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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 16.05.2016

+ W.P.(CRL) 236/2016

VIKAS YADAV

..... Petitioner

Through Mr. N. Hariharan, Sr. Advocate with
Mr. K. Singhal, Advocate

versus

STATE NCT OF DELHI

..... Respondent

Through Mr. Rajesh Mahajan, ASC (Crl.) with
Mr. Avi Singh, ASC (Crl.) and
Ms. Parul Jamwal, Advocate
Mr. Varun Chugh, Adv. for R-3

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

SIDDHARTH MRIDUL, J (ORAL)

1. The present petition under Article 226 of the Constitution of India assails the order dated 15th January, 2016 rejecting the petitioner's representation for grant of parole and seeks a direction in the nature of mandamus to the competent authority to release him on parole.

2. Mr. Rajesh Mahajan, learned Additional Standing Counsel (Crl.) appearing on behalf of the official respondent has raised a preliminary

objection with regard to the maintainability of the present petition predicated on the ratio of a judgment rendered by a Constitution Bench of the Supreme Court of India in *K.M. Nanavati vs. State of Bombay* (now Maharashtra) reported as *AIR 1961 SC 112*. In paras 18, 19, 21, 23 and 25 of the said report, the Supreme Court observed as follows:-

“18. ...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 oversimplification 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 Art. 142 is in operation and the matter is sub-judice in this Court.

19. 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.

21. 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 seisin 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 seisin 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 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 interpretation 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.

23. ...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, 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.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.

25. 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.

3. Mr. Mahajan would urge that in view of the ratio in *K.M. Nanavati (supra)*, which has been followed by a Full Bench of the Rajasthan High Court in *Ramesh Kumar vs. State of Rajasthan & Ors.* reported as *2013 Criminal Law Journal 2376*, no representation for grant of parole can be entertained by the executive during the period the Supreme Court is in seisin of an appeal filed by the convict in that case.

4. In other words, it is urged on behalf of the official respondent that when a challenge against the sentence awarded to the petitioner is pending determination before the Supreme Court in a criminal appeal, the power of the executive to consider and allow the representation for parole is eclipsed and cannot, therefore, be exercised.

5. On the contrary, Mr. N. Hariharan, learned senior counsel appearing on behalf of the petitioner invites my attention to a decision rendered by a Full Bench of the Bombay High Court in *S. Sant Singh @ Pilli Singh vs. Secretary Home Department, Govt. of Maharashtra* reported as *2006*

Criminal Law Journal 1515, to urge that in this case the Full Bench whilst interpreting the ratio in *K.M. Nanavati (supra)* has arrived at a conclusion contrary to the decision arrived at by the Full Bench of the Rajasthan High Court in *Ramesh Kumar (supra)*.

6. In my view, this submission made on behalf of the petitioner is not tenable, in view of the decision of the Division Bench of this Court in *Rajesh Kumar vs. Govt. of NCT of Delhi* reported as *2012 (2) Crimes 281 (Delhi)*, wherein in paras 9 and 10 of the said report, the Division Bench has expressed its inability to concur with the decision rendered by the Full Bench of the Bombay High Court in *S. Sant Singh @ Pilli Singh (supra)*. Paras 9 and 10 of the said report are extracted hereinbelow:-

“9. We may however notice that a similar view taken by the Division Bench of the Bombay High Court was set aside by a Full Bench of that Court in *S. Sant Singh @ Pilli Singh Vs. Secretary, Home Deptt, Govt. of Maharashtra*, 2006 CrL. L.J. 1515. It was held that the considerations in grant of bail and parole are different and the two have different connotations and operate in different spheres; that the powers of the Executive of parole can be exercised notwithstanding refusal of bail or suspension of sentence; the right of parole is attracted as soon as a person is in prison governed by the Prisons Act, 1894 irrespective of the pendency of the appeal. *K.M. Nanavati (supra)* was distinguished by holding that the

same dealt with the power of the Government under Section 432 Cr.P.C. to remit or suspend the sentence and has no application to parole which does not fall under remission of sentence.

10. With due respect to the Full Bench of the Bombay High Court, we are unable to concur. The ratio of K. M. Nanavati (supra) is that the Executive is barred from granting the same relief which the Court is entitled to, when seized of the matter and possibility of a conflict if the same were to be permitted. Once the said ratio is found to be applicable to a situation as before us, we fail to see as to how it matters whether the conflict is owing to exercise of power by the Executive under Section 432 Cr.P.C. or to grant parole. What we are concerned with is that what the Court has denied to the convict/accused cannot be permitted to be granted by the Executive and the same if permitted would be totally subversive of rule of law. We may notice that the Supreme Court in Rakesh Kumar Pandey Vs. Udai Bhan Singh, (2008) 17 SCC 764 deprecated the High Court for releasing an accused whose bail, had earlier been cancelled by the Apex Court, in the garb of parole. It would thus be seen that the Courts have always looked down upon something which the Court seized of the matter has refused, being allowed to be done otherwise. As noticed above, the effect of both bail/suspension of sentence and parole is the release of person from detention or custody. If this Court seized of the appeal, in the facts deems it proper to keep the accused/convict behind bars, the Executive cannot be permitted to allow such sentence to run outside the bars.”

