Order, particularly cl. 3 therefore, this Court in Chhitter Mal seems to have concluded that the transaction was, in truth and substance in the nature of compulsory acquisition, with no real freedom to bargain in any area. Shah, J., expressed the Court's interpretation of cl. 3 in no uncertain terms by saying that 'it did not envisage any consensual arrangement."

(10) From the aforesaid observations, it is clear that the Control Orders under which compulsory acquisition of foodgrain can be made stand on a different footing and in those cases the transactions would not amount to sale. It is correct that their Lordships did not agree with the observations of the learned Judges in Chitter Mal's case to the effect that even if in respect of the place of delivery and the place of payment of price there could be a consensual arrangement, the transaction will not amount to a sale. But in spite of those observations, so far as the cases of compulsory acquisition under the relevant procurement orders are concerned, the view in Chhitter Mal's case was upheld. That being so, there is no merit in the contention of the learned State counsel that the judgment of this Court in *Food Corporation of India's case* stands overruled and does not lay down a correct law.

(11) In this view of the matter the instructions issued by the State, copy Annexure P. 1 to the petition, cannot legally be sustained and have to be quashed.

(12) Consequently, we allow this petition with costs and quash the instructions of the State of Haryana issued,—*vide* letter No. 3922/Reg. 6/SII, dated 8th September, 1978 (Copy Annexure P. 1) Counsel's fee Rs. 250.

N. K. S.

FULL BENCH

Before S. S. Sandhawalia, C.J., D. S. Tewatia and Harbans Lal, JJ.

MAJOR SINGH,—*Petitioner.*

versus

UNION OF INDIA and another,—*Respondents.*

Civil Writ Petition No. 2089 *of* 1979.

April 10, 1980.

Code of Criminal Procedure (2 of 1974) *as amended by Act* (45 of 1978)—*Sections* 416, 432, 433, 433-*A and* 434—*Constitution of India*

1950—*Articles* 14, 72 *and* 161, *Seventh Schedule Entry* 4 *of List II and Entries* 1 *and* 2 *of List III—Section* 433-*A imposing restrictions on the powers of remission and commutation of sentence in certain cases—Parliament—Whether competent to enact such law—Provisions of section* 433-*A—Whether limit the scope of exercise of powers under Articles* 72 *and* 161 *and therefore unconstitutional—Death sentence commuted by the State Government, Central Government or a Court under section* 416—*Convict—Whether can be released before completion of* 14 *years' of actual jail term—Commutation of death sentence by the President or the Governor—Restrictions of section* 433-*A—Whether applicable to such cases—Section* 433-*A—Whether discriminatory in its application and therefore violative of Article* 14.

Held, that in view of Entry 4 of List II in the Seventh Schedule to the Constitution of India 1950, the State Legislature would be competent to legislate regarding such matters as to where a convict is to be kept to undergo his sentence and how he is to be kept; and not how long he is to be kept. For how long a convict prisoner is to be kept in premises declared to be jail, reformatory. Borstal institution and other institutions of the like nature would depend on the sentence imposed upon him by the Court. subject to the remissions that might be granted by the Governor or the State Government or by the President and the Central Government as envisaged by the relevant provisions of the Constitution and of the Code of Criminal Procedure 1973. Besides the provisions of section 432 and 433 of the Code, neither any provision in the Jail Manual nor in the Prisons Act confer any power upon the State Government to remit the sentence of a convict. Entry II of List III of the 7th Schedule is clear and specific in its mention of the Code of Criminal Procedure including the Code of Criminal Procedure as it existed at the commencement of the Constitution. The Entry being in Concurrent List it leaves no manner of doubt that the Parliament is competent either to frame a fresh legislation dealing with the Code of Criminal Procedure or to affect amendment in the existing Code. The Parliament, is, therefore, competent to enact the provisions of Section 433A of the Code.

(Paras 12, 13 and 14).

Held, that the provisions of sections 432 and 433 of the Code are not projection of the powers enshrined in Articles 72 and 161 of the Constitution. The provisions of sections 432 and 433 of the Code exist independently of the provisions of Articles 72 and 161 of the Constitution, and even if the aforesaid two articles are taken off the Constitution, the provisions of sections 432 and 433, and for that matter of section 434, of the Code would not be rendered illegal or unconstitutional and the State Government or the Central Government would continue to enjoy the powers invested in it by virtue of the said provisions. If the aforesaid provisions of the Constitution are wiped off the Constitution, it would only result in divesting the Governor and the President of India of the power which they enjoy

now by virtue of those provisions. However, the expression 'Governor' or 'President' as used in Articles 161 and 72 of the Constitution respectively are not interchangeable with the expression 'State Government' or the 'Union Government' and one cannot read the expression 'State Government' in place of the expression 'Governor' or 'Union Government' in place of the expression 'President'. Hence, it cannot be said that the power to the State or to the Central Government in terms of sections 432, 433 and 434 of the Code emanates from the power vested in the Governor or the President of India under Articles 161 and 72 of the Constitution. The two powers are and remain distinct and separate. The distinction, though tenuous, lies in the exercise of the two powers, for whereas in a given case the power exercisable by the State Government can legitimately be exercised by any Minister or Official entrusted with the exercise thereof under the Rules of Business framed by the Governor under Articles 166(3) of the Constitution by merely expressing it in the name of the Governor but without any actual reference of the matter to the Governor but in a case where the Constitution or a statute confers certain powers upon the Governor or the President then the Council of Ministers or Minister or the official authorised to act for the Governor or the President under the Rules of Business can be required to submit for consideration the matter along with their advice to the Governor or the President as the case may be even when the Governor or the President has no option but to act in accordance with the advice so tendered. It cannot, therefore, be said that section 433-A of the Code trenches upon the provisions of Articles 72 and 161 of the Constitution. (Paras 17, 20 and 24).

