl had crossed 18 years. This shows that Section 20 refers to cases where a person had ceased to be a juvenile under the 1986 Act but had not yet crossed the age of 18 years then the pending case shall continue in that Court as if the 2000 Act has not been passed and if the Court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, shall forward the juvenile to the Board which shall pass orders in respect of that juvenile.

32. In this connection it is pertinent to note that Section 16 of the 2000 Act is identical to Section 22 of the 1986 Act. Similarly Section 15 of the 2000 Act is in pari materia with Section 21 of the 1986 Act. Thus, such an interpretation does not offend Article 20(1) of the Constitution of India and the juvenile is not subjected to any penalty greater than that which might have been inflicted on him under the 1986 Act.

36. We, therefore, hold that the provisions of 2000 Act would be applicable to those cases initiated and pending trial/inquiry for the offences committed under the 1986 Act provided that the person had not completed 18 years of age as on 1.4.2001.

37. The net result is:-
(a) The reckoning date for the determination of the age of the juvenile is the date of an offence and not the date when he is produced before the authority or in the Court.

(b) The 2000 Act would be applicable in a pending proceeding in any court/authority initiated under the 1986 Act and is pending when the 2000 Act came into force and the person had not completed 18 years of age as on 1.4.2001.

94. However, as would appear from the provisions of the Act of 2000 that the Scheme of the 2000 Act is such that such a construction is possible. The same would also be evident from Section 64 which deals with a case where a person has been undergoing a sentence but if he is a juvenile within the meaning of the 2000 Act having not crossed the age of 18, the provisions thereof would apply as if he had been ordered by the Board to be sent to a special home or the institution, as the case may be.

> 95. Section 20 of the Act of 2000 would, therefore, be applicable when a person is below the age of 18 years as on 1.4.2001. For the purpose of attracting Section 20 of the Act, it must be established that: (i) on the date of coming into force the proceedings in which the petitioner was accused was pending; and (ii) on that day he was below the age of 18 years. For the purpose of the said Act, both the aforementioned conditions are required to be fulfilled. By reason of the provisions of the said Act of 2000, the protection granted to a juvenile has only been extended but such extension is not absolute but only a limited one. It would apply strictly when the conditions precedent therefore as contained in Section 20 or Section 64 are fulfilled. The said provisions repeatedly refer to the words 'juvenile' or 'delinquent juveniles' specifically. This appears to be the object of the Act and for ascertaining the true intent of the Parliament, the rule of purposive construction must be adopted. The purpose of the Act would stand defeated if a child continues to be in the company of an adult. Thus, the Act of 2000 intends to give the protection only to a juvenile within the meaning of the said Act and not an adult. In other words, although it would apply to a person who is still a juvenile having not attained the age of 18 years but shall not apply to a person who has already attained the age of 18 years on the date of coming into force thereof or who had not attained the age of 18 years on the date of commission of the offence but has since ceased to be a juvenile."

74. Further, when the issue of consideration of juvenility and the procedure as provide Rule 12 which was required to be followed as per the Rules of 2007, particularly Rule 12, when all its covenants and parameters stood resorted to and concluded in the proceeding held earlier before the Court. Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 reads as follows:-

> **"Rule 12 - Procedure to be followed in determination of Age** (1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.
>
> (2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining-

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a Panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of section 7A, section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed off cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule(3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law."

75. Yet again, the said Rules which were laying the parameters laid down therein to be determined and adhered to by the Courts and the Board, which was fully adhered too in the instant case till the finality of judicial proceedings was reached by resorting to the stage of curative petition which stood decided on 06.02.2006.

76. The aforesaid judgement has also dealt with the situation where the question of juvenility was raised and it was a dispute which required a determination. Since in the instant case neither the said dispute was ever raised or claim of juvenility was ever questioned up to the conclusion of the trial and particularly, when the evidence itself which was adduced by the convict/petitioner proved as per his own version that he was not a juvenile on the date of commission of offence, the protection granted under the said law will not be applicable in the instant case, more particularly, when the said issue already stood determined by the Courts.

77. Another judgement, on which the reliance has been placed by the learned counsel for the petitioner is that reported in **2009 (13) SCC 211** ***Hari Ram v. State of Rajasthan,*** it was yet again from a very limited viewpoint that juvenility has to be considered on the date on which the offence was committed and in accordance with manner laid down under the Rules, when it is questioned. Hence, this judgement will not be of any relevance in the instant case, because it was not dealing with the present circumstances of the case where the issue determination of juvenility has been sought to be resorted to in a malicious manner to reopen the proceedings from the stage of trial after its attainment of finality up to the Hon'ble Apex Court and up to the President of India under Article 72 (1) (c) of the Constitution of India. In the ratio as propounded in the said judgement was not contemplating a situation as it exists in the instant case where the stages of determination or a

trial was pending consideration and the scope of determination of juvenility was still left open, not thereafter when the proceedings before the Court has closed. The emphasis for determination of age of juvenile is only in those cases, which were pending before the Court created under the Act or Code of Criminal Procedure, the said issue since stood closed with the culmination of judicial proceedings in the instant case. Relevant paragraphs of the said judgement read as follows:-

