ASIAN CENTRE FOR HUMAN RIGHTS

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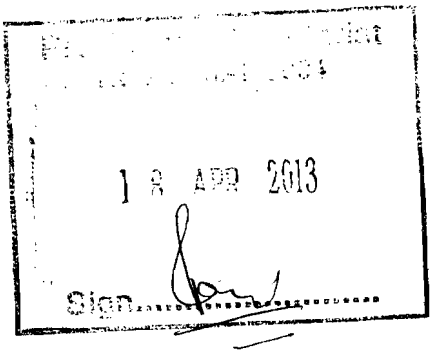


18 April 2013

Mr Pranab Mukherjee
Hon'ble President of India
Rashtrapati Bhawan
New Delhi-110001

Subject: **Submission of a petition under Article 72 of the Constitution of India for commutation of death sentence of condemned prisoner, Mr Devender Pal Singh Bhullar to life imprisonment**

Hon'ble President,

The Asian Centre for Human Rights (ACHR) is submitting this petition under Article 72 of the Constitution of India seeking commutation of death sentence of condemned prisoner, Mr Devender Singh Bhullar to life imprisonment.

Though the Supreme Court of India in its judgement dated 12 April 2013 dismissed the Writ Petition (Criminal) No. 16039 of 2011 in the case of *Devender Pal Singh Bhullar versus State of N.C.T. of Delhi* stating that the delay for consideration of the mercy plea is not a ground of commutation, Asian Centre for Human Rights is of the considered opinion that the said judgement has no bearing on the powers bestowed on the President under Article 72 of the Constitution. **There is already a precedent wherein former Presidents of India had considered mercy petition of Mr Mahendra Nath Das twice.**

Therefore, Asian Centre for Human Rights fervently appeals to Your Honour to reconsider the death sentence of condemned prisoner Mr Davender Pal Singh Bullar and commute the same to life imprisonment and further abolish death penalty on the following ten grounds:

First, President can review a mercy more than once as per precedence

There is already a precedent for the President of India to reconsider a mercy plea twice. The mercy plea of death-row convict, Mahendra Nath Das, of Assam was considered twice as shown from the minutes of the Rashtrapati Bhawan supplied under the RTI Act on 21 July 2011 which is reproduced below:

> "The Then President of India Dr Kalam on 30 September 2005 sent a communication to the HM noting that the conduct of the accused did not show trace of pre-meditated murder and that the crime could have been committed due to lack of mental equanimity. ***In view of the above, the HM was advised to consider extending the benefit of clemency to Mahendra Nath Das and that during his incarceration in prison, he may receive periodical counselling to reform his personal and mental psyche***. These views of the President along with the file had been sent to the HM on 30 September, 2005. The file was later 'recalled from MHA on 5 October 2005 as the President desired to reconsider the matter. The then President while demitting office on 24 July, 2007 had noted that this case may be put up to his successor for a decision."

As Your Honour is aware, President Pratabha Patil had subsequently rejected the mercy plea of Mr Das.

Therefore, Your Honour can recall the order pertaining to mercy plea of Mr Bhullar and review the same.

> The minutes of the meeting issued by the President's Officer under the RTI Act are attached as **Annexure-I**.

Second, the order of the Supreme Court to seek the views of the presiding judge not complied with

As Your Honour is aware, in the case of *Devender Pal Singh Vs NCT of Delhi* (Criminal Appeal No. 993 of 2001) majority judges i.e. Justices Arijit Pasyat and B N Agrawal who upheld the High Court judgement imposing death penalty on Mr Bhullar ordered that "*if any motion is made in terms of Section 432 433 and 433A of the Code and/or Article 72 or Article 161of the Constitution as the case may be, the same may be appropriately dealt with. It goes without saying that at the relevant stage, the factors which have weighed with my learned Brother Mr. Justice Thomas can be duly taken note of in the context of Section 432(2) of the Code*."

Justice M B Shah in an interview to *The Economic Times* on 17 April 2013 stated that his views were not sought as required under Section 432(2) of the Criminal Procedure Code. The Government of India cannot hang somebody without complying with the order of the Supreme Court of India. If the Government of India does not comply with the order, it will not go down well with the society at large.