Held, that a perusal of the provisions of section 433-A of the Code would show that commutation done by the Court in exercise of its powers under section 416 is also affected by the provisions of section 433-A. The first part of section 433-A of the Code covers cases where life sentence is imposed for an offence which is punishable with death. So far as the Courts are concerned their function is to impose sentence—they can substitute one sentence for another. The substitution of the sentence by the courts, even when it is described as commutation, would amount to imposition of the substituted sentence and, therefore, whenever the Courts convert death sentence into life sentence in exercise of their powers under section 416, they must be understood to be imposing life sentence for an offence which is punishable with death sentence and accordingly the case of a convict whose death sentence is so converted into life sentence by the Court under section 416 of the Code falls within the ambit of restrictive provisions of section 433-A of the Code. (Para 28).

Held, that a perusal of section 434 reveals that in case of death sentence, the Central Government, even when it is not the 'appropriate Government', has the same powers as are enjoyed by the State Government under sections 432 and 433 of the Code. Section 433-A expressly restricts the ambit of the power of the State Government exercisable under sections 432 and 433 of the Code and

since the Central Government under section 434 gets power equivalent to that which is enjoyed by the State Government under sections 432 and 433, so its power under section 434 has been accordingly circumscribed by the provisions of section 433-A and, therefore, in a case where the Central Government commutes the death sentence to life sentence, the convict prisoner cannot be released before he has completed 14 years' actual jail term. (Para 29).

Held, that the question of discrimination that could possibly arise pertains only to the cases where a convict's death sentence is commuted by the President or the Governor as against of those whose death sentence is commuted under sections 433 or 434 or 416 of the Code. There cannot be any doubt about the fact that section 433-A neither imposes any limitation nor can it impose any limitation on the constitutional powers enshrined in Articles 72 and 161 of the Constitution but it cannot be said that the resulting discrimination would be such as would pit the provisions of section 433-A of the Code against the provisions of Article 14 of the Constitution. The violation of Article 14 arises when the State denies to any person equality before the law or the equal protection of the laws within the territory of India. Such is not the case here. The convicts whose death sentences are commuted by the Governor or the President, as the case may be, in exercise of their constitutional powers belong to a class apart from those whose sentences of death stand commuted to life sentences under sections 416, 432, 433 and 434 of the Code. Therefore, the provisions of section 433-A of the Code cannot be termed to be suffering from the vice of unconstitutionality.

(Paras 30, 31 and 32).

Case referred by the Hon'ble Division Bench consisting of Hon'ble Mr. Justice Prem Chand Jain & Hon'ble Mr. Justice D. S. Tewatia, on 24th September, 1979 to a larger Bench for decision of an important question of law involved in the case. The larger Bench consisting of the Hon'ble the Chief Justice Mr. S. S. Sandhawalia, Hon'ble Mr. Justice D. S. Tewatia and Hon'ble Mr. Justice Harbans Lal finally decided the case on merits on 10th April, 1980.

Petition Under Articles 226/227 of the Constitution of India praying that :—

(i) *The State Government be directed to dispose of the release case of the petitioner in terms of their Policy decision as mentioned in para 5 of the writ petition, ignoring the provisions of section 433-A as the same are not applicable to his case as submitted in para 11 of the writ petition.*

(ii) *In alternative the provisions of 433-A of the 'Code' be struck down as ultra vires on the ground mentioned in para 13 of the writ petition and thereafter the respondent*

No. 2 be directed by means of an appropriate Writ, Order or Direction to dispose of the petitioner's case under the previous Rules/Policy as if the impugned Section 433-A never came into force.

(*iii*) *Any other Writ, Order or Direction deemed appropriate by this Hon'ble Court be ordered to be issued.*

(*iv*) *In the meanwhile the petitioner be ordered to be enlarged on bail to avoid over detention as he will complete his* 10 *years actual sentence on* 23*rd June,* 1979.

(*v*) *The filing of an affidavit/appending of a verification be dispensed.*

Balwant Singh Malik, Advocate with S. V. Rathee, Advocate, *for the Petitioner.*

Kuldip Singh, Advocate with S. S. Shergill, Advocate for U.O.I., *for the Respondent.*

G. S. Grewal, Addl. A. G. Punjab, for the State of Punjab.

U. D. Gaur, A. G. with Mr. H. S. Gill, AAG, for the State of Haryana.

JUDGMENT

D. S. Tewatia, J.—

1. Whether the provisions of section 433-A added to the Code of Criminal Procedure, 1973 (hereinafter referred to as the Code) by Act No. 45 of 1978, suffer from the vice of unconstitutionality either for the reason that the parliament was not competent to enact it or that it trenches upon the provisions of the articles 72 and 161 of the Constitution of India or in its application it leads to such discrimination as is frowned upon by article 14 of the Constitution of India is the significant question that arises for determination in these two writ petitions (Civil Writs Nos. 2089 and 2167 of 1979).

2. Mr. Balwant Singh Malik, to heighten the impact of his submissions, which shall be presently noticed, has brought into relevancy the facts of Major Singh's case in Civil Writ No. 2089 of 1979 and, therefore, the facts of this case alone require referring to.