> "17. Subsequently, in keeping with certain international Conventions and in particular the Convention on the Rights of the Child and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985, commonly known as the Beijing Rules, the Legislature enacted the Juvenile Justice (Care and Protection of Children) Act, 2000 to attain the following objects:
>
> (i) to lay down the basic principles for administering justice to a juvenile or the child;
>
> (ii) to make the juvenile system meant for a juvenile or the child more appreciative of the developmental needs in comparison to criminal justice system as applicable to adults;
>
> (iii) to bring the juvenile law in conformity with the United Convention on the Rights of the Child;
>
> (iv) to prescribe a uniform age of eighteen years for both boys and girls;
>
> (v) to ensure speedy disposal of cases by the authorities envisaged under this Bill regarding juvenile or the child within a time limit of four months;
>
> (vi) to spell out the role of the State as a facilitator rather than doer by involving voluntary organizations and local bodies in the implementation of the proposed legislation;
>
> (vii) to create special juvenile police units with a humane approach through sensitization and training of police personnel;
>
> (viii) to enable increased accessibility to a juvenile or the child by establishing Juvenile Justice Boards and Child Welfare Committees and Homes in each district or group of districts;
>
> (ix) to minimize the stigma and in keeping with the developmental needs of the juvenile or the child, to separate the Bill into two parts - one for juveniles in conflict with law and the other for the juvenile or the child in need of care and protection;

(x) to provide for effective provisions and various alternatives for rehabilitation and social reintegration such as adoption, foster care, sponsorship and aftercare of abandoned, destitute, neglected and delinquent juvenile and child.
The said Act ultimately came into force on 1st April, 2001.
28. One of the problems which has frequently arisen after the enactment of the Juvenile Justice Act, 2000, is with regard to the application of the definition of "juvenile" under Section 2(k) and (l) in respect of offences alleged to have been committed prior to 1st April, 2001 when the Juvenile Justice Act, 2000 came into force, since under the 1986 Act, the upper age limit for male children to be considered as juveniles was 16 years.

29. The question which has been frequently raised is, whether a male person who was above 16 years on the date of commission of the offence prior to 1st April, 2001, would be entitled to be considered as a juvenile for the said offence if he had not completed the age of 18 years on the said date. In other words, could a person who was not a juvenile within the meaning of the 1986 Act when the offence was committed, but had not completed 18 years, be governed by the provisions of the Juvenile Justice Act, 2000, and be declared as a juvenile in relation to the offence alleged to have been committed by him?

30. The said question, which is identical to the question raised in these proceedings, was considered in the case of Arnit Das v. State of Bihar MANU/SC/0376/2000 : 2000CriLJ2971 , wherein, in the light of the definition of "juvenile" under the 1986 Act, which was then subsisting, this Court came to a finding that the procedures prescribed by the 1986 Act were to be adopted only when the Competent Authority found the person brought before it or appearing before it to be under 16 years of age, if a boy, and under 18 years of age, if a girl, on the date of being so brought or such appearance first before the Competent Authority.

37. The said decision in Pratap Singh's case (supra) led to the substitution of Section 2(l) and the introduction of Section 7A of the Act and the subsequent introduction of Rule 12 in the Juvenile Justice Rules, 2007, and the amendment of Section 20 of the Act. Read with Sections 2(k), 2(l), 7A and Rule 12, Section 20 of the Juvenile Justice Act, 2000, as amended in 2006, is probably the Section most relevant in setting at rest the question raised in this appeal, as it deals with cases which were pending on 1st April, 2001, when the Juvenile Justice Act, 2000, came into force.

50. The said intention of the legislature was reinforced by the amendment effected by the said Amending Act to Section 20 by introduction of the Proviso and the Explanation thereto, wherein also it has been clearly indicated that in any pending case in any Court the determination of juvenility of such a juvenile has to be in terms of Clause 2(l) even if the juvenile ceases to be so "on or before the date of commencement of this Act" (emphasis supplied) and it was also

indicated that the provisions of the Act would apply as if the said provisions had been in force for all purposes and at all material times when the alleged offence was committed.

(emphasis supplied)

51. Apart from the aforesaid provisions of the 2000 Act, as amended, and the Juvenile Justice Rules, 2007, Rule 98 thereof has to be read in tandem with Section 20 of the Juvenile Justice Act, 2000, as amended by the Amendment Act, 2006, which provides that even in disposed of cases of juveniles in conflict with law, the State Government or the Board could, either suo motu or on an application made for the purpose, review the case of a juvenile, determine the juvenility and pass an appropriate order under Section 64 of the Act for the immediate release of the juvenile whose period of detention had exceeded the maximum period provided in Section 15 of the Act, i.e., 3 years.

68. Accordingly, a juvenile who had not completed eighteen years on the date of commission of the offence was also entitled to the benefits of the Juvenile Justice Act, 2000, as if the provisions of Section 2(k) had always been in existence even during the operation of the 1986 Act.

69. The said position was re-emphasised by virtue of the amendments introduced in Section 20 of the 2000 Act, whereby the Proviso and Explanation were added to Section 20, which made it even more explicit that in all pending cases, including trial, revision, appeal and any other criminal proceedings in respect of a juvenile in conflict with law, the determination of juvenility of such a juvenile would be in terms of Clause (l) of Section 2 of the 2000 Act, and the provisions of the Act would apply as if the said provisions had been in force when the alleged offence was committed."