The relevant paragraph of the judgement is reproduced below:

> “33. However, a question arises as to the effect of Brother Shah, J. holding the accused innocent, while deciding the question of sentence. Observations made by this Court in Ramdeo Chauhan v. State of Assam (2001(5)SCC 714) are relevant. It was inter alia observed as follows:-
>
> "But, a question that remains to be considered further is the effect of conclusion arrived at by my learned brother Mr. Justice Thomas. Is the accused remediless; that remains to be seen. Few provisions in the Code of criminal Procedure (for short "the Code") and others in the Constitution deal with such situation. Sections 432, 433 and 433A of the Code and Articles 72 and 161 of the Constitution deal with pardon. Article 72of the Constitution confers upon the President power to grant pardons, reprieves, respites or remission of punishment or to suspend, remit or commute sentence of any person of any offence. The power so conferred is without prejudice to the similar power conferred on the Governor of the Sate. Article 161of the Constitution confers upon the Governor of a State similar powers in respect of any offence against any law relating to a matter to which the executive power of the State extends. The power under Article 72 and Article 161 of the Constitution is absolute and cannot be fettered by any statutory provision such as Sections 432 433 and 433Aof the Code or by any prison rules.
>
> Section 432 of the Code empowers the appropriate Government to suspend or remit sentences. The expression "appropriate Government" means the Central Government in cases where the sentences or order relates to the matter to which the executive power of the Union extends, and the State Government in other cases. The release of the prisoners condemned to death in exercise of the powers conferred under Section 432 and Article 161 of the Constitution does not amount to interference with due and proper cause of justice, as the power of the court to pronounce upon the validity, propriety and correctness of the conviction and sentence remains unaffected. Similar power as that contained in Section 432 of the Code or Article 161 of the Constitution can be exercised before, during or after trial. The power exercised under Section 432of the Code is largely an executive power vested in the appropriate Government and by reducing the sentence, the authority concerned thereby modifies that judicial sentence. The section confines the power of the Government to the suspension of the execution of the sentence or remission of the whole or any part of the punishment. Section 432 of the Code gives no power to the

Government to revise the judgment of the court. It only provides power of remitting the sentence. Remission of punishment assumes the correctness of the conviction and only reduces punishment in part or whole. The word "remit" as used in Section 432 in not a terms of art. Some of the meanings of the word "remit" are "to pardon, to refrain from inflicting, to give up". It is, therefore, no obstacle in the way of the President or Governor, as the case may be in remitting the sentence of death. A remission of sentence does not mean acquittal.

The power to commute a sentence of death is independent of Section 433A. The restriction under Section 433A of the Code comes into operation only after power under Scion 433 is exercised. Section 433A is applicable to two categories of convicts: (a) those who could have been punished with sentence of death, and (b) those whose sentence has been converted into imprisonment for life under Section 433. It was observed in ***Maru Ram v. Union of India*** does not violate Article 20(1) of the Constitution.

In the circumstances, if any motion is made in terms of Section 432, 433 and 433A of the Code and/or Article 72 or Article 161of the Constitution as the case may be, the same may be appropriately dealt with. It goes without saying that at the relevant stage, the factors which have weighed with my learned Brother Mr. Justice Thomas can be duly taken note of in the context of Section 432(2) of the Code."

The principles set out above have application to the present case."

A copy of the judgement of *Devender Pal Singh Vs NCT of Delhi* (Criminal Appeal No. 993 of 2001) is appended as **Annexure-II**

A copy of Justice M B Shah's interview in The Economic Times is appended as **Annexure –III**.

Third, dissenting judgment at any stage must be one of the criteria for granting pardon

The presiding judge of the Supreme Court had dissented against award of death penalty and opined that Mr Bhullar should be released as he was convicted solely based on confessional statement made to the police officer which was admissible under Section15(1) of the Terrorist and Disruptive Activities (Prevention) Act. Justice Shah held that:

"In this view of the matter, when rest of the accused who are named in the confessional statement are not convicted or tried, this would not be a fit case for convicting the appellant solely on the basis of so-called confessional statement recorded by the police officer.