3. Major Singh petitioner in Civil Writ No. 2089 of 1979 was about 20 years of age at the relevant time. He was sentenced to death by the trial Court which was maintained right up to the Supreme Court. He succeeded in getting the same commuted to life sentence on a mercy petition presented to the President of India under article 72 of the Constitution of India. He had already completed 10 years' actual jail term as on 23rd June, 1979, which with the remissions came to 16 years and 6 months. That in view of the policy decision of the State Government that such life convicts as were under 20 years of age on the date of the commission of crime, and whose death sentence stood commuted to life sentence, be released after they undergo 10 years actual jail detention (exclusive of all remissions), provided they had maintained good conduct throughout, the District Level Committee recommended to the State Government on 28th December, 1978, the release of Major Singh. The Inspector-General of Prisons, Punjab, is alleged to have favourably reacted to the said recommendation when forwarding the same to the State Government. The State Government, however, declined to pass the release order in view of the provisions of section 433-A of the Code which by then had become operative with effect from 18th December, 1978.

4. In the return filed on behalf of the State, all the facts recapitulated above from the petition have been admitted excepting the fact that the Inspector-General of Prisons had forwarded the recommendation for the consideration of the State Government and the further fact pertaining to the undergoing of total jail term inclusive of remissions. Regarding these two facts, it has been stated that the Inspector-General of Prisons, in view of the provisions of section 433-A of the Code did not forward the recommendation for the consideration of the State Government for the release of the convict Major Singh, and that the period of remissions came to 6 years, 3 months and 28 days instead of 6 years and 6 months as mentioned in the petition and when the parole period of one month and twelve days is deducted therefrom, the total jail term including the one actually undergone by the convict came to 16 years 2 months and 16 days. It was also further asserted that the State Government had laid down guidelines for submission of the rolls of different kinds of convicts after the expiry of certain periods of jail terms for consideration of the Government. These instructions did not give any right to the convicts for their release on the expiry of any such period of sentence.

5. The provisions of section 433-A of the Code require noticing at the very threshhold. These are in the following terms:—

> "433-A. 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 commuted 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."

6. Mr Malik, learned counsel for the petitioner, has argued that for purposes of legislation the matter pertaining to the release of a prisoner falls exclusively within the domain of the State Legislature by virtue of the provisions of Entry 4 of List II of the Seventh Schedule of the Constitution of India. He stressed that the Code, in substance, must be taken to deal with the investigation and trial of a case. Once the accused is tried and convicted and sent to prison to undergo the sentence of imprisonment imposed by the Court, then it is the Prisons Act and the Prisoners Act that would govern his detention in jail and release therefrom and to the extent any provision in the Code deals with the release of the convict prisoner it impinges upon Entry 4 of List II of the Seventh Schedule of the Constitution of India. The legislation in regard to matters included in Entry 4 of List II of the Seventh Schedule of the Constitution being the exclusive prerogative of the State legislature, so *pro tento* the Parliament would not be competent to enact any provision pertaining to the release of prisoners.

7. It was further argued that the existence of certain provisions in the Code, at the commencement of the Constitution, is not decisive of the fact as to whether the release of prisoners pertains to a matter dealt with in Entry 2 of List III of Seventh Schedule of the Constitution of India. In support of his submission, he placed reliance on Supreme Court decision in *G. V. Ramanaiah* v. *The Superintendent of Central Jail, Rajahmundry and others* (1).

(1) A.I.R. 1974 S.C. 31.

8. The question that fell for consideration before their Lordships in that case was whether it was the Central Government or the State Government, which was the 'appropriate Government' empowered to remit the sentence of a person convicted of offences under section 489-A to 489-D of the Indian Penal Code.

9. Section 402(3) of the old Code defines 'appropriate Government thus : [equivalent to S. 432(7) of the new Code]:

> "In this section and in section 401, the expression 'appropriate Government' shall mean—
>
> (a) in cases where the sentence is for an offence against, or the order referred to in sub-section (4-A) of section 401 is passed under any law relating to a matter to which the executive power of the Union extends, the Central Government; and
>
> (b) in other cases, the State Government."

10. In that case, Sarkaria, J., who delivered the opinion for the Bench, held that in view of Entries Nos. 36 and 93 of Union List in the Seventh Schedule, currency, coinage and legal tender, to which offences under sections 489-A to 489-D, I.P.C. related, were matters which fell exclusively within the legislative competence of the Union Legislature; therefore, the offences under sections 489-A to 489-D were the offences relating to a matter to which the executive power of the Union extended; and that a plain reading of the above Entry No. 1 of the Concurrent List would show that the ambit of criminal law was first enlarged by including in it the Indian Penal Code, and, thereafter, from such enlarged ambit all offences against laws with respect to any of the matters specified in List I or List II were specifically excluded. This excluding clause in Entry No. I, List III read with Entries Nos. 36 and 93 of the Union List shows beyond all manner of doubt that in respect of offences falling under sections 489-A to 489-D, only the Central Government was competent to suspend or remit the sentence of a convict.

11. Entry I and Entry 2 of List III—Concurrent List—of Seventh Schedule to the Constitution of India are in the following terms :

> "1. Criminal law, including all matters included in the Indian Penal Code at the commencement of this Constitution but excluding offences against laws with respect

to any of the matters specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power.

'2. Criminal procedure, including all matters included in the Code of Criminal Procedure at the commencement of this Constitution."

A bare comparison of the two Entries would show up the inapplicability of the ratio of *G. V. Ramanaiah's case* (supra) to the present case. The exclusion made in Entry 1 is not repeated in Entry No. 2.

12. Entry 4 of List II is in the following terms:

"4. Prisons, reformatories, Borstal institutions and other institutions of a like nature and persons detained therein; arrangements with other States for the use of prisons and other institutions."