78. The learned counsel for the petitioner has made reference to a judgement reported in **2015 (17) SCC 699, *Ram Narain v. State of Uttar Pradesh,*** where the convict of the offence under Section 302 of Cr.P.C. after the affirmation of sentence from the Hon'ble Apex Court and dismissal of the review petition has served a sentence for 10 years and thereafter he has raised the question, that at the stage when the proceedings under Section 313 was held he was unable to produce his school leaving certificate so as to prove his age. Now, subsequently, he has moved an application for determination of his juvenility after serving 10 years of sentence after being convicted, the Hon'ble Apex Court permitted the determination of juvenility in the light of the subsequent evidence which was sought to be

produced by the convict. Though, there cannot be any dispute with regard to the said proposition where the liberty as was granted by the Hon'ble Apex Court that a question of determination of juvenility could still be raised after an order of conviction after collecting the subsequent evidence pertaining to the determination of the age of the convict, but this case could yet be distinguished from the present case from the viewpoint that in the instant case too, the parents of the convict petitioner after an order of conviction by the Courts i.e. which was upheld upto the Hon'ble Apex Court had collected the evidence and thereafter they have produced the school leaving certificate to show that the date of birth of the convict, as recorded in the school records, was 01.01.1980 and not of 1998, the said aspect, it has been considered by the Courts below even upto the proceedings before the Hon'ble Apex Court.

79. But the distinction herein in the instant case is to the effect that the evidence, as it existed during the course of trial itself has given a sufficient admitted proof that the accused was major as per his own evidence adduced by him which remained unrebutted by him before the Court below. This judgement can also be distinguished from the viewpoint that in the said judgement, it was after the conviction, rendered by the Hon'ble Apex Court, the convict was serving the sentence, but in the instant case, after the dismissal of the Jail Appeal by the Hon'ble Apex Court on 05.12.2002, and consequently affirming the death penalty as imposed by the Division Bench of this Court by its judgement dated 19.09.2001, on the discovery of the subsequent and new evidence, the petitioner/convict himself, based on those evidences procured by his parents at a later stage had filed a writ petition before the Hon'ble Apex Court in order to determine him to be juvenile based on the School Leaving Certificate, which was obtained by him at a later

stage the writ petition was filed by petitioner by invoking Article 32 of the Constitution of India. The said writ petition, which was filed by him before the Hon'ble Apex Court, it was held by the Hon'ble Apex Court as to not maintainable vide its judgement dated 16.02.2005, in view of judgement of conviction by Hon'ble Apex Court dated 05.12.2002, and was later on directed to be treated as to be a Curative Petition to the judgement rendered in the Jail Appeal which was decided on 05.12.2002, and to the review judgement dated 04.03.2003. The curative petition too was dismissed on 06.02.2006. Meaning thereby, the question of determination of juvenility even after conviction, and based on discovery of new evidence was turned down by the Hon'ble Apex Court by dismissing curative petition, by which the proceedings before the Court ended; and also because mercy petition under Article 72 (1) (c) of the Constitution of India was pending after being filed on 30.04.2003 before the President of India which was later commuted by the President of India on 08.05.2012.

80. Hence, it was under an altogether a different set of circumstances and that too in the light of the fact that when the mercy petition, which was already filed by the present petitioner/convict before the President of India on 30.04.2003, which later stood decided by the President on 08.05.2012. All these proceedings, which culminated by the order of President of India on 08.05.2012, would not apply in the circumstances, which have been sought to be relied with by the learned counsel for the petitioner in the light of the aforesaid judgement, as it was based upon altogether a different circumstances and particularly, the fact of the present case where it shakes up the very conscious of human being, where the petitioner is found to be an accused and ultimately resulting to a convict of murdering three persons of the same family on the same

day. It was too heinous a crime resulting into his conviction and its ultimate determination under Article 72 (1) (c) by the President of India. Relevant paragraphs of the judgement in **Ram Narain's case (supra)** read as follows:-

> "2. The learned counsel appearing for the petitioner-applicant submitted that in view of the aforesaid fact the petitioner-applicant should be given exemption under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000. He further drew our attention to the certificate issued by the Senior Jail Superintendent, Central Jail, Agra, certifying the period he is in jail. The learned counsel appearing in this matter further submitted that according to the prosecution the petitioner-applicant was charged under Section 302 of the Penal Code, 1860 for committing the murder of one Nathi Lal on 21-12-1976 at about 6.30 p.m. by causing him gunshot injury. The petitioner-applicant pleaded juvenility before the trial court in his statement recorded under Section 313 of the Code of Criminal Procedure, 1973 on 28-7-1978, along with other grounds in his defence, but he could not produce the transfer certificate during prosecution being helpless and as a result whereof he had to suffer the sentence under Section 302 IPC culminating to life imprisonment. The special leave petition filed by the petitioner-applicant before this Court was dismissed[1] on 20-8-2004 and the review petition was also dismissed by this Court by its order dated 13-10-2004.
>
> **4.** In *Upendra Pradhan* v. *State of Orissa* wherein the appeal of the accused was allowed granting him the benefit of the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000, this Court observed: (SCC pp. 130-31, paras 19-20)
>
> > "*19*. … The learned counsel for the appellant raises the plea of juvenility under Section 7-A of the Juvenile Justice (Care and Protection of Children) Act, 2000. The plea can be raised before any court and at any point of time. We feel that the stand taken by the counsel is correct and we will look into the present lis keeping in mind the juvenility of the appellant-accused at the time of commission of the crime. As stated earlier, the age of the appellant-accused was less than 18 years at the time of the incident. It has been brought to our notice that the appellant has undergone about 8 years in jail. The appellant falls within the definition of "juvenile" under Section 2(*k*) of the Juvenile Justice (Care and Protection