Finally, such type of confessional statement as recorded by the investigating officer cannot be the basis for awarding death sentence.

In the result, Criminal Appeal No.993 of 2001 filed by the accused is allowed and the impugned judgment and order passed by the Designated Court convicting the appellant is set aside. The accused is acquitted for the offences for which he is charged and he is directed to be released forthwith if not required in any other case.

In view of the above, Death Reference Case (Crl.) No. 2 of 2001 would not survive and stands disposed of accordingly"

It is submitted that **had Mr Bhullar not been tried under the Terrorist and Disruptive Activities (Prevention) Act (TADA), he would have been acquitted as under Section 25 of the Indian Evidence Act any confessional statement given by accused to police is inadmissible as evidence and cannot be brought on record by the prosecution and is insufficient to convict the accused**. This is consistent with Article 14(3)(g) of the International Covenant on Civil and Political Rights ratified by India which clearly states "*3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality… (g) Not to be compelled to testify against himself or to confess guilt*".

It is pertinent to mention that both the TADA and the Prevention of Terrorism Act (POTA) have been repealed and terror offences are currently dealt with under the Unlawful Activities (Prevention) Act, 1967 (UAPA) as amended from time to time. In the UAPA, the provision that made confessional statement to a police officer as admissible as evidence has been deleted. Given that the Government of India itself has found adequate reasons not to include any such provision, the death sentence to Mr Bhullar should be commuted to life imprisonment. In fact as a matter of principle, the Government of India should commute all the death sentences awarded to any convict solely based on confession to police officers to life imprisonment.

Fourth, parity must be ensured while commuting to life imprisonment

Asian Centre for Human Rights cites 16 cases below to show the death penalty was commuted to life imprisonment by the President despite no dissenting judgment of any of the judges of the Supreme Court. This is in contrast to the dismissal of mercy petition of Mr Bhullar despite dissenting judgment of Justice Shah.

List of 16 cases commuted to life imprisonment:

1. State of U.P vs. Satish
   Criminal Appeal No. 256-257 of 2005]

2. State of Rajasthan vs Kheraj Ram
   Criminal Appeal No. 830 of 1996

3. Bantu vs The State of U.P
   Criminal Appeal No. 117 of 2007

4. Prajeet Kumar Singh vs State of Bihar
   Criminal Appeal No. 1621 of 2007

5. Gurdev Singh & Anr. vs State of Punjab
   Criminal Appeal No. 392 of 2002

6. State of U.P. vs Sattan @ Satyendra & Ors
   Criminal Appeal Nos. 314-315 of 2001

7. Shobhit Chaman & Anr vs State of Bihar
   Criminal Appeal Nos. 262-263/98 @ SLP (CRL.) NOS. 3729-30/97

8. Mohan and Ors. Vs. State of Tamil Nadu
   Criminal Appeal Nos. 1234-1237 of 1997

9. Molai & Anr. Vs. State of Madhya Pradesh
   Criminal Appeal No. 678 of 1999

10. Sunil Baban Pingale Vs. State of Maharashtra
    Criminal Appeal No. 1213 of 1998

11. Sushil Murmu Vs. State of Jharkhand
    Criminal Appeal No. 947 of 2003

12. Atbir vs Govt. of N.C.T of Delhi
Criminal Appeal No. 870 of 2006

13. Saibanna Vs. State of Karnataka
Criminal Appeal No. 656 of 2004

14. Jai Kumar Vs. State of M.P.
Criminal Appeal No. 548 of 1999

15. Harbajan Singh Vs. State of Jammu & Kashmir
Criminal Appeal No. 227 of 1974

16. Lok Pal Singh vs State of M.P.
Criminal Appeal Nos. 25 and 145 of 1984

Copies of the above judgements are appended as **Annexure - IV.**

Unlike the above cases, in the case of Mr Bhullar, the Presiding judge had dissented and by the law of natural justice, the death sentence of Mr Bhullar ought to be commuted to life imprisonment.