In view of Entry 4 of List II, in our opinion, the State Legislature would be competent to legislate regarding such matter as to where a convict is to be kept to undergo his sentence, and how he is to be kept; and not how long he is to be kept. For how long a convict prisoner is to be kept in premises declared to be jail, reformatory, Borstal institution and other institutions of the like nature, would depend on the sentence imposed upon him by the Court, subject to remissions that might be granted by the Governor or the State Government or by the President and the Central Government as envisaged by relevant provisions of the Constitution and of the Code which are extracted below :—

RELEVANT ARTICLES OF THE CONSTITUTION

"72. (1) The President 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—

(a) * * * * *

(b) 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 ;

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

(2) * * * * *

(3) Nothing in sub-clause (c) of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force.

* * * * *
* * * * *
* * * * *

161. 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 PROVISIONS OF SECTIONS 432, 433 AND 434 OF THE CODE.

"432. (1) When any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

* * * * *

"433. The appropriate Government may, without the consent of the person sentenced, commute —

(a) a sentence of death, for any other punishment provided by the Indian Penal Code ;

(b) a sentence of imprisonment for life for imprisonment for a term not exceeding fourteen years or for fine ;

(c) a sentence of rigorous imprisonment for simple imprisonment for any term to which that person might have been sentenced, or for fine ;

(d) a sentence of simple imprisonment, for fine

434. The powers conferred by sections 432 and 433 upon the State may, in the case of sentence of death, also be exercised by the Central Government".

13. The proposition of law that, besides the provisions of sections 432 and 433 of the Code, neither any provision in the Jail Manual nor in the Prisons Act confers any power upon the State Government to remit the sentence of a convict, is no longer in doubt in view of the authoritative pronouncement of their Lordships in *Gopal Vinayak Godse* v. *The State of Maharashtra and others* (2) and later on in *State of Madhya Pradesh* v. *Rattan Singh and others* (3) in which their Lordships enunciated the following propositions:—

"(1) That a sentence of imprisonment for life does not automatically expire at the end of 20 years including the remissions, because the administrative rules framed under the various Jail Manuals or under the Prisons Act cannot supersede the statutory provisions of the Indian Penal Code. A sentence of imprisonment for life means a sentence for the entire life of the prisoner unless the appropriate Government chooses to exercise its discretion to remit either the whole or a part of the sentence under section 401 of the Code of Criminal Procedure ;

(2) that the appropriate Government has the undouted discretion to remit or refuse to remit the sentence and where it refuses to remit the sentence no writ can be issued directing the State Government to release the prisoner ;

* * * * *

14. Entry 2 of List II—Concurrent List—of the seventh schedule of the Constitution of India is clear and specific in its mention of the Code of Criminal Procedure including the Code of Criminal Procedure as it existed at the commencement of the Constitution. The Entry being in the Concurrent List, it leaves no manner of doubt that the Parliament is competent either to frame a fresh legislation dealing with the Code of Criminal Procedure or to effect amendment in the existing Code of Criminal Procedure.

(2) AIR 1961 S.C. 600.

(3) AIR 1976 S.C. 1552.

15. For the reasons aforesaid we hold that the Parliament was competent to enact the provisions of section 433-A of the Code.

16. The next point canvassed by Mr. Malik was that the provisions of section 433-A of the Code would tend to limit the powers invested by articles 72 and 161 of the Constitution of India in the President of India and the Governor respectively and, therefore, the said provisions suffered from the vice of unconstitutionality. The learned counsel elaborated his aforesaid submission by stressing the fact that the provisions of sections 432, 433 and 434 of the Code are the mere projections of the powers of the Governor of the State or the President of India, as the case may be, which inhere in them by virture of the provision of articles 161 and 72 of the Constitution of India respectively. For the aforesaid submission, the learned counsel sought to draw sustenance from Supreme Court decision in *K. M. Nanavati* v. *The State of Bombay* (now Maharashtra) (4), and drew pointed attention to the following observations therefrom:—

> "Let us now turn to the law on the subject as it obtains in India since the Code of Criminal Procedure was enacted in 1898, section 401 of the Code gives power to the executive to suspend the execution of the sentence or remit the whole or any part of the punishment without conditions or upon any conditions which the person sentenced accepts. Section 402 gives power to the executive without the consent of the person sentenced to commute a sentence of death into imprisonment for life and also other sentences into sentences less rigorous in nature. In addition the Governor General had been delegated the power to exercise the prerogative power vesting in His Majesty. Sub-section (5) of section 401 also provides that nothing contained in it shall be deemed to interfere with the right of His Majesty or the Governor-General when such right is delegated to him to grant pardons, reprieves, respites or remissions of punishment. This position continued till the Constitution came into force. Two provisions were introduced in the Constitution to cover the former royal prerogative relating to pardon, and they are articles 72 and 161. Article 72 deals with the power of

(4) A.I.R. 1961 S.C. 112.

> the President to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence. Article 161 gives similar power to the Governor of a State with respect to offences against any law relating to a matter to which the executive power of the State extends. Sections 401 and 402 of the code had continued with necessary modifications to bring them into line with articles 72 and 161. It will be seen however, that articles 72 and 161 not only deal with pardons and reprieves which were within the royal prerogative but have also included what is provided in sections 401 and 402 of the Code ....."

17. The submission advanced by the learned counsel is utterly untenable and its untenability does not stand in any manner lessened by the decision which the learned counsel pressed upon us for consideration. Their Lordships when saying that the provisions of sections 401 and 402 of the Code (which have been reincaranated with certain modifications in the amended Code as sections 432 and 433) have been brought in line with the provisions of articles 72 and 161 of the Constitution of India, do not even remotely suggest that these provisions of the Code are projection of the powers enshrined in articles 72 and 161 of the Constitution of India. The provisions of sections 432 and 433 of the Code exist independently of the provisions of articles 72 and 161 of the Constitution of India. Even if the aforesaid two articles are taken off the Constitution of India, the provisions of sections 432 and 433, and for that matter of section 434, of the Code would not be rendered illegal or unconstitutional and the State Government or the Central Government would continue to enjoy the powers invested in it by virtue of the said provisions. If the aforesaid provisions of the Constitution of India are wiped off the Constitution of India, it would only result in divesting the Governor and the President of India of the power which they enjoy now by virtue of those provisions.

