

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 28.06.2016

Delivered on : 20.07.2016

CORAM:

THE HON'BLE MR. JUSTICE M.SATHYANARAYANAN

W.P.No.39328 of 2015

S.Nalini

.. Petitioner

Vs.

1.The State of Tamil Nadu,
Rep by the Secretary to Government,
Home, Prohibition and Excise Department,
Secretariat, Chennai-600 009.

2.The Additional Director General of Police &
Inspector General of Prisons,
Gandhi Irwin Road,
Egmore, Chennai-600 008.

3.The Superintendent of Prison,
Special Prison for Women,
Vellore.

.. Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Mandamus directing the first respondent/State of Tamil Nadu to consider and decide the petitioner's representation dated 22.02.2014 seeking her release from prison under Article 161 of the Constitution.

For Petitioner : Mr.M.Radhakrishnan

For Respondents: Mr.A.L.Somayaji, Advocate General
assisted by
Mr.R.Govindasamy,
Special Government Pleader

O R D E R

The petitioner is a life convict and she would state that she was convicted and sentenced to death in Rajiv Gandhi Assassination Case and her conviction and sentence of death, awarded by the Trial Court for the offence under Section 120-B read with Section 302 IPC, was confirmed by the Hon'ble Supreme Court of India, vide order dated 11.05.1999 in Death Reference Case No.1 of 1998 etc. The sentence of death awarded to the petitioner was commuted to rigorous imprisonment for life by the first respondent under Article 161 of the Constitution of India on 24.04.2000. The petitioner would further state that the date of conviction was 28.01.1998 and her death sentence was commuted to life imprisonment on 24.04.2000 and she had completed the sentence of imprisonment for more than 22 years.

2. The grievance expressed by the petitioner is that though about 2200 life convicts who had served ten years of imprisonment and less were released by the first respondent in exercise of powers under Article 161 of the Constitution of India, her case has not been considered on the ground that it falls under Section 435 of the Code of Criminal Procedure, 1973. The petitioner also placed reliance upon Letter (FS)No.1358, Home dated 10.11.1994 of the first respondent, wherein the Government of Tamil Nadu, Home Department directed the Inspector General of Prisons, Madras-2 to forward necessary proposals in respect of such convicts who come within the purview of G.O.Ms.No.1762, Home dated 20.07.1987 for consideration under Article 161 of the Constitution of India and her case falls within the ambit of the said letter. It is also stated by the petitioner that in respect of a life convict, namely Raju @ Subburaj, who was convicted by the Trial Court for the commission of offences under Sections 302, 376 and 417 IPC and sentenced to death by the Trial Court, on appeal the sentence of death was modified to one of life imprisonment and though his request for premature release was rejected, later on positively considered and accordingly, he was released prematurely on humanitarian ground under Article 161 of the Constitution of India, vide G.O.(Ms)No.428, Home (Prison-IV) Department dated 29.07.2011 and in the light of the said fact also, the petitioner is eligible to be considered for premature release. The petitioner, in this regard, has submitted a representation dated 22.02.2014 to the first respondent through proper channel and since no orders have been passed, came forward to file this writ petition.

3. Mr.M.Radhakrishnan, learned counsel appearing for the petitioner has drawn the attention of this Court to the

materials placed and typed of documents and would submit that even in respect of a worst case of convict, who was convicted for the offences under Sections 302, 376 and 417 IPC was favourably considered for premature release under Article 161 of the Constitution of India and whereas the request of the petitioner, who is languishing in prison for more than 22 years have not been considered at all despite the representation dated 22.02.2014. The learned counsel appearing for the petitioner has drawn the attention of this Court to the Constitution Bench Judgment of the Hon'ble Supreme Court of India in Union of India v. V.Sriharan @ Murugan & Others [2015 (13) Scale 165] and would submit that the Supreme Court, while answering Question Nos.52.1 to 52.5 had observed that the right to claim remission, commutation, reprieve etc. as provided under Article 72 or Article 161 of the Constitution will always be available being Constitutional Remedies untouchable by the Court and that the powers under Sections 432 and 433 CrPC are to be exercised by the Appropriate Government statutorily and it is always left to be decided by the Appropriate Government and the cases which fall within the four corners of Section 432(7)(a) CrPC by virtue of specific Executive Power conferred on the Centre, the same will clothe the Union Government the primacy with the status of Appropriate Government and barring the said provision, in all other cases where the offender is sentenced or the sentence order is passed within the territorial jurisdiction of the concerned State, the State Government would be the Appropriate Government and in the light of the said authoritative pronouncement, there cannot be any impediment on the part of the first respondent to consider and dispose of the petitioner's representation for premature release positively and appropriate directions may be given to the first respondent to pass orders on the representation of the petitioner at the earliest.

