K. M. NANAVATI

v.

THE STATE OF BOMBAY

1960

September 5.

(B. P. SINHA, C. J., J. L. KAPUR, P. B. GAJENDRAGADKAR, K. SUBBA RAO and K. N. WANCHOO, JJ.)

Sentence, suspension of—Order by Governor during pendency of appeal in the Supreme Court—If constitutionally valid—Governor's power of clemency—Court's power of granting bail or suspending sentence—Harmonious exercise of two powers—The Constitution of India, Arts. 161, 142—Supreme Court Rules, Order XXI, r. 5.

The petitioner was Second in Command of I. N. S. Mysore which came to Bombay in the beginning of March, 1959. Soon thereafter he was arrested on a charge of murder under s. 302 of the Indian Penal Code and was placed, and continued to remain, in naval custody all along during his trial. In due course he was placed on trial by a jury before the Sessions Judge, Greater Bombay, in which the jury returned a verdict of not guilty by a majority; but the Sessions Judge disagreeing with the verdict of the jury made a reference to the High Court which convicted the petitioner under s. 302 of the Indian Penal Code and sentenced him to imprisonment for life. On the same day when the High Court pronounced its judgment the Governor of Bombay passed an order under Art. 161 of the Constitution of India suspending the sentence passed by the High Court of Bombay on the petitioner until the appeal intended to be filed by him in the Supreme Court against his conviction and sentence was disposed of and subject meanwhile to the condition that he shall be detained in the Naval Jail custody. A warrant for the arrest of the petitioner which was issued in pursuance of the judgment of the High Court was returned unserved with the report that it could not be served in view of the order of the Governor suspending the sentence passed upon the petitioner.

In course of the hearing of an application for leave to appeal to the Supreme Court filed by the petitioner in the High Court the matter of the unexecuted warrant was placed before it and a Special Bench of the High Court after examining the validity of the action taken by the Governor came to the conclusion that the order passed by the Governor was not invalid, that the order for detention of the petitioner in naval custody was not unconstitutional and that the sentence passed on the petitioner having been suspended the provisions of O. XXI, r. 5, of the Supreme Court Rules did not apply and it was not necessary for the petitioner to surrender to his sentence.

Thereafter the petitioner filed an application for special leave in the Supreme Court and also another application praying for exemption from compliance with the aforesaid rule and

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for the hearing of his application for special leave without surrendering to his sentence. His plea at first was that as he was not a free man it was not possible for him to comply with the requirements of O. XXI, r. 5, of the Supreme Court Rules; but he subsequently amended it to the effect that the aforesaid Rule did not apply to his case in view of the Governor's order. On a reference of this matter by a Division Bench of this Court to the Constitution Bench for hearing,

Held, that the Governor had no power to grant the suspension of sentence for the period during which the matter was sub-judice in this Court. The Governor's order suspending the sentence could only operate until the matter became sub-judice in this Court on the filing of the petition for special leave to appeal whereupon this Court being in seisin of the matter would consider whether O. XXI, r. 5 should be applied or the petitioner should be exempted from the operation thereof as prayed for. It would then be for this Court to pass such orders as it thought fit as to whether bail should be granted to the petitioner or he should surrender to his sentence or to pass such other order as the court deemed fit in the circumstances of the case.

On the principle of harmonious construction and to avoid a possible conflict between the powers given under Art. 161 to the Governor and under Art. 142 to the Supreme Court, both of which are absolute and unfettered in their respective fields of operation, it must be held that Art. 161 does not deal with the suspension of sentence during the time that Art. 142 is in operation and the matter is sub-judice in the Supreme Court.

Per KAPUR J. (*dissenting*)—The language of Art. 161 is of the widest amplitude. It is plenary and an act of grace and clemency and may be termed as benign prerogative of mercy. The power of pardon is absolute and exercisable at any time. Rules framed under Art. 145 are subordinate legislation and cannot override the provisions of Art. 161 of the Constitution itself. While the Governor's power to grant pardon is a power specially conferred upon him as was vested in the British Governor in British days, the power given to the Court under Art. 142(1) is a general power exercisable for doing complete justice in any cause or matter, and if they deal with the same matter then Art. 161 must prevail over Art. 142(1). The two powers may have the same effect but they operate in distinct fields on different principles taking wholly irreconcilable factors into consideration.

The action taken by the executive being the exercise of overriding power is not subject to judicial review.

It could not have been the intention of the framers of the Constitution that the amplitude of executive power should be restricted as to become suspended for the period of pendency of an appeal in the Supreme Court.

CRIMINAL APPELLATE JURISDICTION : Criminal Misc. Petn. No. 320/60.

Application for exemption from compliance with the requirements of Rule 5 of Order XXI, Supreme Court Rules, 1950 (as amended).

1960. July 18, 19, 20, 21, 22.

S. N. Andley, J. B. Dadachanji, Rameshwar Nath and *P. L. Vohra*, for the petitioner.

H. M. Seervai, Advocate-General for the State of Bombay, Atul Setalved and *R. H. Dhebar*, for the respondent.

[Sinha C. J.—Do you dispute the power of the Court to make this rule ?]

H. M. Seervai :—No, My Lord. The Court imposes a penalty in its judicial capacity; the Executive remits the penalty in its executive capacity. There is no clash between the two powers. The powers of the Executive do not collide with the powers of the judiciary. The prerogative of the King or the President can never be in conflict with the judiciary, executive or legislature. Prerogatives come to aid the process of justice. Power of pardon is plenary in nature and unfettered. It could be exercised at any time after the commission of the offence, before indictment, during the trial and after the trial.

[Sinha C. J.—Is not that power of pardon exercised before the trial ?]

Pardon is given after the offence is proved. In the United States the question is never asked whether the President has invaded the power of the judiciary.

[Sinha C. J.—So far as India is concerned take a case like this : A man is convicted for murder and sentenced to imprisonment for life. But subsequently it is found that the deceased died a natural death or the deceased appeared alive afterwards. What will happen ?]

A pardon will be granted (s. 401). The President is entitled to pardon a person convicted for an offence punishable with death, *United States* v. *Wilson*, 8 L. Ed. 640 at 644, *Ex parte Wells*, 15 L. Ed. 421, 423.

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A free and unconditional pardon has the effect of obliterating the crime. Section 426(1) empowers the Court to suspend the sentence or grant bail. The Executive, Judiciary and Legislature, paralysing each other never happens. *United States* v. *Klein*, 20 L. Ed. 519, *Ex Parte Grossman*, 69 L. Ed. 527.

[SUBBA RAO J.—Your argument assumes that if the Governor's order was valid then the Supreme Court Rule would not come in. It may not be necessarily so because in the present case there was a conviction and sentence and the accused has no right of appeal. The accused invited the order of the Governor. Entertainment of the appeal by special leave is in the discretion of the Supreme Court. Unless there are adequate reasons for the Governor to make this order, why should we use our discretion to give exemption to the accused from the rules of the Court ?]

The sentence having been suspended there is no sentence and therefore this Court need not insist on his surrender.

[SUBBA RAO J.—The provisions, of Art. 161 did not say that the power under it could be exercised notwithstanding other provisions of the Constitution. Was it, therefore, not necessary to harmonise this power with other constitutional provisions such as Art. 142 ?]

[KAPUR J.—In India have the Courts power to suspend a sentence?]

Yes, in a limited way as provided in s. 426.

[KAPUR J.—If the sentence is suspended, there is no sentence.]

No, there is no sentence to surrender to. The execution of sentence is an executive power. The function of the Court ends with the passing of the sentence. To carry the sentence into execution is an executive order. *United States* v. *Benz*, 75 L. Ed. 354, 358.

In India we start with s. 401 of the Code of Criminal Procedure, 1898, and s. 295 Government of India Act, 1935.

Pardon is a part of the Constitutional scheme, *Balmukand* v. *King Emperor*, L. R. 42 I. A. 133.

Exercise of prerogatives is in the jurisdiction of the Executive and not the judiciary, *Lala Jairam Das* v. *King Emperor*, L. R. 72 I. A. 120. The powers are in aid of justice.

[SUBBA RAO J.—Your argument is that one acts in the judicial field, while the other acts in the executive field and hence there is no conflict. But whatever the nature of the power, the Governor in exercising that power is encroaching on the field occupied by the Supreme Court. Under the Constitution the Supreme Court can entertain appeals and pass the necessary orders and perhaps, under the rules suspend or stay execution of a sentence. On the other hand the Governor under Art. 161 has powers to suspend the sentence. I am suggesting that where there is a conflict of jurisdiction between the Judiciary and the Executive is it not reasonable to bring harmony between these two? What is wrong in confining the power of the Governor to cases where there is no appeal pending before the Supreme Court? Can the executive interfere with the judiciary in the midst of a case?]

Yes, in its administrative capacity it can ask the Advocate-General to enter a *nolle prosequi* and terminate the trial. This a statutory power. *Babu Lal Chokhani* v. *Emperor*, [1937] 1 Cal. 464. Court refused bail but the executive suspended the sentence.

The State of Bihar v. *M. Homi*, [1955] 2 S.C.R. 78.

Rule 5, Order XXI, of the Supreme Court Rules represents a well-settled practice of all courts but it cannot affect the power of pardon or the exercise of prerogatives which is unfettered. The Rule postulates that there is a sentence to surrender to. Under Arts. 72, 161 the President's prerogative is not made subject to any parliamentary legislation. There is no limit to Art. 72 or Art. 161 in the Constitution express or implied, *Hari Vishnu Kamath* v. *Syed Ahmad Ishaque*, [1955] 1 S. C. R. 1104. The powers of the Court and the Executive are distinct and separate. The Executive comes in after the Court has performed its function.

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[KAPUR J.—You are talking about suspension of the sentence but can the Supreme Court suspend the sentence? We can grant bail but can we suspend the sentence?

Yes, the Supreme Court has the power to stay the execution of sentence.]

[KAPUR J.—Is the condition imposed upon Commander Nanavati illegal?]

No, nobody has said so.

The Court can say judicially that justice requires that a convicted person should remain in jail but the President can say on considerations of mercy that he should be set at liberty, *King* v. *S. S. Singh*, I.L.R. 32 Pat. 243. Power of prerogative is far wider than the judicial powers of the Court. The expression "at any time" in s. 401, Code of Criminal Procedure, recognises this principle.

[GAJENDRAGADKAR J.—Can the naval authorities keep the petitioner in naval custody? Is it legal?]

The naval authorities made no such request. The Governor ordered him to be kept in naval custody and the naval authorities did not object. There is nothing illegal about it. It was perfectly legal. The validity of the Governor's order has not been referred to this constitutional bench of the Court. There is a distinction between illegal and unlawful. Illegal is that which the law directly forbids; unlawful is that which the law does not recognise.

[SINHA C. J.—What is unlawful may become lawful by consent but what is illegal cannot become legal even by consent.]

The Governor's order should not be held to be illegal without any complaint to that effect from the parties concerned and in their absence. When the navy accepted the Governor's order it could be presumed that there was a usage, s. 3(3)(12), Navy Act. There is no section in the Navy Act which prohibits such custody.

[GAJENDRAGADKAR J.—Is this the position now that the Provost Marshall is keeping the petitioner in

his custody without any express provision of the Navy Act ?]

Section 14 of the Navy Act. There is a difference between a private person and a naval officer being detained in naval custody. Commander Nanavati is still in naval service. He cannot leave the naval service.

[SUBBA RAO J.—There are two ways of reconciling the powers of the Governor under Art. 161 and those of the Supreme Court under Arts. 142, 144, 145. One way was to say that the Supreme Court had no power when the Executive exercised its powers. The other way was to say that while both had powers, so far as pardon and remission were concerned the Executive had the exclusive power, but as far as suspension was concerned, when proceedings were pending in the Supreme Court the Executive could not make an order impinging upon the Supreme Court's power.]

But in the interest of justice the Supreme Court can pass any suitable order. The power of the Supreme Court under Art. 141 is a power generally exercisable in all cases but the Governor's power is a special power. If there is a conflict between a General power and a special power the special power should prevail although I don't admit that there is a conflict.

H. N. Sanyal, Additional Solicitor-General of India, S. M. Sikri, Advocate-General for the State of Punjab and *T. M. Sen*, for the Attorney-General of India. There is no conflict at all. The power of the Supreme Court is a judicial power; the power of the Governor is an executive power. They cannot collide at all. The Supreme Court can certainly exercise its power but let it not disregard the power of the executive. Let both the powers be harmonised.

C. B. Agarwala (Amicus Curiae)—The Supreme Court is a Court of record under Art. 129 and has the constitutional privilege of prescribing its procedure under which it will exercise its discretion vested in it under the Constitution. By Art. 145 the Supreme

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Court has the constitutional power to lay down rules imposing conditions under which alone it would entertain a special leave petition.

The material rule is made under the constitutional right given to the Supreme Court as a Court of Record and not under a law made under Art. 245. Subordinate legislation presupposes a rule made under laws enacted under Art. 245. Its analogy cannot be applied to rules under Art. 145. The fact that the rules made by the Supreme Court under Art. 145 require the approval of the President cannot convert the rules into a law made under Art. 245.