> of Children) Act, 2000. He can raise the plea of juvenility at any time and before any court as per the mandate of Section 7-A and has rightly done so. It has been proved before us, as per the procedure given in Rule 12 of the Juvenile Justice Model Rules, 2007, and the age of the appellant-accused has been determined following the correct procedure and there is no doubt regarding it.
>
> *20*. On the question of sentencing, we believe that the appellant-accused is to be released. In the present matter, in addition to the fact that he was a juvenile at the time of commission of offence, the appellant-accused is entitled to benefit of doubt. Therefore, the conviction order passed by the High Court is not sustainable in law. Assuming without conceding, that even if the conviction is upheld, Upendra Pradhan has undergone almost 8 years of sentence, which is more than the maximum period of three years prescribed under Section 15 of the Juvenile Justice Act of 2000. Thus, giving him the benefit under the Act, we strike down the decision of the High Court. This Court has time and again held in a plethora of judgments on the benefit of the 2000 Act and on the question of sentencing."

81. One another judgement, on which reliance has been placed by the learned counsel for the petitioner is with regards to the stage at which the benefit of the determination of an age can be derived by the person convicted, has been considered by the Hon'ble Apex Court in the matters reported in **2015 (15) SCC 637, *Abdul Razzak v. State Uttar Pradesh,*** wherein the Hon'ble Apex Court has held that the effect of juvenility could be taken into consideration on the changed factors, which were enforced by the subsequent legislation and hence the criteria of determination of juvenility is possible even after the enforcement of the Act of 2000 was even available to those convicts, who were sentenced under the earlier Act of 1986. Yet again, at the risk of the repetition, this Court draws the distinction from the viewpoint that it was not a case where the

determination of an offence has attained the stage of finality by the Hon'ble Apex Court and after the consideration of mercy/pardon petition by the President of India under Article 72 (1) (c), because if under the pretext of retrospective applicability of a welfare legislation in order to protect a juvenile, who is in conflict with law is taken into consideration, it will defeat the very purpose of conducting a prolonged trial of an offence which was committed on 15.11.1994, and which has attained its finality by the Hon'ble Apex Court on 06.02.2006 with the dismissal of curative petition.

> "12. The above view was reiterated by a bench of three Judges in Abuzar Hossain alias Gulam Hossain v. State of West Bengal MANU/SC/0845/2012 : (2012) 10 SCC 489, as follows:
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> 39.1. A claim of juvenility may be raised at any stage even after the final disposal of the case. It may be raised for the first time before this Court as well after the final disposal of the case. The delay in raising the claim of juvenility cannot be a ground for rejection of such claim. The claim of juvenility can be raised in appeal even if not pressed before the trial court and can be raised for the first time before this Court though not pressed before the trial court and in the appeal court.
>
> 39.2. For making a claim with regard to juvenility after conviction, the claimant must produce some material which may prima facie satisfy the court that an inquiry into the claim of juvenility is necessary Initial burden has to be discharged by the person who claims juvenility
>
> 39.3. As to what materials would prima facie satisfy the court and/or are sufficient for discharging the initial burden cannot be catalogued nor can it be laid down as to what weight should be given to a specific piece of evidence which may be sufficient to raise presumption of juvenility but the documents referred to in Rules 12(3)(a)(i) to (iii) shall definitely be sufficient for prima facie satisfaction of the court about the age of the delinquent necessitating further enquiry Under Rule 12. The statement recorded Under Section 313 of the Code is too tentative and may not by itself be sufficient ordinarily to justify or reject the claim of juvenility. The credibility and/or acceptability of the documents like the school leaving certificate or the voters' list, etc. obtained after conviction would depend on the facts and circumstances of each case and no hard-and-fast rule can be prescribed that they must be prima facie accepted or rejected. In Akbar Sheikh MANU/SC/0746/2009 : (2009) 7 SCC 415 : (2009) 3 SCC (Cri) 431 and Pawan MANU/SC/0289/2009 : (2009) 15 SCC 259 : (2010) 2 SCC (Cri) 522 these documents were not

found prima facie credible while in Jitendra Singh MANU/SC/0962/2010 : (2010) 13 SCC 523 : (2011) 1 SCC (Cri) 857 the documents viz. school leaving certificate, marksheet and the medical report were treated sufficient for directing an inquiry and verification of the Appellant's age. If such documents prima facie inspire confidence of the court, the court may act upon such documents for the purposes of Section 7-A and order an enquiry for determination of the age of the delinquent.

39.4. An affidavit of the claimant or any of the parents or a sibling or a relative in support of the claim of juvenility raised for the first time in appeal or revision or before this Court during the pendency of the matter or after disposal of the case shall not be sufficient justifying an enquiry to determine the age of such person unless the circumstances of the case are so glaring that satisfy the judicial conscience of the court to order an enquiry into determination of the age of the delinquent.