7. Mr. N. Hariharan, learned senior counsel appearing on behalf of the petitioner invites my attention to para 12 of the report in ***Rajesh Kumar***

(*supra*), to urge that a statutory appeal before a High Court is a matter of right whereas a Special Leave Petition under Article 136 of the Constitution of India is not a matter of right, as in the present case, and therefore, the two situations are not akin to each other. Para 12 of the said report reads as under:-

“12. Insofar as challenge to the conviction order in the Supreme Court is concerned, the difference is that such an order is challenged by filing SLP under Article 136 of the Constitution and Leave to appeal has to be obtained whereas filing an appeal in the High Court is a statutory right given to a convict; therefore the two situations are not akin to each other.”

8. However, the afore-stated paragraph does not come to the aid of the petitioner, in view of the fact that the petitioner's appeal assailing the order on sentence passed by the trial court and affirmed by this Court, is pending determination before the Supreme Court of India.

9. Further, the Supreme Court in *K.M. Nanavati (supra)* while dealing with the question as to whether the power of suspension of sentence under Article 161 of the Constitution of India could be exercised during the period when the matter is subjudice before the Supreme Court, held that the power of the executive could not be exercised while the court is seized of the matter.

10. In this behalf, it would be relevant to extract Article 161 of the Constitution of India, which reads as under:-

“161. Power of Governor to grant pardons, etc, and to suspend, remit or commute sentences in certain cases 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”.

11. A plain reading of the above extracted Article makes it clear that the power of the Governor extends to suspend, remit or commute sentences as well as to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of a convict. The power to grant reprieves and respites, in my view, necessarily means and includes the power to grant parole.

12. In view of the foregoing, the present petition is squarely covered by the ratio of the decision rendered by the Constitution Bench of the Supreme Court of India in ***K.M. Nanavati (supra)***.

13. Moreover, the submission on behalf of the official respondent that no representation seeking parole can be entertained by the executive whilst the

Supreme Court is in seisin of an appeal filed by the convict in the case also finds clear and unequivocal support from the paragraphs 45 to 49 of the report in ***Ramesh Kumar (supra)***, which are as follows:-

“45. Much has been sought to be suggested that in Nanavati's case (AIR 1961 SC 112), the question before the Supreme Court was only as to whether the Governor under Article 161 of the Constitution of India can exercise his power of suspension of sentence during the period when the Supreme Court is in seisin of the case; and, therefore, this decision does not apply to the question at hands about the power of grant of parole. The argument, in our view, has several shortcomings.

46. In the first place, it could be noticed clearly that Article 161 of the Constitution in fact occurs in Chapter II of Part VI of the Constitution of India providing for the executive power of the States; and therein, Article 161 confers plenary powers on the Governor to grant pardons and to suspend, remit or commute sentences. With respect, we are clearly of the view that what has been laid down by the Hon'ble Supreme Court in respect of the power of the Governor under Article 161 of the Constitution of India that the same could be exercised until the matter is not sub judice before the Court, applies with greater force on the powers of the State Government under Section 432 of the Code of 1973. It follows rather as a necessary consequence that such powers of the State Government under Section

432 can be exercised only so long the matter is not sub judice in the Court.

47. Secondly, the scope of powers under the relevant provisions of the Code of Criminal Procedure directly arose for consideration; or at any rate, it was an innate issue, which was considered and pronounced upon by the Hon'ble Supreme Court. The issue arose precisely in the circumstances that the Governor's order was likely to interfere or meddle with the exercise of jurisdiction by the Hon'ble Supreme Court; and that was held impermissible. In all its parameters and features, the decision in K.M. Nanavati relates to the question at hands and the answer therein, in our view, governs the entire field.

48. Though as observed hereinabove, pronouncement on law by the Hon'ble Supreme Court in K.M. Nanavati is directly applicable to the case at hands but, even if it be assumed for the sake of hyper- technical argument that the scope of particular statutory provision was not as such before the Hon'ble Supreme Court and even if it be assumed that what the Hon'ble Supreme Court has said in K.M. Nanavati's case as regards the provisions of the Code of Criminal Procedure is in the nature of obiter-dictum (though such assumptions would not be justified as noticed above), we have no hesitation in repelling such arguments too with a simple reference to the fundamental principle that even an obiter of the Hon'ble Supreme Court is required to be followed and obeyed [vide observations in paragraph 17 in Sarwan Singh Lamba & Ors. Vs. UOI & Ors : (1995) 4 SCC 546].

49. Thus, respectfully following the dictum in *Nanavati*, we are clearly of the view that the answer to the referred question is in the negative.”

14. The foregoing discussion leaves no manner of doubt that when a challenge against the sentence awarded to the petitioner is pending determination before the Supreme Court in a criminal appeal, the power of the executive to consider a representation for parole made by the petitioner is eclipsed and cannot, therefore, be exercised.

15. Consequently, in view of the pendency of a criminal appeal instituted on behalf of the petitioner assailing the sentence awarded to him by the courts below, before the Supreme Court, the official respondent could not have entertained a representation for parole on his behalf in terms of the decision of the Supreme Court in *K.M. Nanavati (supra)*. Accordingly, the present petition assailing the order passed by the competent authority rejecting the representation on behalf of the petitioner for grant of parole and seeking a direction to the official respondent to release the petitioner on parole, is also not maintainable, and is hereby dismissed whilst reserving liberty to the petitioner to institute an appropriate proceeding in accordance with law, before the Hon’ble Supreme Court of India.

16. The present writ petition is disposed of accordingly.

17. *Dasti.*

SIDDHARTH MRIDUL, J

MAY 16, 2016

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