The rule in question made by the Supreme Court requires that the special leave petition is subject to the condition that the petitioner surrenders to the authority of the Supreme Court, and by passing the order in question the Governor has deprived the Supreme Court of its authority over the custody of the accused pending the special leave petition. Article 161 read with Art. 154 shows that the Governor even while exercising his constitutional powers cannot affect, modify or override the powers of the Supreme Court or the procedure prescribed by it.

After a special leave petition is made to it or when the appeal is admitted, the Supreme Court has ample jurisdiction to give relief by way of suspension of sentence under Art. 141 and the rules. Power of suspension of sentence is not exercisable by the Executive when relief can be granted by the trial Court or a competent Court of appeal.

The appropriate construction of the rule would indicate that the Governor's powers under Art. 161 operate only up to the stage when an application for special leave is made under Art. 136 and cannot interfere with the authority of the Supreme Court thereafter.

Assuming, without admitting, that the Governor could interfere with the authority and jurisdiction of the Supreme Court he could do so only if a valid order was made under Art. 161. The order under consideration being subject to an illegal condition is an illegal order. Even if, the condition is not illegal it has been

operated only by the petitioner's voluntary consent with the object of not complying with the rule of the Supreme Court. The Supreme Court will decline to exercise its discretion in favour of the petitioner who by his voluntary act put himself out of its jurisdiction.

Under Art. 144 the Governor's authority is bound to aid the court in the exercise of its jurisdiction. It is open to the petitioner to approach the Government to modify the Governor's order to enable him to comply with the procedure of the Supreme Court.

[KAPUR J.—Has the Court power to suspend a sentence? Has any court ever done so? Has any court ever ordered that the sentence will take effect after a certain period of time?]

The appellate Court has the power to suspend the sentence under Art. 142.

[SINHA C. J.—The Executive can intervene at any time during the trial.]

Yes, in the case of pardon, *The State of Bombay* v. *The United Motors (India) Ltd.*, [1953] S.C.R. 1069.

[SINHA C. J.—The argument of the petitioner is that there is no sentence in operation and therefore there is nothing to surrender to.]

There is apparently a conflict. The Court says the petitioner must surrender to his sentence. The Executive says that he need not surrender and will remain in some other custody. The Governor has extended the period of suspension till the decision of the petitioner's appeal in this Court. There is clash with the rule of this Court.

[SINHA C. J.—If the Supreme Court refused bail can the executive suspend the sentence?]

No, it cannot, in cases of suspension there is apparently a conflict. There is a distinction between pardon and suspension. Suspension stands on a different footing. Pardon can be granted at any stage but suspension of sentence can be made only after the sentence is inflicted.

H. M. Seervai in reply. Nothing in Arts. 142, 145 and ss. 411, 426, Code of Criminal Procedure, will

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supersede the powers of the Governor to grant reprieve, etc. The Code of Criminal Procedure gives the power of suspension, of bail, etc.

[KAPUR J.—Did the Federal Court have power to suspend a sentence.]

Yes, it had the power to grant bail or stay execution of sentence. The power of the Court to suspend is not absolute.

[SINHA C. J.—The Executive is bound to execute the orders of the Court.]

Yes, but if the Government, after the passing of the Court's order, itself in its own jurisdiction passes an order suspending the sentence the Executive in that case has no authority to execute the order of the Court, *United States* v. *Benz*, 75 L. Ed. 354, Hales Pleas of the Crown,—Reprieves before or after the judgment, p. 412, *Rogers* v. *Peck*, 50 L. Ed. 256—Reprieve being granted when a matter was before the Court.

1960. September 5. The Judgment of Sinha, C. J., Gajendragadkar, Subba Rao and Wanchoo, JJ., was delivered by Sinha C. J. Kapur, J., delivered a separate Judgment.

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SINHA C. J.—This matter has been placed before the Constitution Bench in rather extraordinary circumstances, as will presently appear. It involves the question as to what is the content of the power conferred on the Governor of a State under Art. 161 of the Constitution; and whether the order of the Governor of Bombay dated March 11, 1960, impinges on the judicial powers of this Court, with particular reference to its powers under Art. 142 of the Constitution.

For the determination of the constitutional issue raised in this case, it is not necessary to go into the merits of the case against the petitioner. It is only necessary to state the following facts in order to appreciate the factual background of the order of the Governor of Bombay aforesaid impugned in this case. The petitioner was Second in Command of I. N. S. Mysore, which came to Bombay in the beginning of

March 1959. On April 27, 1959, the petitioner was arrested in connection vith a charge of murder under s. 302 of the Indian Penal Code. He was produced before the Additional Chief Presidency Magistrate, Greater Bombay, in connection with that charge on April 28, 1959. The Magistrate remanded him to police custody on that day. On the following day (April 29, 1959) the Magistrate received a letter from the Flag Officer, Bombay, to the effect that he was ready and willing to take the accused in naval custody as defined in s. 3(12) of the Navy Act, 1957, in which custody he would continue to be detained under the orders of the Naval Provost Marshall in exercise of his authority under s. 89(2) and (3) of the Navy Act. Thereupon the Magistrate made the order directing that the accused should be detained in the Naval Jail and Detention Quarters in Bombay. The Magistrate has observed in his order that he had been moved under the instructions of the Government of India. The petitioner continued to remain in naval custody all along. In due course, he was placed on trial before the Sessions Judge, Greater Bombay. The trial was by a jury. The jury returned a verdict of 'not guilty' by a majority of eight to one. The learned Sessions Judge made a reference to the High Court under s. 307 of the Criminal Procedure Code, disagreeing with the verdict of the jury. The reference, being Cr. Ref. No. 159 of 1959, was heard by a Division Bench of the Bombay High Court. The High Court accepted the reference and convicted the petitioner under s. 302 of the Indian Penal Code and sentenced him to imprisonment for life, by its judgment and order dated March 11, 1960. On the same day, the Governor of Bombay passed the following order :—

"In exercise of the powers conferred on me by Article 161 of the Constitution of India, I, Shri Prakasa, Governor of Bombay, am pleased hereby to suspend the sentence passed by the High Court of Bombay on Commander K. M. Nanavati in Sessions Case No. 22 of IVth Sessions of 1959 until the appeal intended to be filed by him in the Supreme Court against his conviction and sentence is disposed of and

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subject meanwhile to the conditions that he shall be detained in the Naval Jail Custody in I. N. S. Kunjali".

In pursuance of the judgment of the High Court, a writ issued to the Sessions Judge, Greater Bombay, communicating the order of the High Court convicting and sentencing the petitioner as aforesaid. The Sessions Judge issued a warrant for the arrest of the accused and sent it to the police officer in charge of the City Sessions Court for Greater Bombay for execution. The warrant was returned unserved with the report that the warrant could not be served in view of the order set out above passed by the Governor of Bombay suspending the sentence upon the petitioner. The Sessions Judge then returned the writ together with the unexecuted warrant to the High Court.

In the meantime an application for leave to appeal to the Supreme Court was made soon after the judgment was pronounced by the High Court and the matter was fixed for hearing on March 14, 1960. On that day the matter of the unexecuted warrant was placed before the Division Bench which directed that, in view of the unusual and unprecedented situation arising out of the order of the Governor the matter should be referred to a larger Bench. Notice was accordingly issued to the State of Bombay and to the accused person. A Special Bench of five Judges of that Court heard the matter. The Special Bench premitted two Advocates, Mr. Kotwal and Mr. Pranjpe, to appear on behalf of the Western India Advocates' Association. Similarly, Mr. Peerbhoy was also permitted to appear along with Mr. Latifi on behalf of the Bombay Bar Association. They were heard as *amicus curiae* in view of the fact that the Advocate General for the State of Bombay and the counsel for accused were both sailing in the same boat, that is to say, both of them were appearing to support the order made by the Governor. In view of the great importance of the issues involved, the Court allowed those Advocates to represent the other view point. The Advocate General of Bombay as also counsel for the

accused made objections to the Court hearing the Advocates aforesaid on the ground that they had no *locus standi*. The Advocate General of Bombay also raised a preliminary objection to the hearing of the matter by the Special Bench on the ground that it had no jurisdiction to examine the validity of the action taken by the Governor, because there was no judicial proceeding then pending. The criminal reference aforesaid, to which the State and the accused were parties, had already been disposed of and none of those parties had raised any grievance or objection to the order of the Governor impugned before the Court. The Court overruled that objection in view of the fact that the writ issued by the Court had been returned unexecuted on grounds which could be examined by the Court as to the validity of the reasons for the return of the warrant unexecuted. The High Court then examined the validity of the action taken by the Governor and came to the conclusion that it had the power to examine the extent of the Governor's power under Art. 161 of the Constitution and whether it had been validly exercised in the instant case. After an elaborate examination of the questions raised before it, the Special Bench came to the conclusion that the order passed by the Governor was not invalid. It also held that the condition of the suspension of the order that the petitioner be detained in naval custody was also not unconstitutional, even though the accused could not have been detained in Naval Jail under the provisions of the Navy Act, after he had been convicted by the High Court. The Court also held negativing the contention raised on behalf of the Advocates appearing as *amicus curiae*, that the order of the Governor did not affect the power of the Supreme Court with particular reference to r. 5 of O. XXI of the Rules of the Supreme Court, which will be set out in full hereinafter. The reason for this conclusion, in the words of the High Court, is :—

"As the sentence passed upon the accused has been suspended, it is not necessary for the accused to surrender to his sentence. Order XXI, r. 5, of the

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Supreme Court Rules will not, therefore, apply in this case."

The High Court also overruled the plea of *mala fides*. In the result, the High Court held that as the order made by the Governor had not been shown to be unconstitutional or contrary to law, the warrant should not be reissued until the appeal to be filed in the Supreme Court had been disposed of, unless the order made by the Governor stands cancelled or withdrawn before that event.

The petitioner filed his petition for special leave in this Court on April 20, 1960, and also made an application on April 21, 1960, under O. XLV, rr. 2 and 5 of the Supreme Court Rules for exemption from compliance with O. XXI, r. 5, of those Rules. It was stated in the petition that, soon after his arrest, the petitioner throughout the trial before the Sessions Court and the hearing of the reference in the High Court, had been in naval custody and continued to be in that custody, that he had been throughout of good behaviour and was ready and willing to obey any order of this Court, but that the petitioner "not being a free man it was not possible for him to comply with the requirements of r. 5 of O. XXI of the Supreme Court Rules.....". He, therefore, prayed that he may be exempted from compliance with the aforesaid rule and that his petition for special leave to appeal be posted for hearing without his surrendering to his sentence. On April 25, 1960, the special leave petition along with the application for exemption aforesaid was placed before a Division Bench which passed the following order:—

"This is a petition for special leave against the order passed by the Bombay High Court on reference, convicting the petitioner under s. 302 of the Indian Penal Code and sentencing him to imprisonment for life. Along with his petition for special leave an application has been filed by the petitioner praying that he may be exempted from surrendering under O. XXI, r. 5, of the Rules of this Court. His contention in this application is that he is ready and willing to obey any order that this Court may pass but that as a result of the order passed by the Governor of Bombay

under Art. 161 of the Constitution he is not a free man to do so and that is put forward by him as an important ground in support of his plea that he may be exempted from complying with the relevant rule of this Court. This plea immediately raises an important constitutional question about the scope and extent of the powers conferred on the Governor under Art. 161 of the Constitution and that is a constitutional matter which has to be heard by a Constitution Bench of this Court. We would accordingly direct that notice of this application should be served on the Attorney-General and the State of Bombay and the papers in this application should be placed before the learned Chief Justice to enable him to direct in due course, in consultation with the parties concerned, when this application should be placed for hearing before the Constitution Bench ".

After the aforesaid order of this Court, it appears that on July 6, the petitioner swore an affidavit in Bombay to the effect that his application aforesaid for exemption from compliance with the requirements of r. 5 of O. XXI of the Rules had been made under a misapprehension of the legal position and that the true position had been indicated in the judgment of the Special Bench of the Bombay High Court to the effect that r. 5 of O. XXI of the Rules would not apply to his case in view of the Governor's order aforesaid and that, therefore, his special leave petition be directed to be listed for admission. It is apparent that this change in the petitioner's position as regards the necessity for surrender is clearly an afterthought. Certainly, it came after the Division Bench had directed the constitutional matter to be heard as a preliminary question.

That is how the matter has come before us. Before we heard the learned Advocate General of Bombay, and the learned Additional Solicitor-General on behalf of the Union of India, we enquired of Shri J. B. Dadachanji, Advocate for the petitioner, whether the petitioner was prepared to get himself released from the Governor's order in order to present himself in this

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Court so that the hearing of his special leave petition might proceed in the ordinary course, but he was not in a position to make a categorical answer and preferred to have the constitutional question determined on its merits. We had the assistance of Mr. C. B. Aggarwala, who very properly volunteered his services as *amicus curiae* to represent the other view point. In this Court also the situation was the same as in the High Court, namely, that unless there was an *amicus curiae* to represent the opposite view point, the parties represented before us were not contesting the validity of the Governor's order. Both here and in the High Court, it was at the instance of the Court itself that the matter has been placed for hearing on the preliminary question before dealing with the merits of the petitioner's case.