39.5. The court where the plea of juvenility is raised for the first time should always be guided by the objectives of the 2000 Act and be alive to the position that the beneficent and salutary provisions contained in the 2000 Act are not defeated by the hypertechnical approach and the persons who are entitled to get benefits of the 2000 Act get such benefits. The courts should not be unnecessarily influenced by any general impression that in schools the parents/guardians understate the age of their wards by one or two years for future benefits or that age determination by medical examination is not very precise. The matter should be considered prima facie on the touchstone of preponderance of probability.

39.6. Claim of juvenility lacking in credibility or frivolous claim of juvenility or patently absurd or inherently improbable claim of juvenility must be rejected by the court at the threshold whenever raised.

14. Reference may also be made to Jintendra Singh alias Babboo Singh and Anr. v. State of Uttar Pradesh MANU/SC/0679/2013 : (2013) 11 SCC 193 laying down as follows:

“80. The settled legal position, therefore, is that in all such cases where the accused was above 16 years but below 18 years of age on the date of occurrence, the proceedings pending in the court concerned will continue and be taken to their logical end except that the court upon finding the juvenile guilty would not pass an order of sentence against him. Instead he shall be referred to the Board for appropriate orders under the 2000 Act. Applying that proposition to the case at hand the trial court and the High Court could and indeed were legally required to record a finding as to the guilt or otherwise of the Appellant. All that the courts could not have done was to pass an order of sentence, for which

purpose, they ought to have referred the case to the Juvenile Justice Board.

81. The matter can be examined from another angle. Section 7-A(2) of the Act prescribes the procedure to be followed when a claim of juvenility is made before any court. Section 7-A(2) is as under:

7-A. Procedure to be followed when claim of juvenility is raised before any court.--

(1)***

(2) If the court finds a person to be a juvenile on the date of commission of the offence Under Sub-section (1), it shall forward the juvenile to the Board for passing appropriate order, and the sentence if any, passed by a court shall be deemed to have no effect.

82. A careful reading of the above would show that although a claim of juvenility can be raised by a person at any stage and before any court, upon such court finding the person to be a juvenile on the date of the commission of the offence, it has to forward the juvenile to the Board for passing appropriate orders and the sentence, if any, passed shall be deemed to have (sic no) effect. There is no provision suggesting, leave alone making it obligatory for the court before whom the claim for juvenility is made, to set aside the conviction of the juvenile on the ground that on the date of commission of the offence he was a juvenile, and hence not triable by an ordinary criminal court. Applying the maxim expressio unius est exclusio alterius, it would be reasonable to hold that the law insofar as it requires a reference to be made to the Board excludes by necessary implication any intention on the part of the legislature requiring the courts to set aside the conviction recorded by the lower court. Parliament, it appears, was content with setting aside the sentence of imprisonment awarded to the juvenile and making of a reference to the Board without specifically or by implication requiring the court concerned to alter or set aside the conviction. That perhaps is the reason why this Court has in several decisions simply set aside the sentence awarded to the juvenile without interfering with the conviction recorded by the court concerned and thereby complied with the mandate of Section 7-A(2) of the Act."

82. This case would be on a distinct footing altogether because the stages at which the Hon'ble Apex Court has permitted the consideration of determination of the issue of juvenility were the stages when the matter was ceased with the Court or there was an

order of conviction, which was still under judicial consideration before the Courts, but it was not dealing with the situation where the mercy petition for pardon preferred by the convict petitioner under Article 72 (1) (c) of the Constitution of India has already been considered by the President of India, because this Court is of the view that as soon as on an affirmation of sentence of conviction, if a convict invokes Article 72 (1) (c) of the Constitution of India, that too as it is in the instant case when it was invoked as back as on 30.04.2003, that in itself would amount to acceptance of guilt, for which he has already been convicted by the Courts and that too on a conclusion of the proceedings held before the Court and in such an eventuality, it would amount to that it is an admission of guilt and ones a mercy/pardon petition has been sought, then the protection by way of re-determination of juvenility, would amount to holding a re-trial of the case under the pretext of enforcement of the new legislation either that is by the Act of 2000 or of the Amendment Act 2 of 2015, which cannot be made applicable after the finality of decision by the President of India on 08.05.2012.

83. The learned counsel for the petitioner extended his argument taking shelter to the judgement of Hon'ble Apex Court reported in **2012 (8) SCC 800, *Babla alias Dinesh v. State of Uttarakhand.***

> "6. We have heard the Learned Counsel for the parties to the lis. We have also carefully perused the judgment and order passed by the High Court. We are of the opinion that the High Court has erred in dismissing the appeal on the ground that no evidence was adduced and no suggestion was made to the witnesses regarding juvenility of the Appellant during the trial. In our opinion, the issue of raising the plea for determination of juvenility for the first time at the appellate stage is no more res integra. This Court in Lakhan Lal v. State of Bihar MANU/SC/0259/2011 : (2011) 2 SCC 251, has allowed such plea raised before this Court for the first time and, taking note of its previous decisions on this point, has observed thus:
>
> "21. The fact remains that the issue as to whether the Appellants were juvenile did not come up for consideration for whatever reason,

before the Courts below. The question is whether the same could be considered by this Court at this stage of the proceedings. A somewhat similar situation had arisen in Umesh Singh and Anr. v. State of Bihar MANU/SC/0375/2000 : (2000) 6 SCC 89 wherein this Court relying upon the earlier decisions in Bhola Bhagat v. State of Bihar MANU/SC/1361/1997 : (1997) 8 SCC 720, Gopinath Ghosh v. State of W.P. MANU/SC/0101/1983 : 1984 Supp. SCC 228 and Bhoop Ram v. State of U.P. MANU/SC/0070/1989 : (1989) 3 SCC 1, while sustaining the conviction of the Appellant therein under all the charges, held that the sentences awarded to them need to be set aside. It was also a case where the Appellant therein was aged below 18 years and was a child for the purposes of the Bihar Children Act, 1970 on the date of the occurrence. The relevant paragraph reads as under (Umesh Singh case, SCC, pp.93-94, para 6):