18. The learned counsel nevertheless argued that by virtue of the definition of the State Government and the Central Government as given in section 3(60) and section 3(8) respectively of the General Clauses Act, the expressions 'Governor' used in article 161 and the 'President of India' used in article 72 of the Constitution of

India have to be respectively understood as State Government and the Central Government and, therefore, the powers flowing from articles 161 and 72 of the Constitution of India are exercisable by the State Government and the Central Government. The learned counsel sought to underpin his aforesaid submission with the Supreme Court decision in *The State of Uttar Pradesh* v. *Mohammad Naim*, (5).

19. In the case before their Lordships, one of the questions that fell for consideration was as to whether the State Government could invoke the jurisdiction of the High Court under section 561-A of the unamended Code. That was a case in which the High Court had made some sweeping remarks against the entire police force. The learned Single Judge dismissed the petition observing that the State could not be considered as an aggrieved party. It was in the context of that question that their Lodrships happened to refer to the definition of the State Government, as mentioned in the General Clauses Act of 1897, and not that they decided any controversy as to whether the expression 'Governor' occurring in the Constitution of India is interchangeable with the expression 'State Government'.

20. By virtue of the provisions of articles 53 and 154 of the Constitution of India, the executive power of the Union and the State Governments vests in the President and the Governor respectively and as ordained by articles 77 and 166 of the Constitution of India all executive actions of the Union and the State Governments shall be expressed to be taken in the name of the Psesident and the Governor respectively, and, therefore, whenever any executive act is done or expressed to be done by the President or the Governor, that would tantamount to be an action of the Union Government or the State Government, as the case may be, by virtue of the definition referred to by their Lordships and relied upon by the learned counsel on behalf of the petitioner: but it does not mean that wherever in the Constitution the expression 'Governor' or 'President' is used, that expression is interchangeable with the expression 'State Government' or the 'Union Government' and one can read the expression 'State Government' in place of the expression 'Governor' or 'Union Government/Government of India' in place of the expression 'President'. Hence, it cannot be said

(5) AIR 1964 S.C. 703.

that the power to the State or to the Central Government, in terms of sections 432, 433 and 434 of the Code, emanates from the power vested in the Governor or the President of India under articles 161 and 72 of the Constitution of India.

21. The learned counsel for the petitioner, Mr. Malik, however, then sought to argue that since the Governor or the President, as the case may be, had to exercise his power vested in him by articles 161 and 72 of the Constitution of India in accordance with the advice tendered by his Minister or the Council of Ministers, as the case may be, depending upon the Rules of Business framed under article 166(2) and 77(2) of the Constitution and, therefore, restriction imposed on the power of the State Government and the Central Government under sections 432 and 433 by section 433-A of the Code in the matter of commuting of sentence and granting of remissions would serve no useful purpose, as that would not involve loss of any power to either of the Government, for what they cannot do under sections 432 and 433 of the Code, they can do through the Governor or the President, as the case may be, under articles 161 and 72 of the Constitution of India.

22. The learned counsel for the petitioner attempted to shore up his above legal stance from the following observations of Sandhawalia, J. (as he then was) who delivered the majority opinion for the Bench in *State of Punjab* v. *Om Parkash Dharwal and another*, (6).

> "It is, therefore, manifest from legislative history, from the unanimous opinion of the constitutional authorities, and the binding observations of the Supreme Court that our Constitution envisages the President only as a constitutional head who acts primarily upon the advice of his Council of Ministers and the field of such advice is all pervasive, except in the marginal and rare cases which are only in the nature of exceptions which go to prove the rule, the President acts only by the advice of his Cabinet. However, where the very nature of the power is such that it cannot possibly be exercised on the advice of the Council of Ministers it is then alone that the President may act otherwise. An example of this may be noticed where he is called upon to choose the Prime Minister after a general

(6) 1973(1) S.L.R. 135.

election. Obviously in such a situation he cannot act on the advice of the Council of Ministers. Even in this situation his supposed discretion, however, is deeply limited and hedged down by the settled convention that he must call upon the leader of the largest party in the Lok Sabha to form the Government and to nominate him as the Prime Minister. For our purpose, it is not necessary to be exhaustive on the powers in which the President may have to act without the advice of his Cabinet. There is, however, no escaping the inevitable conclusion that under our Constitution so far as the President is concerned there appears to be no scope or basis for floating the theory that the President exercises any powers in his individual discretion or individual judgment. Such powers were expressly vested in the Governor-General by the Government of India Act, 1935 and these powers were expressly rejected and excluded by the Union Constitution Committee when drafting the Constitution. The Constituent Assembly accepted this and by necessary implication denuded the executive head of the Union, namely, the President of India of any such power. On comparing the two great constitutional systems, namely, the British and the American Constitution from which the founding fathers drew their inspiration in our Constitution it had been said that the King of England reigns but does not rule, the President of America rules but does not reign but the President of India neither reigns nor rules. This addage in homely terms truely expresses the position of the President of India as a constitutional figure head.