4. Per contra, Mr.A.L.Somayaji, learned Advocate General assisted by Mr.R.Govindasamy, learned Special Government Pleader appearing for the respondents has drawn the attention of this Court to the counter affidavit filed on behalf of the respondents wherein it has been averred among other things that the petitioner is not entitled to seek the benefits of G.O(MS). No.428, Home dated 29.07.2011 or the Letter No.1358, Home dated 10.11.1994 for the reason that since the crime was investigated by the Central Bureau of Investigation, the State, while exercising its powers under Section 432 CrPC, has to consult the Central Government and accordingly, the State Government has addressed a letter dated 19.02.2014 to the Government of India, Ministry of Home Affairs to indicate the views of the Government of India on the proposal to remit the sentence of life imprisonment and to release the seven persons, namely Tvl V.Sriharan @ Murugan, T.Suthendraraja @ Santhan, A.G.Perarivalan @ Arivu, Jayakumar, Robert Payas, Ravichandran and

Nalini/petitioner and challenging the said letter, the Government of India had filed a writ petition in W.P.(Crl)No.48 of 2014 on the file of the Hon'ble Supreme Court of India and a Three Judges Bench of the Hon'ble Supreme Court of India, which heard the writ petition, in its order dated 25.04.2014 had referred the matter to the Constitution Bench and framed seven questions. The Hon'ble Supreme Court of India passed further orders on 23.07.2015 modifying it's earlier order dated 09.07.2014 and made it clear that the said order shall not be applicable to the respondents in W.P.(Crl.)No.48 of 2014 including the petitioner in the present writ petition and as a result of the said order, the interim order permitting the State Government to examine the power of Remission shall not be applicable to the respondents including this writ petitioner, who is also a party/respondent in W.P.(Crl.)No.48 of 2014.

5. In sum and substance, it is the submission of the learned Advocate General that till the disposal of W.P.(Crl.)No.48 of 2014, the State Government is not in a position to take any decision and pass orders on the petitioner's representation dated 22.02.2014 and depending upon the result of the said writ petition, further action would be taken on the above cited representation.

6. This Court paid it's anxious consideration and best attention to the rival submissions and also perused the materials placed before this Court.

7. It is relevant to extract the following paras in the judgment rendered by a Constitution Bench of the Hon'ble Supreme Court of India in Union of India v. V.Sriharan @ Murugan and Others [2015 (3) Scale 165] :

"163.....

Question No.52.2 Whether the "Appropriate Government" is permitted to exercise the power of remission under Sections 432/433 of the Code after the parallel power has been exercised by the President under Article 72 or the Governor under Article 161 or by this Court in its Constitutional power under Article 32 as in this case?

Ans. The exercise of power under Sections 432 and 433 of Code of Criminal Procedure will be available to the Appropriate Government even if such consideration was made earlier and exercised under Article 72 by the President or under Article 161 by the Governor. As far as the

application of Article 32 of the Constitution by this Court is concerned, it is held that the powers under Sections 432 and 433 are to be exercised by the Appropriate Government statutorily and it is not for this Court to exercise the said power and it is always left to be decided by the Appropriate Government.

Question Nos. 52.3, 52.4 and 52.5

52.3 Whether Section 432(7) of the Code clearly gives primacy to the Executive Power of the Union and excludes the Executive Power of the State where the power of the Union is coextensive?