6. So far as Arvind Singh, Appellant in Criminal Appeal No. 659 of 1999 is concerned, his case stands on a different footing. On the evidence on record, the Learned Counsel for the Appellant, was not in a position to point out any infirmity in the conviction recorded by the trial court as affirmed by the appellate court. The only contention put forward before the court is that the Appellant is born on 1-1-67 while the date of the incident is 14-15-1980 and on that date he was hardly 13 years old. We called for report of experts being placed before the court as to the age of the Appellant, Arvind Singh. The report made to the court clearly indicates that on the date of the incident he may be 13 years old. This fact is also supported by the school certificate as well as matriculation certificate produced before this Court which indicate that his date of birth is 1-1-1967. On this basis, the contention put forward before the court is that although the Appellant is aged below 18 years and is a child for the purpose of the Bihar Children Act, 1970 on the date of the occurrence, his trial having been conducted along with other accused who are not children is not in accordance with law. However, this contention had not been raised either before the trial court or before the High Court. In such circumstances, this Court in Bhola Bhagat v. State of Bihar MANU/SC/1361/1997 : 1997 (8) SCC 720, following the earlier decision in Gopinath Ghosh v. State of West Bengal MANU/SC/0101/1983 : 1984 Supp. SCC 228 and Bhoop Ram v. State of U.P. MANU/SC/0070/1989 : 1989 (3) SCC 1 and Pradeep Kumar v. State of U.P. MANU/SC/0027/1994 : 1995 Supp. (4) SCC 419, while sustaining that the sentences awarded to them need to be set aside. In view of the exhaustive discussion of the law on the matter in Bhola Bhagat case, we are obviated of the duty to examine the same but following the same, with respect, we pass similar orders in the present case. Conviction of the Appellant Arvind Singh is confirmed but the sentence imposed upon him stands set aside. He is, therefore, set at liberty, if not required in any other case.

We are in respectful agreement with the view expressed by this Court in the aforesaid decision.

7. We have carefully perused the report dated 03.12.2011 of the learned Additional Sessions Judge. Since the report is made after holding due

> inquiry as required under the Act and the Rules, we accept the same. Accordingly, we hold that the Appellant was juvenile, as envisaged under the Act and the Rules framed thereunder, on the date of commission of the offence.
>
> 8. The Jail Custody Certificate, produced by the Appellant suggests that he has undergone the actual period of sentence of more than three years out of the maximum period prescribed Under Section 15 of the Act. In the circumstance, while sustaining the conviction of the Appellant for the aforesaid offences, the sentence awarded to him by the Trial Court and confirmed by the High Court is set aside. Accordingly, we direct that the Appellant be released forthwith, if not required in any other case. The appeal is partly allowed."

84. But this Court is of the view that even, this judgement too will not apply in the cases which are sought to be considered yet again after dismissal of curative petition and particularly after the commutation order of the President of India dated 08.05.2012, which makes the present case different and distinct than to the others.

85. The learned counsel for the petitioner has further placed reliance on a judgement reported in **2012 (9) SCC 750, *Aswani Kumar Saxena v. State of M.P.,*** which provides that as per the procedure contemplated under the Act of 2000 for determination of juvenility under Section 7A of the said Act has to be read with Rule 12 (2), where it has held that the determination of the age of juvenile has had to be considered within the specified time period, as provided under the Rules. It only contemplates a determination or conducting of an enquiry with regard to the age of the accused person only at the stage when the proceedings are pending before the Court or a Board, as defined under the Act by virtue of a medical examination or on an opinion expressed by the medical experts. Since here in the instant case, the stage when the determination of juvenility was sought by the petitioner, was not the proceeding which was pending consideration before the Court or a Board, as created under the Act or as per the procedure prescribed under the Act, the said ratio as propounded in the judgement only creates an embargo

about adopting the procedure for determination of the juvenility in a **pending proceedings** and not otherwise. Reference may be had at para numbers 24, 25, 26 and 27 which are quoted hereunder:-

> "24. We may, however, point out that none of the above mentioned judgments referred to earlier had examined the scope, meaning and content of Section 7A, Rule 12 of the 2007 Rules and the nature of the inquiry contemplated in those provisions. For easy reference, let us extract Section 7A of the Act and Rule 12 of the 2007 Rules:
>
> **Section 7A - Procedure to be followed when claim of juvenility is raised before any court.**
>
> (1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:
>
> Provided that a claim of juvenility may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.
>
> (2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate order, and the sentence if any, passed by a court shall be deemed to have no effect.
>
> **Rule 12. Procedure to be followed in determination of Age.-** (1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.
>
> (2) The Court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.
>
> (3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court

or the Board or, as the case may be, the Committee by seeking evidence by obtaining -

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of section 7A, section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed off cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law.