Fifth, a mentally unfit person cannot be hanged

Mr Bhullar continues to be under treatment for mental disorder and suicidal tendencies at the Institute of Human Behaviour Allied Science, New Delhi and media reports quoted the doctors attending/treating Mr Bhullar stating that Mr Bhullar requires further treatment. The Government of India must not execute a mentally and physically unfit person.

Sixth, Indian society is not ready to live with executions of convicts every second or third day

It is submitted that the Indian society is not ready to live with executions of convicts every second or third day. The inordinate delay in consideration of the mercy pleas shows that the Government of India itself takes into account the opposition to death penalty. It is submitted that as per the National Crimes Records Bureau of the Ministry of Home Affairs, the Sessions courts awarded death penalty to 5,776 convicts during 2001 to 2011. Out of 5,776 convicts sentences for 4,321 persons were commuted to life imprisonment while sentences of 1,455 persons i.e. 132 persons per year were confirmed by the higher courts. If India is to resume execution, it

will require execution of about 100 plus death-row convicts each year in addition to all death-row convicts who have not been executed so far.

The figures on death sentences as provided by the NCRB are appended as **Annexure - V.**

Seventh, no scientific or empirical basis to suggest that death penalty acts as a deterrent

There is no scientific or empirical basis to suggest that death penalty acts as a deterrent against any crime. Though no execution had been carried out since the execution of Dhananjoy Chatterjee on 14 August 2004, the number of murder cases have reduced. According to the National Crimes Record Bureau, in 2001 a total of 36,202 murder cases were registered in India. Though the population of India increased from 1.028 billion in 2001 to 1.21 billion in 2011, the murder cases indeed reduced to 34,305 in 2011. It indicates that death penalty does not act as a deterrent. It is known to the Government of India that terror offences in India have reduced because of the peace-processes initiated, changes in geo-politics and cooperation of the neighbouring countries and international community, and not necessarily because of imposition of death penalty.

Eighth, terror offender do not deserve any mercy is non-est in law

The rejection of mercy petitions on the ground that terror offender deserve no mercy is without any legal basis. The death sentence is awarded based on "the rarest of rare case" doctrine and no distinction is made with respect to terror offences and other offences. Even with respect to terror offences, India gave sovereign assurance to Portugal not to impose death penalty on Abu Salem, an accused of the 1993 Mumbai serial blasts in which about 250 persons were killed and about 700 were injured.

Further, the Government of India must recognize the right to equality includes equality among persons in similar situation. All death row convicts are equal among themselves and any exclusion of any death row convict on the ground of terror offences being unpardonable, which is *non-est* in law, shall constitute violation of Article 14 of the Constitution of India.

Ninth, justice is not synonymous of death sentence

Justice is not synonymous of death sentence, which is barbaric and constitute an inhuman and degrading punishment. Nor justice is achieved

only by killing another human being even if it is with the sanction of the law. The award of life imprisonment is equally an efficacious form of justice.

Tenth, abolition of death penalty is in India's national interest

The adoption of specific resolutions in the State Assemblies of Jammu and Kashmir, Tamil Nadu and Punjab against imposition of death penalty shows that a substantial segment of the Indian society is not ready to accept death penalty. A number of political parties including the DMK and CPI have been demanding abolition of death penalty.

The Government of India must take cognizance of the fact that carrying out execution has the potential to whip up sentiments and not necessarily without consequences as to the peace and security of India. Since life imprisonment is an equally efficacious form of justice, the Government of India should take a political decision to abolish death penalty while ensuring that those guilty of heinous crimes spent rest of their lives in prisons. India must note that as many as 143 countries have already abolished death penalty.

In the light of the above grounds, Asian Centre for Human Rights calls upon the Government of India to:

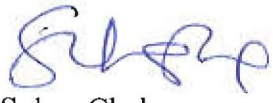
(i) commute condemned prisoner, Mr Devender Pal Singh Bhullar's death sentence to life imprisonment;

(ii) declare a moratorium on death penalty; and

(iii) set up an expert committee to consider ways/means for final abolition of death penalty.

With respectful regards,

Yours sincerely



Suhas Chakma
Director

Encl: As above.