The learned Advocate General of Bombay has argued with his usual vehemence and clarity of expression that the power of pardon, including the lesser power of remission and suspension of a sentence etc. is of a plenary character and is unfettered; that it is to be exercised not as a matter of course, but in special circumstances requiring the intervention of the Head of the Executive; that the power could be exercised at any time after the commission of an offence; that this power being in the nature of exercise of sovereign power is vested in the Head of the State and has, in some respects, been modified by statute; that the power of pardon may be exercised unconditionally or subject to certain conditions to be imposed by the authority exercising the power; that such conditions should not be illegal or impossible of performance or against public policy. It was further argued that the power of pardon is vested in the Head of the State as an index of sovereign authority irrespective of the form of Government. Thus the President of the United States of America and Governors of States, besides, in some cases Committees, have been vested with those powers, which cannot be derogated from by a Legislature. So far as India is concerned, before the Constitution came into effect such powers have been regulated by statute, of course, subject to the power of the

Crown itself. After the Constitution, the power is contained in Art. 72 in respect of the President, and Art. 161 in respect of the Governor of a State. Articles 72 and 161 are without any words of limitation, unlike the power of the Supreme Court contained in Arts. 136, 142, 145 and other Articles of the Constitution. Hence, what was once a prerogative of the Crown has now crystallized into the common law of England and statute in India, for example, s. 401 of the Code of Criminal Procedure, or Arts. 72 and 161 of the Constitution. He particularly emphasised that the two powers, namely, the power of the Executive to grant pardon, in its comprehensive sense, and of the Judiciary are completely apart and separate and there cannot be any question of a conflict between them, because they are essentially different, the one from the other. The power of pardon is essentially an executive action. It is exercised in aid of justice and not in defiance of it. With reference to the particular question, now before us, namely, how far the exercise of the executive power of pardon contained in those two Articles of the Constitution can be said to impinge on the judicial functions of this Court, it was argued that r. 5 of O. XXI of the Rules of this Court postulates the existence of a sentence of imprisonment and, as in this case, as a result of the Governor's order, there is no such sentence running there could not be any question of the one trespassing into the field of the other. Rule 5 aforesaid of this Court represents the well-settled practice of this Court, as of other Courts, that a person convicted and sentenced to a term of imprisonment should not be permitted to be in contempt of the order of this Court, that is to say, should not be permitted to move the appellate court without surrendering to the sentence. But the petitioner is not in such contempt, because r. 5 did not apply to him. The order of sentence against him having been suspended, he is not disobeying any rule or process of this Court or of the High Court. The power of the Supreme Court to make rules is subject to two limitations, namely, (1) to any law made by Parliament and (2) the approval of the President. On the other hand,

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Arts. 72 and 161 enshrine the plenary powers of the sovereign State to grant pardon etc., and are not subject to any limitations. There could, therefore, be no conflict between these two, and if there were any conflict at all, the limited powers of the Court must yield to the unlimited powers of the Executive. As regards the condition imposed by the Governor, subject to which the sentence passed against the petitioner had been suspended, the condition was not illegal, because it did not offend against any peremptory or mandatory provisions of law. It is not the same thing to say that the condition was not authorised by law as to say that the condition was illegal, in the sense that it did what was forbidden by law. We were referred to the various provisions of the Indian Navy Act (Act LXII of 1957) to show that there were no provisions which could be said to have been contravened by the condition attached to the order of suspension by the Governor. Furthermore, the naval custody in which the petitioner continues had been submitted to by the petitioner and what has been consented to cannot be illegal, though it may not have been authorised by law. Lastly, it was contended that the observation of the High Court in the last paragraph of its judgment was entirely uncalled for, because once it is held, as was held by the High Court, that the Governor's order was not unconstitutional, it was not open to the High Court to make observations which would suggest that the Governor had exercised his power improperly. If the exercise of the power by the Governor is not subject to any conditions, and is not justiciable, it was not within the power of the High Court even to suggest that the Governor should not have passed the order in question. The learned Additional Solicitor General adopted the able arguments of the Advocate General and added that, in terms, there was no conflict between Arts. 142 and 161 of the Constitution.

Mr. C. B. Aggarwala, to whom the Court is obliged for his able assistance to the Court, argued that the exercise of the rule making power by the Supreme Court is not a mere statutory power, but is a constitutional privilege; that the Supreme Court alone could

lay down rules and conditions in accordance with which applications for special leave to appeal to the Court could be entertained; that the material rule governing the present case was made under the constitutional power of the Supreme Court under Art. 145 and that the Advocate-General was in error in describing it as subordinate legislation; that the fact that the rules made by this Court under Art. 145 of the Constitution require the approval of the President cannot convert them into rules made under a law enacted in pursuance of power conferred, either by Art. 123 or Art. 245 of the Constitution; that the underlying idea behind r. 5 of O. XXI of the Rules of this Court is to see that the petitioner to this Court or the appellant should remain under the directions of the Court; that the Governor by passing the order in question has deprived the Supreme Court of its power in respect of the custody of the convicted person; that the power under Art. 161 has to be exercised within the limits laid down by Art. 154 of the Constitution. It was also argued that the petitioner could have got his relief from this Court itself when he put in his application for special leave and that in such a situation the Executive should not have intervened. In other words, the contention was that, like the Courts of Equity, which intervened in aid of justice when law was of no avail to the litigant, the Executive also should exercise their power only where the courts have not been clothed with ample power to grant adequate relief in the particular circumstances governing the case. It was further argued that on a true construction of the provisions of the law and the Constitution, it would appear that the Governor's power extends only up to a stage and no more, that is to say, the Governor could suspend the operation of the sentence only until the Supreme Court was moved by way of special leave and then it was for the Court to grant or to refuse bail to the petitioner. Once the Court has passed an order in that respect, the Governor could not intervene so as to interfere with the orders of the Court. Alternatively, it was argued that, even assuming that an order of suspension in terms made by the Governor,

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could at all be passed during the pendency of the application for leave to appeal to this Court, such an order could be passed only by the President, and not by the Governor. In any view of the matter, it was further argued, the Governor could pass an order contemplated by Art. 161, but could not add a condition, as he did in the present case, which was an illegal condition. It was further argued that the generality of the expressions used in s. 401 of the Criminal Procedure Code has to be cut down by the specific provisions of s. 426 of that Code. In other words, when there is an appeal pending or is intended to be preferred, during that limited period, the trial court itself or the appellate court, has to exercise its judicial function in the matter of granting bail etc.; and the appropriate Government is to stay its hands during that time.

Before dealing with the main question as to what is the scope of the power conferred upon the Governor by Art. 161 of the Constitution, it will be convenient to review in a general way the law of pardon in the background of which the controversy has to be determined. Pardon is one of the many prerogatives which have been recognised since time immemorial as being vested in the sovereign, wherever the sovereignty might lie. Whether the sovereign happened to be an absolute monarch or a popular republic or a constitutional king or queen, sovereignty has always been associated with the source of power—the power to appoint or dismiss public servants, the power to declare war and conclude peace, the power to legislate and the power to adjudicate upon all kinds of disputes. The King, using the term in a most comprehensive sense, has been the symbol of the sovereignty of the State from whom emanate all power, authority and jurisdictions. As kingship was supposed to be of divine origin, an absolute king had no difficulty in proclaiming and enforcing his divine right to govern, which includes the right to rule, to administer and to dispense justice. It is a historical fact that it was this claim of divine right of kings that brought the Stuart Kings of England in conflict with Parliament as the

spokesman of the people. We know that as a result of this struggle between the King, as embodiment of absolute power in all respects, and Parliament, as the champion of popular liberty, ultimately emerged the constitutional head of the Government in the person of the King who, in theory, wields all the power, but, in practice, laws are enacted by Parliament, the executive power vests in members of the Government, collectively called the Cabinet, and judicial power is vested in a Judiciary appointed by the Government in the name of His Majesty. Thus, in theory, His Majesty or Her Majesty continues to appoint the Judges of the higest courts, the members of the Government and the public servants, who hold office during the pleasure of the sovereign. As a result of historical processes emerged a clear cut division of governmental functions into executive, legislative and judicial. Thus was established the "Rule of Law" which has been the pride of Great Britain and which was highlighted by Prof. Dicey. The Rule of Law, in contradistinction to the rule of man, includes within its wide connotation the absence of arbitrary power, submission to the ordinary law of the land, and the equal protection of the laws. As a result of the historical process aforesaid, the absolute and arbitrary power of the monarch came to be canalised into three distinct wings of the Government. There has been a progressive increase in the power, authority and jurisdiction of the three wings of the Government and a corresponding diminution of absolute and arbitrary power of the King. It may, therefore, be said that the prerogatives of the Crown in England, which were wide and varied, have been progressively curtailed with a corresponding increase in the power, authority and jurisdiction of the three wings of Government, so much so that most of the prerogatives of the Crown, though in theory they have continued to be vested in it, are now exercised in his name by the Executive, the Legislature and the Judiciary. This dispersal of the Sovereign's absolute power amongst the three wings of Government has now

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become the norm of division of power; and the prerogative is no greater than what the law allows. In the celebrated decision of the House of Lords in the case of *Attorney General* v. *De Keyser's Royal Hotel, Limited* (1) which involved the right of the Crown by virtue of its prerogative, to take possession of private property for administrative purposes in connection with the defence of the realm, it was held by the House of Lords that the Crown was not entitled by virtue of its prerogative or under any statute, to take possession of property belonging to a citizen for the purposes aforesaid, without paying compensation for use and occupation.

It was argued by Sir John Simon, K. C., for the respondents that:—

"The prerogative has been defined by a learned author as 'the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown'. It is the ultimate resource of the executive, and when there exists a statutory provision covering precisely the same ground there is no longer any room for the exercise of the Royal Prerogative. It has been taken away by necessary implication because the two rights cannot live together". (See p. 518 of the Report).

This argument on behalf of the respondents appears to have been accepted by Lord Dunedin, who delivered the leading opinion of the House in these terms:—

"The prerogative is defined by a learned constitutional writer as 'the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown'. Inasmuch as the Crown is a party to every Act of Parliament it is logical enough to consider that when the Act deals with something which before the Act could be effected by the prerogative, and specially empowers the Crown to do the same thing, but subject to conditions, the Crown assents to that, and by that Act, to the prerogative being curtailed". (See p. 526 of the Report).

This position has been recognised in Halsbury's Laws

(1) [1920] A.C. 508.

of England, Volume 7, Third Edition, at p. 221, in these words:—

"The prerogative is thus created and limited by the common law, and the Sovereign can claim no prerogatives except such as the law allows, nor such as are contrary to Magna Carta, or any other statute, or to the liberties of the subject.

The courts have jurisdiction, therefore, to inquire into the existence or extent of any alleged prerogative.....".

We have thus briefly set out the history of the genesis and development of the Royal Prerogative of Mercy because Mr. Seervai has strongly emphasised that the Royal Prerogative of Mercy is wide and absolute, and can be exercised at any time. Very elaborate arguments were addressed by him before us on this aspect of the matter and several English and American decisions were cited. In so far as his argument was that the power to suspend the sentence is a part of the larger power of granting pardon it may be relevant to consider incidentally the scope and extent of the said larger power; but, as we shall presently point out, the controversy raised by the present petition lies within a very narrow compass; and so concentration on the wide and absolute character of the power to grant pardon and over-emphasis on judicial decisions which deal directly with the said question would not be very helpful for our present purpose. In fact we apprehend that entering into an elaborate discussion about the scope and effect of the said larger power, in the light of relevant judicial decisions, is likely to create confusion and to distract attention from the essential features of the very narrow point that falls to be considered in the present case. That is why we do not propose to enter into a discussion of the said topic or to refer to the several decisions cited under that topic.

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

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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 s. 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 Arts. 72 and 161. Article 72 deals with the power of 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 have continued with necessary modifications to bring them into line with Arts. 72 and 161. It will be seen, however, that Arts. 72 and 161 not only deal with pardons and reprieves which were within the royal prerogative but have also included what is provided in ss. 401 and 402 of the Code. Besides the general power, there is also provision in ss. 337 and 338 of the Code to tender pardon to an accomplice under certain conditions.

In this case we are primarily concerned with the extent of the power of pardon vested in the State so far as the Governor is concerned by Art. 161 of the Constitution. Article 161 is in these terms:—

"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."

Though Art. 161 does not make any reference to Art. 72 of the Constitution, the power of the Governor of a State to grant pardon etc. to some extent overlaps the same power of the President, particularly in the case of a sentence of death. Articles 72 and 161 are in very general terms. It is, therefore, argued that they are not subject to any limitations and the respective area of exercise of power under these two Articles is indicated separately in respect of the President and of the Governor of a State. It is further argued that the exercise of power under these two Articles is not fettered by the provisions of Arts. 142 and 145 of the Constitution or by any other law. Article 142(1) is in these terms:—

"The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe."