(Emphasis added)

25. Section 7A, obliges the court only to make an inquiry, not an investigation or a trial, an inquiry not under the Code of Criminal Procedure, but under the J.J. Act. Criminal Courts, JJ Board, Committees etc., we have noticed, proceed as if they are conducting a trial, inquiry, enquiry or investigation as per the Code. Statute requires the Court or the Board only to make an 'inquiry' and in what manner that inquiry has to be conducted is provided in JJ Rules. Few of the expressions used in Section 7A and Rule 12 are of considerable importance and a reference to them is necessary to understand the true scope and content of those provisions. Section 7A has used the expression "court shall make an inquiry", "take such evidence as may be necessary" and "but not an affidavit". The Court or the Board can accept as evidence something more than an affidavit i.e. the Court or the Board can accept documents, certificates etc. as evidence need not be oral evidence.

26. Rule 12 which has to be read along with Section 7A has also used certain expressions which are also be borne in mind. Rule 12(2) uses the expression "prima facie" and "on the basis of physical appearance" or "documents, if available". Rule 12(3) uses the expression "by seeking evidence by obtaining". These expressions in our view re-emphasize the fact that what is contemplated in Section 7A and Rule 12 is only an inquiry. Further, the age determination inquiry has to be completed and age be determined within thirty days from the date of making the application; which is also an indication of the manner in which the inquiry has to be conducted and completed. The word 'inquiry' has not been defined under the J.J. Act, but Section 2(y) of the J.J. Act says that all words and expressions used and not defined in the J.J. Act but defined in the Code of Criminal Procedure, 1973 (2 of 1974), shall have the meanings respectively assigned to them in that Code.

27. Let us now examine the meaning of the words inquiry, enquiry, investigation and trial as we see in the Code of Criminal Procedure and their several meanings attributed to those expressions. "Inquiry" as defined in Section 2(g), Code of Criminal Procedure reads as follows:

“2. (g) "Inquiry" means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court.

The word "enquiry" is not defined under the Code of Criminal Procedure which is an act of asking for information and also consideration of some evidence, may be documentary. "Investigation" as defined in section 2(h), Code of Criminal Procedure reads as follows:

“2. (h)‘Investigation’ includes all the proceedings under this code for the collection of evidence conducted by a police officer or by

> any person (other than a Magistrate) who is authorized by a Magistrate in this behalf.
>
> The expressions "trial" has not been defined in the Code of Criminal Procedure but must be understood in the light of the expressions "inquiry" or "investigation" as contained in sections 2(g) and 2(h) of the Code of Criminal Procedure."

86. On its reading of definition of enquiry or investigation, it could be rationally concluded that the term enquiry contemplated under the Act, as defined under Section 2 (g) of Code of Criminal Procedure it is only inclusive of the enquiry required to be conducted by the Magistrate or the Court or the Board, before whom the proceedings are pending prior to its final determination by the Courts created under law or the Act or under which the proceedings are held. Under the pretext of enforceability of the provisions of a new Act laying down a new parameter of leaving it open for a convict to get his age re-determined at any stage of the proceedings will obviously exclude the case at hand where juvenility has never been a question which was raised initially before the trial Court or even before the Division Bench based on certificate issued in 2001 in the Jail Appeal (decided on 19.09.2001) preferred by the convict/petitioner and particularly, when the evidences which were on record ran contrary to his own case as placed in the proceedings under Section 313 of Cr.P.C.

87. The learned counsel for the petitioner has drawn the attention of this Court to the judgement as reported in **2010 (14) SCC 209, *Ramdeo Chauhan v. Bani Kant Das and Ors.,*** which was dealing with a situation where on the culmination of the judicial review of an offence when the Governor under Article 161 of Constitution of India under the power of clemency of the President under Article 72(1)(c) of the Constitution of India, disagrees with the order of conviction and interferes in the matter restoring the

clemency order, in such circumstances, the Court has held that even the judgement of the Hon'ble Apex Court would be treated to have been interfered with under Article 161 and under 72 of the Constitution of India. This was a case which was based on the judgement of the Governor under Article 161, and the scope of interference which has been left with the Court, only limited in its scope when the order under Article 161 or under Article 72 of the Constitution of India is ex facie perverse or total arbitrary or based on a personal vendetta. The said principle, as laid down in the aforesaid judgement will not apply in the instant case for the reason being its not the case which has been argued or pleaded by the petitioner in writ petition before this Court or at any stage of the proceedings that the judgement rendered by the President of India under Article 72 (1) (c) of the Constitution suffered from the aforesaid vices of non disclosure of the relevant reasons and that to the propositions as it has been laid down in relation to the Governor who by changing the awarding of the death sentence into a life imprisonment that was maintained as it has happened in the instant case, where the President of India has exercised his powers under Article 72 (1)(c) of the Constitution and has pardoned the petitioner by showing his mercy as contemplated under the aforesaid provisions. The said judgement has not considered scope of exercise of power under Article 72 (1) (c) vested with the President of India from the settled view point that it was not a judicial exercise of power rather it was an exercise of executive power which was exercised by the President, which cannot be made subject matter of judicial review by the High Court under Article 226 or under Section 482 of the Code of Criminal Procedure. Because this Court is of the view that as on its culmination of proceedings by President of India it cannot be subjected to judicially review in the exercise of