Is the position any different as regards the powers vested in the executive head of the States of the Union, namely, the Governor ? The answer again appears to be in almost identical term as it is in the case of the head of the Union, namely, the President. The Constitution deals with the Union and the State executive separately but the provisions in both the Chapters, namely Chapter I of Part V and Chapter 2 of Part VI follow a common pattern and are in most cases *mutatis mutandis* the same for the Union and the for the States. The perusal and comparison of the corresponding provisions dealing with the executive functions of the President and the Governor shows close

similarity, if not identity on a variety of points. That the Governor is cast in the image of the President and in fact has more limited powers is apparent from the above-said provisions. The Governor unlike the President is not an elected head and by virture of article 155 he is appointed by the President and holds office during his pleasure. Under the emergency provisions of the Constitution, the Governor can merely act as a delegate of the President when he assumes to himself all the functions of the Government of the State. Reference in this regard may be made to article 163(1) which is in the following terms:—

"163(1) There shall be a council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion."

The comparison of this provision with the corresponding article 74(1) is instructive. This would make evident that the Constitution itself has in terms expressly provided where the Governor has to exercise any of his functions in his discretion. By necessary implication, the other functions of the Governor are to be discharged by him with the aid and advice of his Council of Ministers. The above quoted article, therefore, clearly lays down that except where the Constitution expressly says so, the Governor is to act merely as a Constitutional Head of the State who abides by the advice tendered to him by his Cabinet. In the later provisions that follow, the Constitution provides for the specific situation in which the Governor is to act apart from the advice of his Council of Ministers. Reference in this connection may be made to article 371, sub-clauses (1) and (2) which provide for the powers of the President to create any special responsibility of the Governor in regard to the matters mentioned in that article. Again article 371-A sub-clause 1(b) mentions clearly the situation where the Governor of Nagaland will exercise his individual judgment and individual discretion which shall be final. Again article 371-A, sub-clause 2(b) and (f) mentions the powers which the Governor is to

exercise in his discretion. Similarly in the Sixth Schedule to the Constitution para 9, sub-clause (2) and para 18, sub-clause (3) specifically empower the Governor to act in his discretion.

Reading the above-said provisions with article 163(1), the only result that seems to follow is that except for the specified provisions where the Governor is to act either in his individual discretion or in his individual judgment or in discharge of his special responsibility, he is to act in the remaining field of his functions according to the advice of his Cabinet."

23. The learned counsel for the petitioner further sought to reinforce his above submission with the following observations of Krishna Iyer, J., made in *Samsher Singh* v. *State of Punjab and another*, (7):—

"The argument of the counsel for the appellant is that wherever the President is invested with power and the same holds good for the Governor—he is soverign in his own right and has to exercise the functions personally and the orders of a proxy, even a Minister, cannot do duty for the exercise of Presidential power. There is logic in arguing that if, under article 311, the President or Governor means President or Governor personally, under other similar articles the rules of business making over exercise of functions to Ministers and officers cannot be valid. Indeed, a whole host of such articles exist in the Constitution, most of them very vital for the daily running of the administration and embracing executive, emergency and legislative powers either of a routine or momentous nature. The power to grant pardon or to remit sentence (Article 161), the power to make appointments including (that) of Chief Minister (Article 164), the Advocate-General (Article 165), the District Judges (Article 233), the Members of the Public Service Commission (Article 316) are of this category. Likewise, the power to prorogue either House of Legislature or to dissolve the Legislative Assembly (Article 174), the right to address or send messages to the

(7) A.I.R. 1974 S.C. 2192.

Houses of the Legislature (Article 175 and Article 16), the power to assent to Bills or withhold such assent (Article 200), the power to make recommendations for demands of grants (Article 203(3), and the duty to cause to be laid every year the annual budget (Article 202), the power to promulgate ordinances during recesses of the Legislature (Article 213) also belong to this species of power. Again, the obligation to make available to the Election Commission the requisite staff for discharging the functions conferred by Article 324(1) on the Commission (Article 324(6), the power to nominate a member of the Anglo-India Community to the Assembly in certain situations (Article 333), the power to authorise the use of Hindi in the proceedings in the High Court (Article 348(2), are illustrative of the functions of the Governor *qua* Governor.

Similarly, the President is entrusted with powers and duties covering a wide range by the Articles of the Constitution. Indeed, he is the Supreme Commander of the Armed Forces (Article 53(2), appoints Judges of the Supreme Court and the High Courts and determines the latter's age when dispute arises, has power to refer questions for the Advisory opinion of the Supreme Court (Article 143) and has power to hold that Government of a State cannot be carried in accordance with the Constitution (Article 356). The Auditor-General, the Attorney-General, the Governors and the entire army of the public servants hold office during the pleasure of the President, Bills cannot become law, even if passed by Parliament, without the assent of the President. Recognising and derecognising rules of former native States of India is a power vested in the President. The extraordinary powers of legislation by Ordinances, dispensing with enquiries against public servants before dismissal, declaration of emergency and imposition of President's rule by proclaimation upon States, are vast powers of profound significance. Indeed, even the power of summoning and proroguing and dissolving the House of the People and returing Bills passed by the Parliament belong to him. If only we expland the ratio of Sardarilal (8) and Jayantilal (9) to every function which

(8) (1971)3 S.C.R. 461 = 1971 S.C. 1547.

(9) (1964)5 S.C.R. 294 = (A.I.R. 1964 S.C. 648).

the various Articles of the Constitution confer on the President or the Governor, Parliamentary democracy will become a dope and national elections a numerical exercise in expensive futility. We will be compelled to hold that there are two parallel authorities exercising powers of governance of the country, as in the dyarchy days, except that Whitehall is substituted by Rashtarpati Bhavan and Raj Bhavan. The Cabinet will shrink at Union and State levels in political and administrative authority and, having solemn regard to the gamut of his powers and responsibilities, the Head of State will be a reincaranation of Her Majesty's Secretary of State of India, untroubled by even the British Parliament—a little taller in power than the American President. Such a distortion, by interpretation it appears to us, would virtually amount to a subversion of the structure, substance and vitality of our Republic, particularly when we remember that Governors are but appointed functionaries and the President himself is elected on a limited indirect basis. As we have already indicated, the overwhelming catena of authorities of this Court have established over the decades that the cabinet form of Government and the Parliamentary system have been adopted in India and the contrary concept must be rejected as incredibly alergic at our political genius, constitutional creed and culture."