It will be seen that it consists of two parts. The first part gives power to this Court in the exercise of its jurisdiction to pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it. The second part deals with the enforcement of the order passed by this Court. Article 145 gives power to this Court with the approval of the President to make rules for regulating generally the practice and procedure of the Court. It is obvious that the rules made under Art. 145 are in aid of the power given to this Court under Art. 142 to pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it. Rule 5 of O. XXI of the Rules of this Court was framed under Art. 145 and is in these terms:—

"Where the petitioner has been sentenced to a

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term of imprisonment, the petition shall state whether the petitioner has surrendered. Unless the Court otherwise orders, the petition shall not be posted for hearing until the petitioner has surrendered to his sentence."

This rule was, in terms, introduced into the Supreme Court Rules last year and it only crystallized the pre-existing practice of this Court, which is also the practice in the High Courts. That practice is based on the very sound principle which was recognised long ago by the Full Bench of the High Court of Judicature, North Western Provinces, in 1870, in the case of *The Queen* v. *Bisheshar Pershad* (1). In that case no order of conviction had been passed. Only a warrant had been issued against the accused and as the warrant had been returned unserved a proclamation had been issued and attachment of the property of the accused had been ordered, with a view to compelling him to surrender. The validity of the warrant had been challenged before the High Court. The High Court refused to entertain his petition until he had surrendered because he was deemed to be in contempt of a lawfully constituted authority. The accused person in pursuance of the order of the High Court surrendered and after he had surrendered, the matter was dealt with by the High Court on its merits. But as observed above the Rules framed under Art. 145 are only in aid of the powers of this Court under Art. 142 and the main question that falls for consideration is, whether the order of suspension passed by the Governor under Art. 161 could operate when this Court had been moved for granting special leave to appeal from the judgment and order of the High Court. As soon as the petitioner put in a petition for special leave to appeal the matter became *sub judice* in this Court. This Court under its Rules could insist upon the petitioner surrendering to his sentence as a condition precedent to his being heard by this Court, though this Court could dispense with and in a proper case could exempt him from the operation of that rule. It is not disputed that this Court has the power to stay the execution of the sentence and to grant bail pending the

(1) Vol. 2, N.W.P. High Court Reports, p. 441.

disposal of the application for special leave to appeal. Rule 28 of O. XXI of the Rules does not cover that period, but even so the power of the Court under Art. 142 of the Constitution to make such order as is necessary for doing complete justice in this case was not disputed and it would be open to this Court even while an application for special leave is pending to grant bail under the powers it has under Art. 142 to pass any order in any matter which is necessary for doing complete justice.

But it has been argued that, even as the terms of Art. 161 are without any limitation, the provisions of s. 401 of the Code of Criminal Procedure are also in similarly wide terms, and do not admit of any limitations or fetters on the power of the Governor; the Governor could, therefore, suspend the execution of the sentence passed by the High Court even during the period that the matter was pending in this Court. In other words, the same power of dealing with the matter of suspension of sentence is vested both in this Court as also in the Governor.

This immediately raises the question of the extent of the power under s. 401 of the Code with respect to suspension as compared with the powers of the Court under s. 426, which enables the Court pending appeal to suspend the sentence or to release the appellant on bail. It will be seen from the language of s. 426 of the Code of Criminal Procedure dealing with the power of the appellate court that, for reasons to be recorded in writing, the court may order that the execution of the sentence be suspended or that if the accused is in confinement he may be released on bail or on his own bond. Section 401 occurs in Chapter XXIX, headed "Of suspensions, remissions and commutations of sentences". This Chapter, therefore, does not deal with all the powers vested in the Governor under Art. 161 of the Constitution, but only with some of them. Section 426 is in Chapter XXXI, headed as "Of appeal, reference and revision". Section 426, therefore, deals specifically with a situation in which an appeal is pending and the appellate court has seisin of the case and is thus entitled to pass such orders as

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it thinks fit and proper to suspend a sentence. It will thus be seen that whereas Chapter XXIX, in which s. 401 occurs, deals with a situation in which pendency of an appeal is not envisaged, s. 426 deals with a situation in which pendency of an appeal is postulated. In other words, Chapter XXIX deals with persons sentenced to punishment for an offence simpliciter in general terms, whereas s. 426 deals with a special case and therefore must be out of the operation of s. 401. But it has been vehemently argued by the learned Advocate General that the words "at any time" indicate that the power conferred by s. 401 may be exercised without any limitation of time. In the context of s. 401 "any time" can only mean after conviction. It cannot mean before conviction, because there cannot be any sentence before conviction. The question then is: "Does it cover the entire period after the order of conviction and sentence even when an appeal is pending in the appellate court and s. 426 can be availed of by the appellant?"

It will be seen that s. 426 is as unfettered by other provisions of the Code as s. 401 with this difference that powers under s. 426 can only be exercised by an appellate court pending an appeal. When both the provisions are thus unfettered, they have to be harmonised so that there may be no conflict between them. They can be harmonised without any difficulty, if s. 426 is held to deal with a special case restricted to the period while the appeal is pending before an appellate court while s. 401 deals with the remainder of the period after conviction. We see no difficulty in adopting this interpretation nor is there any diminution of powers conferred on the executive by s. 401 by this interpretation. The words "at any time" emphasise that the power under s. 401 can be exercised without limit of time, but they do not necessarily lead to the inference that this power can also be exercised while the court is seized of the same matter under s. 426.

Turning now to Arts. 142 and 161, the argument of Mr. Seervai is that though this Court has the power to suspend sentence or grant bail pending hearing of the

special leave petition, that would not affect the power of the executive to grant a pardon, using the term in its comprehensive sense, as indicated above. Reference was in this connection made to *Balmukand and others* v. *The King Emperor* (1). That was a case where a convicted person had moved His Majesty in Council for special leave to appeal and the question arose as to the power of the executive to suspend the sentence. In that connection Lord Haldane, L. C., made the following observations:—

"With regard to staying execution of the sentence of death, their Lordships are unable to interfere. As they have often said, this Board is not a Court of Criminal Appeal. The tendering of advice to His Majesty as to the exercise of his prerogative of pardon is a matter for the Executive Government and is outside their Lordships' province. It is, of course, open to the petitioners' advisers to notify the Government of India that an appeal to this Board is pending. The Government of India will no doubt give due weight to the fact and consider the circumstances. But their Lordships do not think it right to express any opinion as to whether the sentence ought to be suspended".

These observations were made because the Judicial Committee of the Privy Council, unlike the Supreme Court, was not a Court of criminal appeal and therefore the question of suspending the operation of the sentence of death was not within their judicial purview. The granting of special leave by the Privy Council was an example of the residuary power of the Sovereign to exercise his judicial functions by way of his prerogative and therefore the petitioner was left free in that case to approach the Government of India, as the delegate of the Sovereign, to exercise the prerogative power in view of the circumstance that an appeal to the Privy Council was intended. The footnote to the Report also contains the following:

"The petitioners were reprieved by the Government of India pending the hearing of the petition for leave to appeal". (see p. 134).

(1) (1915) 42 I.A. 133.

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It is noteworthy that the reprieve granted in that case covered only the period until the grant or refusal of the petition for leave to appeal and did not go further so as to cover the period of pendency of the appeal to the Privy Council, unlike the order now impugned in this case. The power which was vested in the Crown to grant special leave to appeal to convicted persons from India has now been conferred on this Court under Art. 136. The power under Art. 136 can be exercised in respect of " any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India ". This wide and comprehensive power in respect of any determination by any court or tribunal must carry with it the power to pass orders incidental or ancillary to the exercise of that power. Hence the wide powers given to this Court under Art. 142 " to make such order as is necessary for doing complete justice in any cause or matter pending before it ". As already indicated, the power of this Court to pass an order of suspension of sentence or to grant bail pending the disposal of the application for special leave to appeal has not been disputed and could not have been disputed keeping in view the very wide terms in which Art. 142 is worded. When an application for special leave to appeal from a judgment and order of conviction and sentence passed by a High Court is made, this Court has been issuing orders of interim bail pending the hearing and disposal of the application for special leave as also during the pendency of the appeal to this Court after special leave has been granted. So if Mr. Seervai's argument is correct that the pendency of a special leave application in this Court makes no difference to the exercise of the power by the executive under Art. 161, then both the judiciary and the executive have to function in the same field at the same time. Mr. Seervai however contended that there could never be a conflict between the exercise of the power by the Governor under Art. 161 and by this Court under Art. 142 because the power under Art. 161 is executive power and the power under Art. 142 is judicial power

and the two do not act in the same field. That in our opinion is over-simplification of the matter. It is true that the power under Art. 161 is exercised by the executive while the power under Art. 142 is that of the judiciary; but merely because one power is executive and the other is judicial, it does not follow that they can never be exercised in the same field. The field in which the power is exercised does not depend upon the authority exercising the power but upon the subject-matter. What is the power which is being exercised in this case? The power is being exercised by the executive to suspend the sentence; that power can be exercised by this Court under Art. 142. The field in which the power is being exercised is also the same, namely, the suspension of the sentence passed upon a convicted person. It is significant that the Governor's power has been exercised in the present case by reference to the appeal which the petitioner intended to file in this Court. There can therefore be no doubt that the judicial power under Art. 142 and the Executive power under Art. 161 can within certain narrow limits be exercised in the same field. The question that immediately arises is one of harmonious construction of two provisions of the Constitution, as one is not made subject to the other by specific words in the Constitution itself. As already pointed out, Art. 161 contains no words of limitation; in the same way, Art. 142 contains no words of limitation and in the fields covered by them they are unfettered. But if there is any field which is common to both, the principle of harmonious construction will have to be adopted in order to avoid conflict between the two powers. It will be seen that the ambit of Art. 161 is very much wider and it is only in a very narrow field that the power contained in Art. 161 is also contained in Art. 142, namely, the power of suspension of sentence during the period when the matter is *sub-judice* in this Court. Therefore on the principle of harmonious construction and to avoid a conflict between the two powers it must be held that Art. 161 does not deal with the suspension of sentence during the time that

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Art. 142 is in operation and the matter is *sub-judice* in this Court.

In this connection it is well to contrast the language of s. 209(3) and s. 295(2) of the Government of India Act, 1935. Section 209(3) gave power to the Federal Court to order a stay of execution in any case under appeal to the Court, pending the hearing of the appeal. Section 295(2) provided that nothing in this Act shall derogate from the right of His Majesty, or of the Governor General if any such right is delegated to him by His Majesty, to grant pardons, reprieves, respites or remissions of punishments. It may have been possible to argue on the language of s. 295(2) that the prerogative exercised by His Majesty transcended the power of the Federal Court under s. 209(3); but when we compare the language of Arts. 72 and 161 with the language of s. 295(2) of the Government of India Act, we find no words like "Nothing in this Constitution" or "Notwithstanding anything contained in this Constitution" in them. Such words have been used in many articles of the Constitution: (See for example, Art. 262(2) which provides specifically for taking away by Parliament by law the power of this Court in disputes relating to water and begins with words "Notwithstanding anything in this Constitution"). The absence therefore of any such qualifying words in Art. 161 makes the power of this Court under Art. 142 of the same wide amplitude within its sphere as the power conferred on the Governor under Art. 161. Therefore if there is any field where the two powers can be exercised simultaneously the principle of harmonious construction has to be resorted to in order that there may not be any conflict between them. On that principle the power under Art. 142 which operates in a very small part of the field in which the power under Art. 161 operates, namely, the suspension and execution of sentence during the period when any matter is *sub-judice* in this Court, must be held not to be included in the wider power conferred under Art. 161.

In this connection Mr. Seervai drew our attention to the power of *nolle prosequi*. It may be mentioned

that that power is not analogous to the power of pardon though its exercise may result in a case in a court coming to an end. Similar powers are contained in ss. 333 and 494 of the Code of Criminal Procedure. The fact that the Advocate General in the one case and the Public Prosecutor in the other can bring a prosecution to an end has in our opinion no bearing on the question raised in the present case. In any case action under s. 333 of the Code results in a discharge only and may leave it open, for example, to a private party to bring a complaint in the proper court unless the presiding judge directs that the discharge shall amount to an acquittal. Under s. 494 the withdrawal of a case can only take place with the consent of the Court. In any case these proceedings being not in the nature of pardon or suspension or remission or commutation of sentence have no bearing on the question before us.