extraordinary jurisdiction of this Court. That too without placing the order of President of India dated 08.05.2012 on record and challenging the same by way of relief 2 as claimed in the writ petition and that too in absence of the same being placed on record for consideration by this Court, which is barred by judicial pronouncements reported in **RD 1999 649, *Pramod Kumar and others v. Sub Divisional Officer Khaga Fatehpur and others*** and **AIR 1986 SC 2166, *Surinder Singh v. Central Govt. and others*** that the High Court cannot scrutinize the propriety to an order in the absence of the same being made as part of record to enable it to be scrutinised by the Hon'ble Court, leaving it open for its scrutiny or it could be placed for a judicial analysis by the High Court, hence too the writ petition is misconceived and deserves to be dismissed on this ground itself. The relevant paragraphs of ***Pramod Kumar's case (Supra)*** read as under:-

> "3 At the very out set. It is significant to mention that although the petitioners have prayed for quashing the order dated 20.1.1988 of the Sub-Divisional Officer, Khaga, District Fatehpur, but a copy of the said order has not been annexed.
>
> 4. In view of the pronouncement of the Hon'ble Supreme Court made in the judgment reported in AIR 1986 SC 2166, Surinder Singh v Central Government and others, that the High Court cannot quash an order unless it is brought on the record, this writ petition deserves to be dismissed."

In ***Surinder Singh's case (Supra),*** the Hon'ble Apex Court has held as under:-

> "9. The second question relates to the validity of the order of Shri Rajni Kant the officer to whom power under Section 33 was delegated, extending time to enable the appellant to deposit the auction sale money. Shri Rajni Kant by his order dated 6.2.70 exercising the delegated powers of the Central Govt. under Section 33 of the Act set aside the order cancelling the auction sale held in August 1959 and permitted the appellant to deposit the balance of the purchase money within fifteen days from the date of the order with a default clause that on his failure his petition would stand dismissed. In accordance with that order appellant was entitled to deposit the money till February 21, 1970. It appears that on appellant's request the office prepared a challan

> which was valid up to February 20, 1970. The appellant went to the State Bank on February 20, 1970 to make the deposit but due to rush he could not make the deposit. On his application Shri Rajni Kant extended the time permitting the deposit by 28.2.1970 as a result of which a fresh challan was prepared which was valid up to 28.2.1970 and within that period appellant deposited the balance purchase money. The subsequent order of Shri Rajni Kant was challenged by the respondents and the High Court has quashed that order, although that order was not before the High Court as none of the parties filed the same. The respondents who had challenged the order of Shri Rajni Kant should have filed a copy of the order. In the absence of the order under challenge the High Court could not quash the same. Normally whenever an order of Govt. or some authority is impugned before the High Court under Article 226 of the Constitution, the copy of the order must be produced before it. In the absence of the impugned order it would not be possible to ascertain the reasons which may have impelled the authority to pass the order. It is therefore improper to quash an order which is not produced before the High Court in a proceeding under Article 226 of the Constitution. The order of the High Court could be set aside for this reason, but we think it necessary to consider the merits also.
>
> Section 33 reads as under:
>
> "Certain residuary powers of Central Govt.-
> The Central Govt. may at any time call for the record of any proceeding under this Act and may pass such order in relation thereto as in its opinion the circumstances of the case require and as is not inconsistent with any of the provisions contained in this Act or the rules made thereunder."

88. In the judgements relied by the counsel for the petitioner though apparently they are laying down a wider principles and the circumstances and the manner in which the determination of juvenility and retrospective applicability of the Act, is to be taken into consideration even after the order of conviction, but in none of the case which has been relied with it entailed the consideration of gruesome triple murder, which too stood proved at all stages of the judicial proceedings and further it did not dealt with a situation where on a disclosure of a new fact, a writ petition under Article 32 of the Constitution of India, was filed by the convict petitioner and same was dismissed by the Hon'ble Apex Court and hence this Court

is of the view that as soon as the curative petition was dismissed or as soon as the petitioner had been punished to undergo life imprisonment under Article 72 (1) (c) of the Constitution of India by the President of India which is the power vested with the President to show mercy/pardon, has been exercised, this case cannot be treated and placed on a common pedestal as that with the judgements relied by the learned counsel for the petitioner.

89. Thus, in view of the reasons assigned above, this Court is of the view that after the culmination of the proceedings by way of curative petition by an order of Hon'ble Apex Court on 06.02.2006, against an order of affirmation of conviction of a death penalty and with the dismissal of the curative petition by the Hon'ble Apex Court and after the expression of mercy/pardon by the President of India under Article 72 of Constitution has already been extended to the petitioner under Article 72 (1) (c) of the Constitution of India by his Order dated 08.05.2012, in such an eventuality, this Court is of the view that the stage for determination of juvenility and that too under an Act of 2015, which has been enforced much subsequent to the order of conviction will not be attracted.

91. Consequently, this Court is of the view that the present Criminal Writ Petition lacks merit and the same is accordingly dismissed. However, there would be no order as to costs.

(Sharad Kumar Sharma, J.)
23.08.2019

Mahinder/