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Subject- Legislative and Quasi Judicial Powers of Administration

Class- LL.M. II Semester

Topic- Territoriality of executive powers of states in India

Territoriality of executive powers of states in India

When a State Government with the consent of another State Government removes a prisoner under the Transfer of Prisoners Act¹ from its prison to a prison in that another State, can it exercise the executive power of "appropriate Government" under Section 432(7) of Criminal Procedure Code (CrPC) to remit the sentence of the prisoner, subsequent to his transfer?

The answer to this question would involve consideration of the constitutional provisions relating to the territorial extent of the executive powers of the States, in particular with respect to their powers of remission of punishments or sentences. The provisions of CrPC, the Transfer of Prisoners Act, etc., also have to be taken into account. It will naturally necessitate an examination of the decisions of the Supreme Court.

Scheme of distribution of powers in the Constitution

The Constitution distributes the executive powers exercisable with respect to the territory of a State between the Union and the State. Article 72 provides that the President shall have power to grant remissions of punishment or sentence among others, in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends. Article 161, provides that the Governor of a State shall have power inter alia, to grant remissions of punishment or sentence of any person convicted for an offence against any law relating to a matter to which the executive power of the State

extends. Article 73 broadly stated, provides that the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws. Article 162 similarly provides that the executive power of a State shall extend to the matters with respect to which the Legislature of a State has power to make laws.

The Supreme Court has reiterated this position when it ruled in *Ramanaiah case*² that the executive power of the Union or of the State broadly speaking, is coextensive and coterminus with its respective legislative power.

The Constitution under Article 245(1) enacts that Parliament may make laws for the whole of the territory of India and the Legislature of a State may make laws for the whole of the territory of the State. Clause (2) recognises extra-territorial operation of laws of Parliament. Clauses (1) and (2) of Article 245 however imply that the State Legislatures have no extra-territorial powers.³

The subjects included in the State List or in the Concurrent List (in relation to the State) must therefore, be read as referring to "persons" and "things" situated within the territory of the State.⁴

In other words, the executive power of a State like its legislative power is confined to the territory of the State and in this view the Governor of a State under Article 161 cannot remit sentence of a prisoner who is transferred under the Transfer of Prisoners Act to a prison of another State.

Scheme of powers under the CrPC

Section 432(1) of CrPC provides that when a person has been sentenced to punishment for an offence, the appropriate Government, may at any time remit the whole or any part of the punishment. According to sub-section (7) "appropriate Government" means-

"(a) in cases where the sentence is for an offence against any law relating to matter to which the executive power of the Union extends, the Central Government;

(b) in other cases, the Government of the State within which the offender is sentenced."

A cursory perusal of the definition of "appropriate Government" will show that it is nothing but the placement of phraseology of Articles 72 and 161 of the

Constitution. Therefore, it follows that the exercise of the executive power of the State relating to remission of sentences under Section 432(1) and (7) of CrPC like the similar though superior executive power of the Governor under Article 161 (read with Articles 162 and 245) of the Constitution has to remain confined to the boundaries of the territory of the State. Any other construction shall render the definition clause unconstitutional, in the absence of a special provision like Article 286(2), which allows Parliament to intervene between two or more States.⁵

Incidence of Transfer of Prisoners Act, 1950

Persons belonging to one province often commit offences in other provinces. The executive authorities found it administratively necessary to get rid of such convicts of unfamiliar background. Therefore the provisions were made for inter-provincial transfers of such persons under the Prisoners Act, 1871 (5 of 1871) and of 1900.⁶ After the commencement of the Constitution an independent Act, namely Transfer of Prisoners Act, 1950⁷ was passed, also covering Part 'B' States. Section 3 of the Act enacts:

"(1) Where any person is confined in a prison in a State under a sentence ..., the Government of that State with the consent of the Government of any other State may by order, provide for the removal of the prisoner from that prison to any other prison in that other State.

(2) The officer in charge of the prison to which any person is removed under sub-section (1), shall receive and detain him in the prison so far as may be according to the exigency of any writ, warrant or order of the court by which such person has been committed or until such person is discharged or removed in due course of law."

The legal incidence of transfer of prisoner under the two parts of Section 3 of the Act may, be noticed:

(1) The transfer of the prisoner under sub-section (1) initially originates in an agreement at the instance of the Government of the transferor State. But the provision does not provide for any inter-State agreement which would enable the transferor State to retrieve the prisoner, or to reserve any power in regard to prisoner's release; premature or final.

(2) Sub-section (2) creates a statutory relationship between the prisoner on the one hand and the officer in charge of the prison and the transferee Government on the

other. His detention in the prison has to be in terms of the Court's warrant or until he is discharged or removed in due course of law. The expression "discharged in due course of law" means that his detention and release from prison shall be regulated by all the laws or rules in force in the transferee State, governing cases of all classes of prisoners. The cumulative effect of both parts of Section 3 of the Transfer of Prisoners Act, is that a transferred prisoner is removed to a new legal system in a manner as if he was sentenced in the transferee State⁸.