In the present case, the question is limited to the exercise by the Governor of his powers under Art. 161 of the Constitution suspending the sentence during the pendency of the special leave petition and the appeal to this Court; and the controversy has narrowed down to whether for the period when this Court is in seizin of the case the Governor could pass the impugned order, having the effect of suspending the sentence during that period. There can be no doubt that it is open to the Governor to grant a full pardon at any time even during the pendency of the case in this Court in exercise of what is ordinarily called " mercy jurisdiction ". Such a pardon after the accused person has been convicted by the Court has the effect of completely absolving him from all punishment or disqualification attaching to a conviction for a criminal offence. That power is essentially vested in the head of the Executive, because the judiciary has no such 'mercy jurisdiction'. But the suspension of the sentence for the period when this Court is in seizin of the case could have been granted by this Court itself. If in respect of the same period the Governor also has power to suspend the sentence, it would mean that both the judiciary and the executive would be

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functioning in the same field at the same time leading to the possibility of conflict of jurisdiction. Such a conflict was not and could not have been intended by the makers of the Constitution. But it was contended by Mr. Seervai that the words of the Constitution, namely, Art. 161 do not warrant the conclusion that the power was in any way limited or fettered. In our opinion there is a fallacy in the argument in so far as it postulates what has to be established, namely, that the Governor's power was absolute and not fettered in any way. So long as the judiciary has the power to pass a particular order in a pending case to that extent the power of the Executive is limited in view of the words either of ss. 401 and 426 of the Code of Criminal Procedure and Arts. 142 and 161 of the Constitution. If that is the correct intepretation to be put on these provisions in order to harmonise them it would follow that what is covered in Art. 142 is not covered by Art. 161 and similarly what is covered by s. 426 is not covered by s. 401. On that interpretation Mr. Seervai would be right in his contention that there is no conflict between the prerogative power of the sovereign state to grant pardon and the power of the courts to deal with a pending case judicially.

In this connection it may be relevant to deal with another argument urged by Mr. Seervai in respect of the rule framed by this Court under O. 21, r. 5. He contended that Art. 145 under which rules have been framed by this Court is in terms subject to the provisions of any law made by Parliament, and he also emphasised the fact that before the rules can come into force they have to obtain the approval of the President. In other words, the argument is that the rule-making power of this Court is no more than subordinate legislation, and so if there is a conflict between O. 21, r. 5 and Art. 161 the rule must yield to the powers conferred on the Governor by Art. 161. This argument overlooks the fact that in substance and effect the conflict is not between the said rule and Art. 161 but between the wide powers conferred on this Court by Art. 142 and similar wide powers conferred on the Governor under Art. 161. It would,

therefore, be fallacious to suggest that compliance with the rule would become unnecessary because a higher power under Art. 161 has been exercised by the Governor, and so in the face of the order passed by the Governor there is no longer any need to comply with the rule. We have already referred to the genesis of this rule and we have pointed out that though the rule may have been framed under Art. 145 the source of the power of this Court to grant bail or to suspend sentence pending hearing of any criminal matter before it is not the said rule nor Art. 145 but Art. 142; that being so, what we have to decide in the present case is whether having regard to the width and amplitude of the powers conferred on this Court and the Governor by Arts. 142 and 161 respectively it would not be reasonable and proper to harmonise the said two articles in such a way as to avoid any conflict between the said two powers. In the decision of this question the legal character of the rules that may be framed under Art. 145 cannot have any material bearing.

In this connection it would be relevant to consider what would be the logical consequence if Mr. Seervai's argument is accepted. In the present case the Governor's order has been passed even before the petitioner's application for special leave came to be heard by this Court; indeed it was passed before the said application was filed and the reason for passing the order is stated to be that the petitioner intended to file an appeal before this Court. Let us, however, take a case where an application for special leave has been filed in this Court, and on a motion made by the petitioner the Court has directed him to be released on bail on executing a personal bond of Rs. 10,000 and on furnishing two sureties of like amount. According to Mr. Seervai, even if such an order is passed by this Court in a criminal matter pending before it, it would be open to the petitioner to move the Governor for suspension of his sentence pending the hearing of his application and appeal before this Court and the Governor may, in a proper case, unconditionally suspend the sentence. In other words, Mr.

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Seervai frankly conceded that, even in a pending criminal matter before this Court, an order passed by this Court may in effect be set aside by the Governor by ordering an unconditional suspension of the sentence imposed on the petitioner concerned. This illustration clearly brings out the nature of the controversy which we are called upon to decide in this case. If Mr. Seervai's argument is accepted it would inevitably mean that by exercising his power under Art. 161 the Governor can effectively interfere with an order passed in the same matter by this Court in exercise of its powers under Art. 142. It is obvious that the field on which both the powers are operating is exactly the same. Should the sentence passed against an accused person be suspended during the hearing of an appeal on the ground that an appeal is pending? That is the question raised both before this Court and before the Governor. In such a case it would be idle to suggest that the field on which the power of the Governor under Art. 161 can be exercised is different from the field on which the power of this Court can be exercised under Art. 142. The fact that the powers invoked are different in character, one judicial and the other executive, would not change the nature of the field or affect its identity. We have given our anxious consideration to the problem raised for our decision in the present case and we feel no hesitation in taking the view that any possible conflict in exercise of the said two powers can be reasonably and properly avoided by adopting a harmonious rule of construction. Avoidance of such a possible conflict will incidentally prevent any invasion of the rule of law which is the very foundation of our Constitution.

It has been strenuously urged before us that the power of granting pardon is wide and absolute and can be exercised at any time, that is to say, it can be exercised even in respect of criminal matters which are *sub judice*; and the argument is that the power to suspend sentence is part of the larger power to grant pardon, and is similar in character and can be similarly exercised. This argument is fallacious; it ignores

the essential difference between the general power to grant pardon etc., and the power to suspend sentence in criminal matters pending before this Court. The first is an exclusively executive power vesting in the Governor under Art. 161; it does not vest in this Court; and so the field covered by it is exclusively subject to the exercise of the said executive power; and so there can be no question of any conflict in such a case; conflict of powers obviously postulates the existence of the same or similar power in two authorities; on the other hand, the latter power vests both in this Court and the Governor, and so the field covered by the said power entrusted to this Court under Art. 142 can also be covered by the executive power of the Governor under Art. 161, and that raises the problem of a possible conflict between the two powers. That is why we have observed earlier that concentration or even undue emphasis on the character and sweep of the larger power to grant pardon is likely to distract attention from the essential features of the power to suspend sentence with which alone we are concerned in the present proceedings.

As a result of these considerations we have come to the conclusion that the order of the Governor granting suspension of the sentence could only operate until the matter became *sub judice* in this Court on the filing of the petition for special leave to appeal. After the filing of such a petition this Court was seized of the case which would be dealt with by it in accordance with law. It would then be for this Court, when moved in that behalf, either to apply r. 5 of O. XXI or to exempt the petitioner from the operation of that rule. It would be for this Court to pass such orders as it thought fit as to whether the petitioner should be granted bail or should surrender to his sentence or to pass such other or further orders as this Court might deem fit in all the circumstances of the case. It follows from what has been said that the Governor had no power to grant the suspension of sentence for the period during which the matter was *sub judice* in this Court.

A great deal of argument was addressed to us as to

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whether the condition imposed by the Governor in his order impugned in this case was or was not legal. In the view we have taken of the Governor's power, so far as the relevant period is concerned, namely, after the case became *sub judice* in this Court, it is not necessary to pronounce upon that aspect of the controversy.

In the result the application dated April 21, 1960, as amended by the affidavit of July 6, 1960, praying that the special leave petition be listed for hearing without requiring the petitioner to surrender in view of the order of the Governor fails and is dismissed.

Kapur J.

KAPUR J.—I have had the advantage of reading the Order proposed by my Lord the Chief Justice, but I regret I am unable to agree with it and I proceed to give my reasons:

In this petition which is brought for exemption from surrender to the sentence imposed on the petitioner a question of great constitutional importance arises. The petitioner submits that his sentence having been suspended by the order of the Governor of the erstwhile State of Bombay, the rule made by this Court as to surrender which is a condition precedent to the hearing of a petition for leave to appeal against the judgment of the High Court is inapplicable to him and that it is a fit case in which he should be exempted from the operation of the rule. The facts which have given rise to this petition are set out in the order of my Lord the Chief Justice and need not be repeated here.

The decision of this petition depends upon the nature, effect, extent and operation of the powers conferred by arts. 142(1), 145 and 161 of the Constitution; how they are to be construed and how and to what extent, if any, they are in conflict or in accord with each other. It will be necessary to delve into the history of the prerogative of pardons in England and America and see how far the law laid down by courts of those countries and the practice there followed is helpful in discovering the true intent and purpose of these articles of the Constitution.

Under the Indian Constitution the power to grant pardons is vested in the President and the Governors of States. Article 72 deals with the former and art. 161 with the latter. Article 72 which is in Part V, Chapter I, dealing with the Union Executive provides :—

Art. 72. (1) " The President shall have the power to grant pardons, reprieves, respites or remission 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 ".

Article 161 which is in Part VI is as follows :—

" 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 ".

Article 142(1) is as under :—

" The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it ".

Both articles 72 and 161 give the widest power to the President or the Governor of a State as the case may be and there are no words of limitation indicated in either of the two articles. It was argued that under arts. 142 and 145(1) of the Constitution certain powers are conferred on the Supreme Court and if the articles conferring powers on the President and the Governors are read along with the power given to the Supreme

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Court they create a conflict and therefore to give a harmonious interpretation to all the four articles it is necessary to cut down the amplitude of the powers conferred by arts. 72 and 161 of the Constitution. In regard to suspension of sentences it will be fruitful to trace the legislative history of the relevant powers of the executive and the judiciary which arise for construction.

In the Criminal Procedure Code of 1861 (Act XXV of 1861) the power of the executive was confined to remission of punishments and was contained in s. 54 which was as under :—

S. 54. "When any person has been sentenced to punishment for an offence, the Governor General of India in Council, or the local Government, may, at any time, without conditions, or upon any condition which such person shall accept, remit the whole or any part of the punishment to which he shall have been sentenced".

This section was in Chapter III dealing with "Preliminary Rules" which included among other things passing of sentences, the place of confinement of persons convicted and the power of remission of sentences by the Governor General. In Chapter XXX dealing with appeals by s. 421 the appellate court was given the power to suspend sentences pending appeals and release which was in the following terms :—

S. 421. "In any case in which an appeal is allowed, the Appellate Court may, pending the appeal, order that the sentence be suspended, and if the appellant be in confinement for an offence which is bailable, may order that he be released on bail".

Then came the Criminal Procedure Code of 1872, Act X of 1872. In Chapter XXIII dealing with execution of sentences the power of the executive to remit punishment was contained in s. 322 which read as under :—

S. 322. "When any person has been sentenced to punishment for an offence, the Governor General of India in Council, or the Local Government, may at any time, without conditions, or upon any conditions which the person sentenced accepts, remit the

whole or any part of the punishment to which he has been sentenced.....".

And the power of suspension of sentence pending appeals and release and bail was contained in s. 281, a section in Chapter XX dealing with appeals which was in the following terms :—

S. 281. "In any case in which an appeal is allowed, the Appellate Court may, pending the appeal, order that the sentence be suspended, and, if the appellant be in confinement for an offence which is bailable, may order that he be released on bail.

The period during which the sentence is suspended shall be omitted in reckoning the completion of the punishment ".

The Criminal Procedure Code was re-enacted in 1882 being Act X of 1882. The power to suspend or remit sentences was contained in a separate chapter, viz., Chapter XXIX headed "Suspensions, Remissions and Commutations of Sentences". The relevant provision was s. 401 :—

S. 401. "When any person has been sentenced to punishment for an offence, the Governor General in Council, or the Local 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.

.....

.....

Nothing herein contained shall be deemed to interfere with the right of Her Majesty to grant pardons, reprieves, respites, or remissions of punishment".

The power of the appellate courts as to suspension of sentences pending appeals was given in s. 426 which was in Chapter XXXI dealing with appeals and that section was as follows :—

"426. Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing order that the execution of the sentence or order appealed against be suspended

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and, if he is in confinement, that he be released on bail or on his own bond.

The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of any appeal by a convicted person to a Court subordinate thereto.

When the appellant is ultimately sentenced to imprisonment, penal servitude or transportation, the time during which he is so released shall be excluded in computing the term for which he is so sentenced".

A new Criminal Procedure Code was enacted in 1898, a portion of which was subsequently amended. The section dealing with powers of suspension or remission of sentence is 401 which reads as under :—

"401. (1) When any person has been sentenced to punishment for an offence, the Governor General in Council or the local 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.....
.....".

The original sub-section (5) of this section was :

"(5) Nothing herein contained shall be deemed to interfere with the right of His Majesty or of the Central Government when such right is delegated to it to grant pardons, reprieves, respites or remissions of punishment".

And this sub-section was repealed by the Adaptation of Laws Order, 1950. The words Governor General in Council or the Local Government were suitably amended with the various constitutional changes.

The corresponding section of appellate courts is contained in s. 426 which is in Chapter XXXI dealing with appeals etc. The relevant portions of this section when quoted are as under :—

"426. (1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail or on his own bond.

.....

.....

(2) (B) Where a High Court is satisfied that a convicted person has been granted special leave to appeal to the Supreme Court against any sentence which the High Court has imposed or maintained, the High Court may, if it so thinks fit, order that pending the appeal the sentence or order appealed against be suspended, and also, if such person is in confinement, that he be released on bail". (This sub-section was added later).