24. The aforesaid observations came to be made when examining the extreme contention projected before this Court in *Om Parkash Dharwal and another's case* (supra) and before their Lordships of the Supreme Court in *Samsher Singh's case* (supra) that the Governor or the President, as the case may be, exercise their constitutional functions according to their own best judgment untrammlled by any advice tendered by the Council of Ministers in the executive matters, by the Legislature in the legislative matters and by the High Court of the Supreme Court, as the case may be, in judicial matters. But having said what has been said by the High Court in one case and by the Supreme Court in the other, neither of the Courts meant to be understood as saying that the given power vested by certain statutes in the Union or the State Government coalesces with the identical powers conferred on the President or the Governor by the Constitution. The two powers, in our opinion are and remain

distinct and separate. The distinction, though tenuous, lies in the exercise of the two powers, for whereas in a given case the power exercisable by the State Government can legitimately be exercised by any Minister or official entrusted with the exercise thereof under the Rules of Business framed by the Governor under article 166(3) of the Constitution by merely expressing it in the name of the Governor but without any actual reference of the matter to the Governor, but in a case where the Constitution or a statute confers cerain power upon the Governor or the President, then the Council of Ministers or Minister or the official authorised to Act for the Governor or the President under the Rules of Business, can be required to submit for consideration the matter along with their advice to the Governor or the President, as the case may be, even when by virtue of the law as laid down by the Supreme Court and the High Court in the aforesaid two decisions, the Governor or the President has no option, but to act in accordance with the advice so tendered.

25. Now the stage is set to consider the all-important point which Mr. Malik canvassed with some vehemence pertaining to the invidious discrimination that may result as a result of the application of section 433-A of the Code. In order to highlight his submission, the learned counsel cites a hypothetical case where six persons are convicted for an offence under section 302 I.P.C., which is punishable with death. The one, whose part was minor say of merely giving a Lalkara, was sentenced to life imprisonment; the other five who had inflicted the fatal blows and played a graver part in the crime, were sentenced to death two of them being pregnant women and the rest males. The sentence of one pregnant woman was commuted to life sentence by the Court under section 416, Criminal Procedure Code—may be the pregnancy of the other was not apparent and when it became known, she applied to the State Government for clemency and her death sentence was commuted by the State Government under section 433(a). The third one applied to the Governor for mercy and his sentence of death was commuted to life sentence under article 161 of the Constitution. The sentence of forth one was neither commuted by the Government nor the Governor. He applied to the Central Government and the Central Government commuted his death sentence to life sentence under section 434 of the Code. The fifth one presented his mercy petition under article 72 of the Constitution to the President who commuted his death sentence to the life imprisonment.

26. As a result of the application of section 433-A of the Code, the aforesaid six convict prisoners would undergo, in view of the

existing rules framed under the Prisons Act and the executive instructions, different sentence of actual imprisonment. While in the case of those whose death sentences were commuted by the Governor, the President, the Central Government, and the Court under articles 161 and 72 of the Constitution and sections 434 and 416 of the Code respectvely, the provisions of section 432 of the Code would be attracted and it would be open to the State Government to release them in accordance with the existing rules framed under the Prisons Act and the executive instructions, after they have been actually in jail for less than fourteen years, while the one who had been sentenced to life imprisonment by the Court itself and the one, whose death sentence had been commuted under section 433(a) of the Code by either Government cannot be so released till they have been actually in jail for a period of fourteen years. The learned counsel highlighted a further anomaly that results from the fact that the one who had been sentenced to life imprisonment by the Court itself on account of his part in the crime being very minor, he shall have to be in jail actually for fourteen years, but others, who were sentenced to death by the High Court—their part being graver—and their death sentences were being commuted to life sentences under articles 161 and 72 of the Constitution, they could be released under the existing provisions of the rules made under the Prisons Act or the Prisoners Act and the executive instructions as embodied in the Manual for the Superintendence and Management of Jails, without undergoing actual jail term of fourteen years.

27. The rules and the executive instructions that the learned counsel for the petitioner has been trying to make us aware of in the above paragraph are the following:

Relevant provisions of the manual for the Superintendence and Management of Jails.

"631. (1) These rules apply to the whole of British India, inclusive of British Baluchistan and the Sonthal Paraganas.

(2) In these rules—

(a) 'prisoner' includes a person committed to prison in default of furnishing security to keep the peace or be of good behaviour;

(b) 'class I prisoner' means thug, a robber by administration of poisonous drugs or a professional, hereditary or

specially dangerous criminal convicted of heinous organised crime, such as dacoity;

(c) 'class 2 prisoner' means a dacoit or other person convicted of heinous organised crime, not being a professional, hereditary, or specially dangerous criminal;

(d) 'class 3 prisoner' means a prisoner other than a class 1 or class 2 prisoner;

(e) 'sentence' means a sentence as finally fixed on appeal, revision or otherwise, and includes an aggregate of more sentences than one and an order of committal to prison in default of furnishing security to keep the peace or be of good behaviour;

(f) 'life convict' means a person whose sentence amounts to 20 years imprisonment;

(i) a class 1 or class 2 prisoner whose sentence amounts to twenty-five years' imprisonment, or

(ii) a class 3 prisoner whose sentence amounts to twenty years' imprisonment.