It was in this background of the law that the Supreme Court rendered two decisions on this question. The Hon'ble Supreme Court in *Rattan Singh*⁹ and *Ajit Singh*¹⁰ has held the Government of the transferor State to be "appropriate Government" within the meaning of sub-section (7) of Section 432 of CrPC for the purpose of remitting the sentence of a transferred prisoner on the reasoning that transferor State was the "State within which he was sentenced". It is submitted with respect that these decisions do not seem to be correct on the aforementioned reasoning. In *Rattan Singh case*⁹ and also in *Ajit Singh case*¹⁰ none appeared for the respondents. Nor was there any argument on the correct constitutional provisions.

The attention of the Apex Court was not drawn to the clear words of the two sub-sections of Section 3 of the Transfer of Prisoners Act as explained above¹¹. If the transfer happened to be on the request of the prisoner, its contractual character initially and statutory one thereafter, was not affected in any way as to prevent the legal incidence of transfer under Section 3 from coming into play.

After holding that laws of the transferee State would apply on a transferred prisoner, the Apex Court could not at the same time have held the Government of the transferor State competent to exercise the executive power of remission of the sentence of *Rattan Singh*⁹ for, the executive power of a State follows its legislative power¹².

Section 401(2) of CrPC was non-obligatory¹³ and dealt with the matter immediately after the trial stage when the accused had not yet undergone his sentence and therefore hardly had any application to premature release cases of prisoners after undergoing their prescribed departmental duration of the sentences.

The Supreme Court had an opportunity to examine the issue in the case of *Hanumant Dass*¹⁴, wherein the question was whether the State of Himachal Pradesh was a necessary party in the appeal instead of the State of Punjab, on the basis of the construction of clause (b) of sub-section (7) of Section 432 of CrPC as

adopted in *Rattan Singh case*⁹.

It was unfortunate that in this case the Court had to conclude that Punjab was the "appropriate Government" though Punjab had no connection. This was occasioned by its decision in *Rattan Singh*⁹. Besides, this case neither involved a transfer of the prisoners under the Transfer of Prisoners Act nor any dispute with regard to the determination of "appropriate Government" relating to remission of sentence of a convict as to attract the ratio of the decision in *Rattan Singh*⁹. The provision of sub-section (7) of Section 432 of CrPC, in terms restricts the definition of "appropriate Government" only to cases of suspension, commutation or remission of punishment or sentence. The decision in *Hanumant Dass*¹⁴, it is submitted with respect, is clearly erroneous.

Conclusion

The State which shifts a prisoner under the Transfer of Prisoners Act to a prison in another State ceases to be "appropriate Government" to pass an order of release of a prisoner or refuse to pass such order subsequent to his transfer. Such an order will suffer from the vice of extra-territoriality.

The legal effect of the transfer is that a transferred prisoner has legally to be regarded as if he was sentenced in the transferee State. He becomes subject to all laws and executive orders of the transferee State. The Government of the transferee State shall have all powers over the prisoner including the sovereign power relating to remission of punishment or sentence. The Constitution does not grant any executive power to the States with extra-territorial operation. Nor does it vest power in Parliament, which may empower a State to exercise any executive powers beyond its territory or to intervene between two or more States.

1. Central Act 29 of 1950.
2. See *G.V. Ramanaiah v. Supdt. of Central Jail*, (1974) 3 SCC 531.
3. See *State of Bombay v. Chamarbaugwala*, 1957 SCR 874, 885 and *K.K. Kochuni v. State of Madras*, (1960) 3 SCR 887.
4. Privy Council decisions in *Burland v. The King*; and *Sharple v. Bath*, (1922) Appeal Cases 215.
5. It is noteworthy here that the analogous provision in clause (b) of sub-section (3) of Section 402 of CrPC, 1898, namely "the State Government"

was more appropriate and in consonance with the scheme of the Constitution as "the State Government" alone could operate on all prisoners confined in the prisons of that State, without any distinction.

6. See Section 29, Prisoners Act (Central Act 3 of 1900).
7. Enforced w.e.f. 12-4-1950
8. In this connection how the Haryana Legislature added at the end of a similar provision in the Punjab Act of 1926. The clause added to Section 32-A is as follows: "and upon such transfer, the provisions of this Act shall apply to an inmate as if he was originally ordered to be detained under this Act."
9. *State of M.P. v. Rattan Singh*, (1976) 3 SCC 470.
10. *State of M.P. v. Ajit Singh*, (1976) 3 SCC 617.
11. See text accompanying Supra n. 8.
12. *Ramanaiah case*, above
13. *Mohd. Sarwar v. Crown*, (1951) 52 Cri LJ 357, 358 (Pak. F.C.).
14. *Hanumant Dass v. Vinay Kumar*, (1982) 2 SCC 177.