It may be mentioned that in the Code of 1861 the power given to the Governor General was to remit punishment to which an accused person was sentenced and the power of the appellate court was to suspend the sentence pending appeal in non-bailable offences and to release on bail in bailable cases. In the Code of 1872 also the power of the Governor General and of the local Government was one of remission of punishment and the power of the appellate court was of suspension of sentences pending the appeal. In s. 401 of the Act of 1882 the legislature chose to use the words "suspension of the execution of a sentence or remit the whole or any part of punishment". The power was discretionary and there is nothing to indicate that this power was in any way limited. But the power given to the appellate court was differently worded from what was in the previous Codes in that now it was necessary for the Courts to record reasons emphasising that the two powers—the one exercised by the executive and the other exercised by the judiciary—were two separate powers, no doubt, operating for the same purpose but exercised on different considerations and in different circumstances. Of course this does not mean that the courts did not exercise their power judicially previous to the Act of 1882.

In the Act of 1898 also, which is still the law, the same power of suspension of the execution of sentences or remission of punishments is mentioned in s. 401 and in s. 426 giving the powers of the appellate courts the words "for reasons to be recorded in writing" are repeated showing that the legislature wanted to make

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it clear about the essential difference in the nature of the exercise of the power conferred on the executive and on the judiciary. The words "at any time" in s. 401 are very wide and show the plenary nature of the power.

In the Government of India Acts previous to the Act of 1935 nothing was said about the power of the Crown or the power of the Governor General as a delegate of the Crown, and it cannot be said that the Indian legislature, whatever its powers, could affect the King's prerogative and therefore any provision in the Criminal Procedure Code was wholly impuissant as to the King's prerogative of pardons. See *Henrietta Muir Edwards* v. *Attorney General of Canada* (1). Provisions such as s. 401(5) are by way of abundant caution.

Section 295 of the Constitution Act of 1935 was a special provision as to the power of the executive to suspend, remit or commute a sentence of death. Sub-section (1) of that section provided that the power of the Governor General in his discretion were the same as were vested in the Governor General in Council immediately before the commencement of Part III of that Act but save as that no authority in India outside a province had any power to suspend, remit or commute the sentence of any person convicted in a province. Sub-section (2) was a saving clause and it provided :—

S. 295. (2) "Nothing in this Act shall derogate from the right of His Majesty, or of the Governor General, if any such right is delegated to him by His Majesty, to grant pardons, reprieves, respites or remissions of punishment."

Thus the power of the King or of the Governor General as a delegate to grant suspension remission or commutations remained unaffected by the introduction of a federal system with division of subjects between the Centre and the Provinces. This section was in the part dealing with the provisions as to certain legal matters. Thus under the Government of India Act the Governor General in his discretion had the power

(1) [1930] A.C. 124, 136.

to remit etc. sentences of death and Governors of provinces had the power in regard to all sentences passed in a province but the power of the King and of the Governor General as a delegate remained unaffected by the first sub-section of the section. Thus upto the coming into force of the Constitution the exercise of the King's prerogative remained unaffected, was plenary, unfettered and exercisable as hitherto.

Historically in England the King as the autocratic head of the Government always had the power to pardon.

This was a part "of that special pre-eminence which the King hath over and above all other persons and out of the ordinary course of the common law, in right of his royal dignity". Bl. Comm. (i). 239.

A pardon is said by Lord Coke to be a "work of mercy; whereby the King, either before attainder, sentence or conviction or after forgiveth any crime, offence, punishment, execution, right, title, debt or duty, temporal or ecclesiastical". 3 Inst. 233.

The common law is thus stated in Hale's Pleas of the Crown, Vol. 2, Chapter 58, page 412:

"Reprieves or stays of judgment or execution are of three kinds, viz.:

1. *Ex mandate regis.*

2. *Ex arbitrio judicis.* Sometimes the judge reprieves before judgment, as where he is not satisfied with the verdict, or the evidence is uncertain, or the indictment insufficient or doubtful whether within clergy; and sometimes after judgment, if it be a small felony, the out of clergy, or in order to a pardon or transportation. Prompt. Just 22b, and these arbitrary reprieves may be granted or taken off by the justices of gaol delivery, also their sessions be adjourned or finished, and this by reason of common usage, 2 Dyer, 205a, 73 Eng. Reprint, 452.

3. *Ex necessitate legis.* Which is in case of pregnancy, where a woman is convict of felony or treason". Blackstone thus expresses this prerogative:

"The only other remaining ways of avoiding the execution of the judgment are by a reprieve or a pardon; whereof the former is temporary only, the latter permanent.

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1. A reprieve (from reprendre, to take back) is the withdrawing of a sentence for an interval of time; whereby the execution is suspended. This may be, first ex arbitrio judicis; either before or after judgment; as where the judge is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient, or he is doubtful whether the offence be within clergy or sometime if it be a small felony, or any favourable circumstances appear in the criminal's character, in order to give room to apply to the Crown for either an absolute or conditional pardon. These arbitrary reprieves may be granted or taken off by the justices of gaol delivery, although their session be finished, and their commission expired; but this rather by common usage, than of strict right.

Reprieve may also be ex necessitate legis; as, where a woman is capitally convicted and pleads her pregnancy; though this is no cause to stay the judgment, yet it is to respite the execution till she be delivered. This is a mercy dictated by the law of nature in favourem prolis". Bk. 4, chapt. 31, pp. 394, 395.

After imposition of the sentence execution of the sentence may be suspended for a time which is known as respite and may be granted by the king or by the Court. Orfield's Criminal Procedure from Arrest to Appeal, p. 529.

As the possessions of the kings of England expanded and several new colonies came under their sway the power of pardon which the kings exercised came to be exercised by their representatives in the colonies and in America from them it went to the State Governors and to the President for federal offences. The same process was followed in this country as the various enactments and provisions set out above show. It may be repetitive but it cannot be sufficiently emphasised that both the power of pardon and the power of reprieve which is a part of the all comprehensive power of pardon are executive acts and can be exercised at any time and in any circumstances untrammelled and without control and in absolute

freedom except that prescribed by the Constitution; Craies on Statute Law, page 483.

In the Constitution the power of the President is the same as it was in s. 295 of the Constitution Act of 1935 and is unaffected in regard to sentence of death by the power conferred under art. 161. The power of the Governor contained in art. 161 also is of the widest amplitude as the words of the article which have been quoted above would show. In construing a constituent or an organic Statute such as the Constitution that interpretation must be attached which is most beneficial to the widest amplitude of its powers; *British Coal Corporation* v. *King* (1). The Judicial Committee in *Henrietta Muir Edwards* v. *Attorney General of Canada* (2) said:—

"Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction,.....".

In America the exercise of the power of pardon has been held to be governed by the same principles as are applicable to the exercise of the King's power of mercy under the English Constitution. In *United States* v. *Wilson* (3) Marshall, C. J., referring to the exercise of this power said:

"As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bears a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it".

Wayne, J., in *Ex parte Wells* (4) said:

"We still think so, and that the language in the Constitution, conferring the power to grant reprieves and pardons, must be construed with reference to its meaning at the time of its adoption. At the time of our separation from Great Britain, that power had

(1) [1935] A.C. 500.
(2) [1930] A.C. 124, 136.
(3) 8 L. Ed. 640, 643, 644.
(4) 15 L. Ed. 421, 424.

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been exercised by the King, as the Chief Executive. Prior to the Revolution, the Colonies, being in effect under the laws of England, were accustomed to the exercise of it in the various forms, as they may be found in the English books. They were of course to be applied as occasions occurred, and they constitued a part of the jurisprudence of Anglo-America. At that time of the adoption of the Constitution, American statesmen were conversant with the prerogatives exercised by the Crown. Hence when the words to grant pardons were used in the Constitution, they convey to the mind the authority as exercised by the English Crown, or its representatives in the Colonies. At that time both Englishmen and Americans attached the same meaning to the words " pardon ". In the convention which framed the Constitution, no effort was made to define or change its meaning, although it was limited in cases of impeachment.

We must then give the word the same meaning as prevailed here and in England at the time it found a place in the Constitution. This is in conformity with the principles laid down by this court in *Cathcart* v. *Robinson*, 5 Pet. 264, 280; and in *Flavell's case*, 8 Watts & Serg. 197; *Attorney* General's brief ".

In *Ex parte Grossman* (1) Taft, C. J., said:—

" .....

..... The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention, who submitted it to the ratification of the Convention of the thirteen states, were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary. They were familiar with other forms of government recent and ancient, and indicated in their discussions earnest study and consideration of many of them, but when they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law,

(1) 69 L. Ed 527, 530, 532, 535.

confident that they could be shortly and earnestly understood ".

According to the American as also Indian Constitution the power as given to the President is not to reprieve and pardon but that he shall have power to grant reprieves and pardons for offences against the United States except in cases of impeachment. Wayne, J., in *Ex parte Wells* (1) at page 425 has explained the difference between the meaning of these two expressions. " The first conveys only the idea of an absolute power as to the purpose or object for which it is given. The real language of the constitution is general, that is, common to the class of pardons known in the law as such whatever they may be by their denomination. We have shown that conditional pardon is one of them. A single remark from the power to grant reprieves will illustrate the point. That is not only to be used to delay a judicial sentence when the President shall think the merits of the case or some cause connected with the offender may require it, but it also extends to cases *ex necessitate legis* ..... Though the reprieve in either case produces delay in the execution of a sentence ", the reprieves in the two cases are different in their legal character and different as to the causes which may induce the exercise of the power to reprieve.

In India also the makers of the Constitution were familiar with English institutions and the powers of English Kings and the exercise of their power both by the Governor General and the Governors of British India and of its provinces. It will be legitimate to draw on English law for guidance in the construction of the articles dealing with the power of the President and of the Governor in regard to pardons including the other forms of clemency comprised in the two articles. It will not be inappropriate to say that the framers of the Indian Constitution were not only familiar and trained in British Jurisprudence but were familiar with the American Constitution and they were drafting their Constitution in English language and therefore to draw upon the American parallel would be wholly legitimate.

(1) 15 L. Ed. 421, 425.

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The history of the prerogative of pardons and reprieves shows that the power of the executive in the matter of pardons and reprieves and other forms of pardons irrespective of the name used is of the widest amplitude and is plenary in nature and can be exercised at any time after the commission of the offence. The power of the executive is an act of grace and clemency. It is a sovereign or governmental power which in a monarchy is inherent in the King and in a Republic in the State or the people and which may, by the Constitution, be conferred on an officer or a department. It is an executive power of the Governor and it is the same as was exercised by the colonial Governors in America 67 C. J. S. 565.

Wayne, J., in the matter of *Ex parte Wells* (1) has described it as an act of mercy and an act of clemency applicable to pardons of every kind and form. Field, J., in *Ex parte Garland* (2) termed it the benign prerogative of mercy. It is the power for avoiding the execution of the judgment by reprieve or pardon whereof the former is temporary and the latter permanent. According to Willoughby's Constitution of America, Vol. III, p. 1492:—

"The power to pardon includes the right to remit part of the penalty as well as the whole and in either case it may be made conditional. The power may be exercised at any time after the offence is committed, that is, either before, during, or after legal proceedings for punishment". *Ex parte Garland* 4 Wall. 333.

Reprieve whereby the execution is suspended is merely the postponement of the execution for a definite time and it does not and cannot defeat the ultimate execution of the judgment but merely delays it. It is extended to a prisoner in order to afford him an opportunity to procure some amelioration of the sentence which has been imposed upon him. But power to reprieve is an executive act and the sole judge of the sufficiency of facts and of the propriety of the action is the Governor. No other department in America has control over his actions. The pardoning power is in derogation of the law and the power of pardoning

(1) 15 L. Ed. 421, 424. (2) 18 L. Ed. 366, 370 & 371.

when conferred on the head of the executive is an executive power and function. The pardon may be conditional and the grant of a conditional pardon is not illegal.

It has been held that the power of pardon is not subject to legislative control ; *Ex parte Garland* (1) ; nor is it open to the legislature to change the effect of pardon ; *United States* v. *Klein* (2). The executive may grant pardon for good reasons or bad or for any reasons at all ; its act is final and irrevocable. The Courts have no concern with the reasons which actuated the executive. This power is beyond the control of the judiciary ; 39 Am. Jur. 545, ss. 43 ; *Horwitz* v. *Connor* (3).

Thus in England the exercise of the power by the King is the exercise of the power of mercy. The power is plenary in nature and unfettered and as far as constitutional powers are concerned it can be exercised at any time after the commission of the offence. In America the power of the executive under the Federal or State Constitution is the same in its nature as that exercised by the representative of the English Crown in America in colonial times. 67 C. J. S. 565. It has been said that executive clemency exists to afford relief from undue harshness or individual mistake in the operation or enforcement of the criminal law. It is essential in popular Governments as well as in monarchies to vest in some other party than courts the power to ameliorate or avoid particular criminal judgments and the exercise of this power is the exercise by the highest executive of his full discretion and with the confidence that he will not abuse it.