Note.—The case of all life-convicts and of all prisoners sentenced to more than 14 years imprisonment or to transportation and imprisonment for terms exceeding in the aggregate 14 years shall, when the term of imprisonment undergone, together with any remission earned under the rules amounts to 10 or 14 years, as the case may be, submitted for the orders of the Local Government in accordance with the instructions contained in the Home Department Resolution No. 159-67 (Jails), dated the 6th September, 1905.

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645. The total remission awarded to a prisoner under all these rules shall not, without the special sanction of the Local Government, exceed one-fourth part of his sentence.

Provided that in very exceptional and suitable case, the Inspector-General of Prisons may grant remissions

amounting to not more than one-third of the total sentence.

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647. (1) When a life convict who is either—

(a) a class I prisoner, or

(b) a class II or class III prisoner with more than one sentence,

(c) a prisoner in whose case the Local Government has passed an order forbidding his release without reference,

has earned such remission as would entitle him to release but for the provisions of this paragraph, the Superintendent shall report accordingly to the Local Government in order that his case may be considered with reference to section 401 of the Code of Criminal Procedure, 1898.

(2) Save as provided by clause (1) when a prisoner has earned such remission as entitled him to release the Superintendent shall release him".

28. Before dealing with the point canvassed, at this stage, the scope of section 433-A of the Code requires investigation so as to determine the provisions which are brought within its restrictive scope. A perusal of the provisions of section 433-A of the Code, already reproduced above, would, in our opinion, show that commutation done by the Court in exercise of its powers under section 416 is also affected by the provisions of section 433-A. The first part of section 433-A of the Code covers cases where life sentence is imposed for an offence which is punishable with death. So far as the Courts are concerned, their function is to impose sentence—they can substitute one sentence for another. The substitution of the sentence by the Courts, even when it is described as commutation, would, in our opinion, amount to imposition of the substituted sentence and, therefore, whenever the Courts convert death sentence into life sentence in exercise of their powers under section 416, they must be understood to be imposing life sentence for an offence which is punishable with death sentence. And accordingly the case of a convict whose death sentence is so converted into life sentence by the Court

under section 416 of the Code falls within the ambit of restrictive provisions of section 433-A of the Code.

29. As regards section 434 of the Code, the position is no different. Section 434 of the Code reads as follows:—

> "434. The powers conferred by sections 432 and 433 upon the State Government may, in the case of sentences of death, also be exercised by the Central Government".

A bare perusal of the above provisions of section 434 reveals that in the case of death sentence the Central Government, even when it is not the appropriate Government', has the same powers as are enjoyed by the State Government under sections 432 and 433 of the Code. As already observed, section 433-A expressly restricts the ambit of the power of the State Government exercisable under sections 432 and 433 of the Code, and since the Central Government under section 434 gets power equivalent to that which is enjoyed by the State Government under sections 432 and 433, so its power under section 434 stands accordingly circumscribed by the provisions of section 433-A and, therefore, in a case where the Central Government commutes the death sentence to life sentence, the convict-prisoner cannot be released before he has completed fourteen years' actual jail term.

30. In view of the above, the question of discrimination that survives pertains to the cases where a convict's sentence is commuted by the President or the Governor as against of those whose death sentence is commuted under section 433 or 434 or 415 of the Code.

31. There cannot be any doubt about the fact that section 433-A neither imposes any limitation nor can it impose any limitation on the constitutional powers enshrined in articles 72 and 161 of the constitution of India. But in the circumstances it cannot be said that the resulting discrimination would be such as would pit the provisions of section 433-A of the Code against the provisions of article 14 of the Constitution.

32. The violation of article 14 arises when the State denies to any person equality before the law or the equal protection of the laws within the territory of India. Such is not the case here. The convicts whose death sentences are commuted by the Governor or the President, as the case may be, in the exercise of their consequential powers, belong to a class apart from those whose sentences

of death stand commuted to life sentences under the statutory provisions in question, already mentioned, and, therefore, the provisions of section 433-A of the Code cannot be termed to be suffering from the vice of unconstitutionality.

33. The anomalous situation that could arise when as a result of the application of section 433-A of the Code a convict whose part was minor and whom the Court thought fit to sentence to life imprisonment, shall have to spend not less than actual term of fourteen years in Jail, while the other one, whom the Court awarded death sentence and his death sentence came to be commuted either by the Governor or by the President, can be remedied by prematurely releasing the convict of the former category earlier than fourteen years actual jail term.

34. We trust that the Governor or the President, while exercising their powers of remission under articles 161 and 72 of the Constitution of India respectively and the State and the Union Government while exercising their powers under section 432 and 433 of the Code, would definitely have the said anomaly in view, for their hands cannot be forced to release, as we have already observed that their Lordships in *Gopal Vinayak Godse's case* (supra) and later on in *Rattan Singh and others' case* (supra) have categorically spelt out the legal position that life sentence means life sentence and no convict prisoner, on the strength of any rule framed under the Prisons Act or the Prisoners Act or the executive instructions can claim to be released on the expiry of any fixed period mentioned in such rules or instructions, and, therefore, eventually whether a convict prisoner whose sentence of death has been commuted into life sentence under article 72 or 161 of the Constitution of India should or should not be released prior to his actual incarceration of fourteen years would depend upon the absolute discretion of the authority competent under the law to order release of any such prisoner.

35. For the reasons mentioned, we hold that the attack against the constitutionality of section 433-A of the Code fails and finding no merit in these writ petitions (Civil Writs Nos. 2089 and 2167 of 1979) we dismiss the same.

S. S. Sandhawalia, C.J.—I agree.

N. K. S.

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