In *Ex parte Garland* (1), it was held that the President's pardon was not subject to legislative control, said Field, J., " the law thus conferred is unlimited .....It extends to every offence known to the law and may be exercised at any time after its commission.....The power of the President is not subject to legislative control. Congress can neither limit the effect not exclude from its effect any class of offenders. The benign prerogative

(1) 18 L. Ed. 366, 370 & 371. (2) 20 L. Ed. 519.
(3) 6 C. L. R. 1497.

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of mercy resposed in him cannot be fettered by any legislative restriction.....". In *Ex parte Grossman* (1) it was held that there was no difference between the power of the President and that of the king in regard to pardon and at page 535 it was observed by Taft, C. J.:—

"Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies to vest in some other authority than the court power to ameliorate or avoid particular criminal judgment. It is a check intrusted to the Executive for special cases".

That case also laid down that the exercise of the executive power to the extent of destroying the deterrent effect of judicial punishment would be to pervert it but whosoever is to make the power useful must have full discretion to exercise it and that discretion is vested in the highest officer in the nation.

In *Biddle* v. *Vuco Perovich* (2), Holmes, J., in dealing with pardons said:—

"Pardon is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed"

and in *Sorrells* v. *United States* (3) the observation of Holmes, J., were followed and it was held the clemency is the function of the executive and it is the function of the courts to construe the Statute and not to defeat it as construed.

A review of these American cases shows that the courts there have accepted that the English principles respecting the extent, operation and effect of pardons and reprieves apply in America; that the power which

(1) 65 L. Ed. 527, 530, 532, 535. (2) 71 L. Ed. 1161, 1163.
(3) 77 L. Ed. 413 at p. 421.

was exercised by the king and by delegation by the colonial Governors is now exercised by the highest executive in the land and that a pardon which includes a reprieve and a respite may variously be described as an act of clemency, an act of mercy, an act of grace, an exercise of the sovereign or governmental power or the determination of the ultimate authority. Therefore the principles which govern the exercise of this executive power are quite different from those which govern the exercise of the power of the courts. It may also be pointed out that the American courts have frowned upon any interference by the courts or by the legislature with the extent and effect of the prerogative of the people vested in the President in the exercise of his power of benign mercy. It was so held in *Ex parte Garland* (1) and *United States* v. *Klein* (2). In the former case the President had given a pardon to rebels who had taken part in the civil war against the forces of the federation and the legislature had reversed that pardon and it was held that pardon was not subject to legislative control and in the latter which was a conditional pardon the power of the legislature was held not to be exercisable.

The power of the executive can be exercised at any time. This is so in England, in America and in India. "The King", said Lord Coke, "can forgive any crime, offence, punishment or execution either before attainder, sentence or conviction or after"; 3 Insti. 233; Hawkins' Pleas of the Crown bk. 2, Chapt. 37. In the Indian Statute the words "any time" are expressly used in s. 401 of the Criminal Procedure Code and in England it is an accepted practice that the Crown can pardon before or after conviction or before trial. As far as the power of pardon before trial is concerned it can be exercised by entering *nolle prosequi* which is also the law in India. Under s. 333 of the Code of Criminal Procedure the Advocate General can, in cases tried before the High Court, enter a *nolle prosequi* and this power is absolute and not subject to the control of the court. This section makes it clear that before a verdict is given the Advocate-General may inform the

(1) 18 L. Ed. 366, 370 & 371. (2) 20 L. Ed. 519.

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court on behalf of the Government that he will not further prosecute the defendant upon the charge and he shall be discharged but this discharge does not amount to acquittal unless the Judge otherwise directs. We are informed that in the city of Bombay the power of the Advocate-General extends to cases tried by the court of Session. There is no chance of private complainant being able to restart the proceedings because the Crown can always take over any criminal proceeding and then enter a *nolle prosequi*. Similarly the power is given in regard to other courts of original jurisdiction to the Public Prosecutor under s. 494, Criminal Procedure Code, but that power is not as absolute as it is in the case of s. 333 because it is subject to the consent of the Court.

In the absence of constitutional restrictions the power of pardon and reprieve whether conditional or unconditional may be exercised at any time after the commission of the offence either before legal proceedings are taken or during their pendency or after an appeal is filed and while the case is pending in the appellate court. It was so held in *Ex parte Grossman* (1); *Ex parte Garland* (2) and so stated in 67 C. J. S. 572. In the absence of a limitation imposed by law there is no limit to the period of reprieve and successive reprieves where a period is prescribed are not illegal: 67 C. J. S. p. 582.

A case where the power of reprieve was exercised and operated during the pendency of the appellate proceedings is *Rogers* v. *Peck* (3). There one Mary Mabel Rogers was granted reprieve to permit her to appeal to the Supreme Court of the United States from the order of the District Court denying *habeas corpus*. She was convicted of murder at the December term 1903 and was confined in solitary confinement until February 3, 1905, on which day she was to suffer the penalty of death. On February 1, 1905, the Governor reprieved the execution of sentence until June 2, 1905. On April 29, 1905, she presented a petition for a new trial to the Supreme Court of the State. The petition was admitted on May 5, 1905, and fixed for hearing on

(1) 69 L. Ed. 527, 530, 534, 535. (2) 18 L. Ed. 366, 370 & 371.
(3) 50 L. Ed. 256.

May 10, 1905, but was dismissed on May 30, 1905, and a new trial was refused. On June 1, 1905, the execution of the sentence was further reprieved by the Governor until June 23, 1905. Thereupon she filed her petition in the Federal Court for a writ of *habeas corpus* which was dismissed. On that date the Governor further reprieved the execution of the sentence until December 8, 1905. The appeal to the Supreme Court of the United States was admitted on June 22, 1905, but the appeal was finally dismissed on November 27, 1905. One of the grounds of appeal in the Supreme Court was that the Governor, by giving the reprieve, issued his order requiring the execution while proceedings were pending in the court of the United States for her relief on *habeas corpus* and therefore the order was null and void and another ground was the failure of the Supreme Court of the State to grant a stay and fixing a date for execution. Both the grounds were overruled and it was held that the reprieve was to allow the cause to be heard on appeal in the Supreme Court and that the order of the Governor was not against due process clause and when the Governor had given a reprieve beyond the hearing in the State Supreme Court there was no occasion for the court to act in the matter. This case shows that the power of reprieve is exercisable even during the period that proceedings are pending in an appellate court.

The argument in opposition to the submissions of the learned Advocate-General was that although the power of the executive to grant pardon or reprieve or suspension of sentence was absolute and could be exercised at any time yet there was a statutory as well as a constitutional limitation on the exercise of this power which excluded the power of the executive for the period when the case of a defendant had been brought before the Supreme Court or before any other appellate court as the case may be. For the latter reference was made to s. 426 of the Criminal Procedure Code which gives the power to appellate courts to suspend a sentence pending an appeal for reasons to be recorded in writing and as to the former arts.

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142 and 145 of the Constitution were referred to. Article 142 confers on the Supreme Court the power to do complete justice in any cause or matter pending before it and art. 145 gives to the Supreme Court power to make rules with the approval of the President but subject to any law which the Parliament may pass. Under art. 145 which is the rule making power of this court, the court has made two rules which are relevant for the purpose of this appeal and they are Order 21, Rule 5 and Order 21, Rule 28 and when quoted they are as follows :—

O. 21, R. 5 " When the petitioner has been sentenced to a term of imprisonment, the petition shall state whether the petitioner has surrendered. Unless the Court otherwise orders, the petition shall not be posted for hearing until the petitioner has surrendered to his sentence ".

O. 21, R. 28 " Pending the disposal of any appeal under these Rules the Court may order that the execution of the sentence or order appealed against be stayed on such terms as the Court may think fit ".

Rule 5 is a salutory rule in that the court will not hear a case in which the party is in contempt of the order of the subordinate court but that rule is in express words subject to the discretion given to this court under art. 136 which states :—

" Notwithstanding anything in this Chapter the Supreme Court may, in its discretion, grant special leave to appeal..... ".

Rules made under art. 145 are subordinate legislation because they are subject to any law made by Parliament and can be changed by the court with the approval of the President. The change of an article, on the other hand, is to be in accordance with the provisions of the Constitution and therefore merely because this Court has also the power under the rules, to grant suspension of a sentence and it has made rules that it will not entertain any petition for leave to appeal unless the petitioner surrenders himself to the sentence cannot override the provisions of art. 161; because if there is irresolvable conflict between

the article and the rules then the rules must give way, being subordinate legislation.

It was argued that the power of the Court under articles 142 & 145 and of the Governor under art. 161 are mutually inconsistent and therefore the power of the Governor does not extend to the period the appeal is pending in this Court because law does not contemplate that two authorities, i. e., executive and judicial should operate in the same field and that it is necessary that this Court should put a harmonious construction on them. Article 142 of the Constitution, it was contended, is couched in language of the widest amplitude and comprises powers of suspension of sentences etc. The argument that the power of the executive to suspend the sentence under art. 161 and of the judiciary to suspend the sentence under art. 142 and art. 145 are in conflict ignores the nature of the two powers. No doubt the effect of both is the same but they do not operate in the same field; the two authorities do not act on the same principles and in exercising their powers they do not take the same matters into consideration. The executive exercises the power in derogation of the judicial power. The executive power to pardon including reprieve, suspend or respite a sentence is the exercise of a sovereign or governmental power which is inherent in the State power. It is a power of clemency, of mercy, of grace "benign prerogative" of the highest officer of the State and may be based on policy. It is to be exercised on the ground that public good will be as well or better promoted by suspension as by the execution but it is not judicial process. The exercise of this power lies in the absolute and uncontrolled discretion of the authority in whom it is vested.

The power of the courts to suspend sentences is to be exercised on judicial considerations. At Common Law, it was held in *Ex parte U. S.* (1) courts possessed and asserted the right to exert judicial discretion in the enforcement of the law to temporarily suspend either the imposition of sentence or its execution when imposed to the end that pardon might be procured or

(1) 61 L. Ed. 129 at p. 141.

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that the violation of law in other respects might be prevented. It was also held that a Federal District Court exceeds its power by ordering that execution of a sentence imposed by it upon a plea of guilty be suspended indefinitely during good behaviour upon considerations wholly extraneous to the legality of the conviction: *Ex parte U. S.* (1).

Marshall, C. J., in *U. S.* v. *George Wilson* (2) stated as follows:—

".....It is a constituent part of the judicial system that the judge sees only with judicial eyes, and knows nothing respecting any particular case, of which he is not informed judicially".

In *Ex parte Grossman* (3), it was said that administration of justice by the courts is not necessarily or always wise or considerate of circumstances which may mitigate a guilt and in order to remedy this it was thought necessary to vest this in some other authority than the court to ameliorate or avoid particular criminal judgments. The exercise of this power has the effect of destroying the deterrent effect of judicial punishment. The extent of the two powers, judicial and executive and the difference between the two has been pointed out in *United States* v. *Benz* (4) in which it was held that no usurpation of the pardoning power of the executive is involved in the action of a court in reducing punishment after the prisoner had served a part of the imprisonment originally imposed. At page 358 the distinction was stated as follows:—

"The judicial power and the executive power over sentences are readily distinguishable. To render judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment, but does not alter it qua judgment. To reduce a sentence by amendment alters the terms of the judgment itself and is a judicial act as much as the imposition of the sentence in the first instance".

(1) 61 L. Ed. 129 at p. 141.
(2) 8 L. Ed. 640, 643, 644.
(3) 69 L. Ed. 527, 530, 532, 535.
(4) 75 L. Ed. 354.

According to Willis "Courts may exercise the power of suspending sentence although this, like the pardoning power, partakes of the nature of an executive function; which shows that giving of suspensions of sentences is an exercise of executive power; Willis' Constitutional Law, p. 151. Clemency is the function of the executive and it is the function of the courts to construe a Statute and not to defeat it as construed.

The judicial power therefore is exercisable on judicial considerations. The courts would approach every question in regard to suspension with a judicial eye. They are unable to look to anything which is outside the record or the facts which are proved before them. It is not their sphere to take into consideration anything which is not strictly judicial. A court knows nothing of a case except what is brought before it in accordance with the laws of procedure and evidence and consequently this is a power distinct from the power of the executive which may act, taking into consideration extra-judicial matters even on the ground that suspension, remission and commutation may be more for public good and welfare than no interference. These are all matters of public policy and matters which are not judicial and are within the power of the executive and therefore it cannot be said that the two powers operate in the same field. No doubt they may have the same effect but they operate in distinct fields, on different principles taking wholly irreconcilable factors into consideration.

Taking the case of pardon it is important to note that pardon is granted for reasons other than innocence. A pardon, it has been said, "affirms the verdict and disaffirms it not". (28 Harvard Law Review at p. 647 by Samuel Williston).

Commutation of sentences is a power which is exercisable by the executive to ameliorate the rigours of the punishment by courts when death sentences are imposed. It was not contended that the power of commutation is not available to the executive after the sentence is passed and before an appeal is filed or pending the appellate proceedings. It has the same effect as reduction of a sentence by a court from

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death to one of imprisonment for life or transportation for life as it used to be. In England and in America it is exercised on the condition of acceptance by the convict but no such limitation is imposed on the power of the executive under the Indian law. But whereas the court will take into consideration only the circumstances which would justify the exercise of judicial power it is open to the executive to act on other grounds and the act of the executive is not subject to review by the courts, the executive being the sole judge of sufficiency of facts and of the propriety of the action and no other branch has any control over executive action.

As to suspension of sentence again in s. 426 of the Criminal Procedure Code it is expressly stated that an appellate court can suspend the sentence for reasons to be stated; no such limitation is imposed on the executive under s. 401 of the Code. The language of the two sections themselves shows the field in which the two powers operate although the effect may be the same. It is relevant to consider in this connection the grounds on which a court acts in regard to offences punishable with death or imprisonment for life (s. 497 of Cr. P. C.) but no such restrictions impede executive action. Similarly when the Supreme Court acts under art. 142 it acts judicially and takes only those facts into consideration which are sufficient in the judicial sense to justify the exercise of its power; so would be the case when the power is exercised under the rules framed by the court. Thus it appears that the power of the executive and of the judiciary to exercise the power under arts. 161 and 142 or under ss. 401 and 426 are different in nature and are exercised on different considerations and even may have different effect.

Executive power exercised in regard to sentences passed by courts is in its very nature the exercise of constitutional authority which negatives the orders of the court. Every time it is exercised it conflicts with some order of the court whether it is a case of pardon or commutation of sentence or a reprieve or suspension or respite. It is an interference with some action

of the court which makes the power of the executive to that extent overriding. It is for this reason that it has been said in American judgments, e. g., *Ex parte Grossman* (1) that although the Constitution has made the judiciary as independent of other branches as is practicable it is, as often remarked, the weakest of the three. It must look for a continuity of necessary co-operation in the possible reluctance of either of the other branches to the force of public opinion. The action of the executive in interfering with sentences passed by courts is a matter which is not within the amplitude of the judicial power of the courts and whenever any action is taken by the executive, unless it is illegal, it is not justiciable nor subject to legislative control.

The power that this court exercises under Order 21, Rule 5 must also depend upon the decision of the question whether art. 145 can be used in derogation of the power given to the Governors under art. 161. As has been stated above, being subordinate legislation, it must in reality be subordinate to the provisions of the Constitution which is obvious from the fact that any revision of the articles of the Constitution will require the procedure laid down in the Constitution for its amendment whereas the rules made under the Constitution can be changed by the court itself with the approval of the President or by a Parliamentary enactment.

The language of art. 161 is of the widest amplitude and applies to the various forms of clemency mentioned therein. It is not denied that the power of pardon is not affected by art. 142 and this power includes the power to reprieve. It would be an undue construction of the exercise of the power of pardon to take out from its purview that portion of it which is termed reprieve or stay of execution or suspension and respite of sentence which differs from suspension of sentences only in terminology. The construction suggested would be illogical because the plenitude of the language would remain unaffected before the petition for leave to appeal is filed and after the decision

(1) 69 L. Ed. 527, 530, 532, 535.

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of the appeal but the power would remain suspended during the pendency of the appeal proceedings even though the power of pardon and of commutation remains intact and the suggested restriction is not borne out by the language of the article. And this construction is opposed to decisions of courts of America where the power is similar as in India. Even on the analogy of the Privy Council case *Balmukand* v. *King Emperor* (1) where reprieve was granted pending the hearing of the special leave petition, i.e., upto the date the petition was taken up, heard and decided and therefore uptil that date the reprieve was necessary and proper. In *Rogers* v. *Peck* (2) reprieve was granted for a period of time extending beyond the hearing of the appeal proceedings.

If the argument as to want of the power of suspension during the period of pendency of an appeal is sustainable then the power to commute must equally be so affected because what is commutation when exercised by the executive is called reduction of sentence when ordered by the court. The two are neither different in nature nor in effect.

Reference was made to s. 295 of the Government of India Act of 1935 whereby the prerogative of the King and of the Governor General as his delegate was specifically saved. Reference was also made to s. 209(3) of that Act which gave to the Federal Court the power of stay in any case; the argument being that the prerogative power of the King and his delegate the Governor General would not be unlimited but for its being expressly saved by s. 295(2). A close examination of these provisions and the application of rules of interpretation do not support the soundness of this argument.

Section 209(3) is in Part IX The Judicature and Chapter I the Federal Court. It gave power to the Federal Court to stay executions in any case under appeal as follows:

S. 209(3) "The Federal Court may, subject to such terms or conditions as it may think fit to impose, order a stay of execution in any case under appeal to

(1) 42 I.A. 133 (2) 50 L. Ed. 256.

the Court, pending the hearing of the appeal, and execution shall be stayed accordingly ".

Section 295 is in Part XII Miscellaneous and under sub-head Provisions as to legal matters. Section 295 provided :—

S. 295(1) " Where any person has been sentenced to death in a Province, the Governor General in his discretion shall have all such powers of suspension, remission or commutation of sentence as were vested in the Governor General in Council immediately before the commencement of Part III of this Act, but save as aforesaid no authority in India outside a Province shall have any power to suspend, remit or commute the sentence of any person convicted in the Province:

Provided that nothing in this sub-section affects any power of any officer of His Majesty's forces to suspend, remit or commute a sentence passed by a court martial.

(2) Nothing in this Act shall derogate from the right of His Majesty, or of the Governor General, if any such right is delegated to him by His Majesty, to grant pardons, reprieves, respites or remissions of punishment ".

Stay of execution is a term appropriate to civil proceedings as O. 21, rr. 26 & 29 and O. 41, r. 5 of the Code of Civil Procedure would show but even if it applied to criminal proceedings it would be of little assistance in understanding the meaning of art. 142(1) in any different manner from what has been said above. But s. 295(2) is pressed into service to show that wherever the power of the executive is intended to be overriding it is specifically so stated. So construed the power exercisable by the Governor General in his discretion and of the Governor will be of lesser amplitude and subject to the limitation of s. 209(3), whereas the power of the King or the Governor General acting under s. 295(2) will not be so which is seemingly incongruous. Besides the words " nothing in this Act shall derogate " in s. 295(2) only emphasise the constitutional position of the King's prerogative and of his delegate and was more in the nature of

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ex abundanti cautela' because under constitutional practice "*Roy n'est lie par ascun statute, si il ne soit expressement nosme*" is a principle which has been accepted in this court qua the Union or the States. "Where the King has any prerogative, estate, right, title or interest he shall not be barred of them by the general words of an Act if be not named therein"; Broom's Maxims, p. 39 (1939 ed.); *Province of Bombay* v. *Municipal Corporation of the City of Bombay*(1), where it was held that Crown is not bound unless expressly named or is bound by "necessary implication".

If the argument of limitation of the King's prerogative because of these saving words is sound then it means in the Constitution Act the British Parliament did contemplate and provide that the power of the King or of the Governor General as his delegate as to suspensions, remissions or commutation would be overriding and exercisable in spite of the pendency of an appeal in the Federal Court.

There are seven reasons for denying the argument of conflict between arts. 142 and 161:—

(1) As has been discussed above, the two articles operate in two distinct fields where different considerations for taking action apply. That is how the two articles are reconcilable and should be reconciled. This interpretation accords with the rule of statutory co-existence stated in text books on Interpretation of Statutes, which is as follows:—

"It is sometimes found that the conflict of two Statutes is apparent only, as their objects are different and the language of each is restricted to its own object or subject. When their language is so confined, they run in parallel lines without meeting". (Maxwell on Interpretation of Statutes (1953 Ed.), p. 170).

(2) The proper rule of construction of Statutes was laid down in *Warburton* v. *Loveland*(2):

"No rule of construction can require that when the words of a Statute convey a clear meaning..... it shall be necessary to introduce another part of the

(1) 73 I.A. 271. (2) 5 E.R. 499, 410.

Statute, which speaks with less perspicuity, and of which the words may be capable of such construction as by possibility to diminish the efficacy of the other provisions of the Act ".

This rule was accepted in regard to the interpretation of ss. 89, 92 and 93 of the Australian Constitution in the *State of Tasmania* v. *Commonwealth of Australia* (1):

" Applying those expressions to these sections I should say they amount to this; Seeing that sec. 89 has an absolutely clear meaning, the rules of construction do not require us to introduce another part of the Statute which speaks with less perspicuity, and to apply that part to the construction of sec. 89. That would have the effect of diminishing the clearness of sec. 89 and appears to me to be an absolute inversion of the rule which is applicable in such a case ".

In the instant case the words of art. 161 are clear and unambiguous. It is an unsound construction to put a fetter on the plenitude of the powers given in that article by reading an earlier article which deals with the powers of a different department of Government and uses language " which speaks with less perspicuity ".

(3) Moreover it is a relevant consideration in the matter of interpretation that the two articles are in two different parts. There is ample authority for the view that one is entitled to have regard to the indicia afforded by the arrangement of sections and from other indications; *Dormer* v. *New Castle-upon-Tyne Corporation* (2) per Slesser, L. J. The arrangement of sections into parts and their headings are substantive parts of the Act and as is pointed out by Craies on Statute Law (5th Ed.), p. 165, " they are gradually winning recognition as a kind of preamble to the enactments which they precede limiting or explaining their operation ". They may be looked to as a better key to construction than a mere preamble. Ibid p. 195.

(1) 1 C.L.R. 329, 357. (2) [1940] 2 K.B. 204, 217 (C.A.).

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In *Inglis* v. *Robertson*(1) which turned on the meaning of the Factors Act, Lord Herschell said:—

"These headings are not in my opinion mere marginal notes but the sections in the group to which they belong must be read in connection with them and interpreted in the light of them".

Viscount Simon, L. C., said in *Nokes* v. *Doncaster Amalgamated Collieries Ltd.* (2):—

"Moreover, sec. 154 contemplates—or, at any rate, provides for—the dissolution of the transferor company when the transfer of its undertaking has been made, and there appears to be no means of calling back to life the company so dissolved for sec. 294 occurs in Part V of the Companies Act, 1929, dealing with winding up, whereas sec. 154 is found in Part IV".

These cases place accent on the principle that the articles 142(1) and 161 deal with different subjects showing operation in separate fields and were not intended to overlap so as to be restrictive of each other.

(4) The language of art. 161 is general, i. e., the power extends equally to all class of pardons known to the law whatever the nomenclature used; *Ex parte Wells* (3) and therefore if the power to pardon is absolute and exercisable at any time on principles which are quite different from the principles on which judicial power is exercised then restrictions on the exercise of the lesser power of suspension for a period during which the appeal is pending in this court would be an unjustifiable limitation on the power of the executive. It could not have been the intention of the framers that the amplitude of executive power should be restricted as to become suspended for the period of pendency of an appeal in the Supreme Court.

(5) If this interpretation is adopted it would lead to this rather incongruous result that if the appeal is pending in a Court of Session or the High Court the power of the executive will be abundant, overriding

(1) [1898] A.C. 616, 630. (2) [1940] A.C. 1114.

(3) 15 L. Ed. 421, 424.

and operative during the pendency of appeals but will be restrictive when appeal is brought in the Supreme Court.

(6) Article 161 is a later provision and when it was adopted the Constitution makers had already adopted art. 72 and arts. 142(1) and 145. It does not seem reasonable that by so juxtaposing the articles it was the intention of the framers to constrict the power of the executive. The rules of interpretation on this point have thus been stated:

(a) It is presumed that the legislature does not deprive the State of its prerogative powers unless it expresses its intention to do so in express terms or by necessary implication. *Province of Bombay* v. *Municipal Corporation of the City of Bombay* (1); *Director of Rationing & Distribution* v. *Corporation of Calcutta* (2).

(b) It seems impossible to suppose that so material a change in the constitutional powers of the Governor was intended to be effected by a side wind.

(c) The law will not allow alteration of a Statute by construction when the words may be capable of proper operation without it; *Kutner* v. *Philips* (3).

(d) It cannot be assumed that the Constitution has given with one hand what it has taken away with another; *Dormer* v. *New Castle-upon-Tyne Corporation* (4).

(e) If two sections are repugnant, the known rule is that the last must prevail: *Wood* v. *Riley* (5), per Keating, J.

(7) The power given to the Governor in regard to pardons is a specific power specially conferred as was vested in the colonial and British Governors in Indian provinces during British days. The power given to the court under Art. 142(1) is a general power exercisable for doing complete justice in any cause or matter. If they, i.e., arts. 161 and 142(1) deal with

(1) 73 I.A. 271.
(2) Criminal Appeal No. 158 of 1956.
(3) [1891] 2 Q.B. 267, 272.
(4) [1940] 2 K. B. 204, 217 (C.A.).
(5) (1867-8) 3 C.P. 26.

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the same subject matter as is contended then art. 161 must prevail over art. 142(1) which is in accord with the constitutional position as above discussed.

In the circumstances of this case I would grant the petitioner exemption prayed for and proceed to hear the special leave petition on merits.

BY COURT: In view of the majority Judgment, the petition is dismissed.

Petition dismissed.