52.4 Whether the Union or the State has primacy over the subject-matter enlisted in List III of the Seventh Schedule to the Constitution of India for exercise of power of remission?

52.5 Whether there can be two Appropriate Governments in a given case under Section 432(7) of the Code?

Ans. The status of Appropriate Government whether Union Government or the State Government will depend upon the order of sentence passed by the Criminal Court as has been stipulated in Section 432(6) and in the event of specific Executive Power conferred on the Centre under a law made by the Parliament or under the Constitution itself then in the event of the conviction and sentence covered by the said law of the Parliament or the provisions of the Constitution even if the Legislature of the State is also empowered to make a law on the same subject and coextensive, the Appropriate Government will be the Union Government having regard to the prescription contained in the proviso to Article 73(1)(a) of the Constitution. The principle stated in the decision in G.V. Ramanaiah (supra) should be applied. In other words, cases which fall within the four corners of Section 432(7)(a) by virtue of specific Executive Power conferred on the Centre, the same will clothe the Union Government the primacy with the status of Appropriate Government. Barring cases falling under Section 432(7)(a), in all other cases where the offender is sentenced or the sentence order is passed within the territorial jurisdiction of the concerned State, the State Government would be the Appropriate Government."

8. The State Government, in the counter affidavit, took a stand that since the crime was investigated by the Central Bureau of Investigation, while exercising its power under Section 432 CrPC, has to consult the Central Government and accordingly, the Home Department, Government of Tamil Nadu, has addressed a letter dated 19.02.2014 to the Government of India, Ministry of Home Affairs, requesting to indicate the views of the Government of India on the proposal to remit the sentence of life imprisonment and to release the seven persons which include the petitioner also. However, the Government of India, instead of responding to the letter dated 19.02.2014, had filed W.P. (Crl)No.48 of 2014 before the Hon'ble Supreme Court of India and it was referred to the Constitution Bench of the Hon'ble Supreme Court of India and framed seven questions for consideration. The State Government, in the counter affidavit, further stated that the Hon'ble Supreme Court of India, vide order dated 09.07.2014, restrained the State Government from exercising the power of remission to all convicts and it was modified, vide order dated 23.07.2015, restraining the State Government from exercising the power of remission or commutation of sentence imposed on life convicts and also made it clear that the said order shall not be applicable to the respondents in W.P.(Crl.) No.48 of 2014, which include the petitioner herein and therefore, their hands are tight.

9. It is pertinent to point out at this juncture that the petitioner herein is also arrayed as one of the respondents in W.P.(Crl.) No.48 of 2014 and in the light of the order dated 09.07.2014 passed by the Hon'ble Supreme Court of India, the State Government is restrained from exercising the power of remission to the petitioner and other convicts.

10. Mr.M.Radhakrishnan, learned counsel appearing for the petitioner has drawn the attention of this Court to G.O.Ms.No.1762, Home (Prisons-VI) Department dated 20.07.1987 as well as G.O.(Ms)No.428, Home (Prison-IV) Department dated 29.07.2011 and would submit that in the light of the said proceedings, there cannot be any impediment on the part of His Excellency The Governor of Tamil Nadu to exercise powers of clemency under Article 161 of the Constitution of India and in fact, in the case of a life convict, namely Thiru Raju @ Subburaj, who was involved in the commission of heinous crime, was imposed with sentence of death and it's modification to life imprisonment was favourably considered on humanitarian grounds and the sentence of life was remitted under Article 161 of the Constitution of India and therefore, the case of the petitioner may also be sympathetically considered.

11. It is relevant to extract Articles 161 and 162 of the Constitution of India:

"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.

162. Extent of executive power of State.- Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws:

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof."

Thus, under Article 161 of the Constitution of India, the Governor is having 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 which the executive power of the State extends.

12. It is to be noted at this juncture that Governor is the constitutional or formal head of the State and he exercises all his powers and functions conferred on him by or under the Constitution on the aid and advice of the Council of Ministers save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion. Wherever the Constitution requires the satisfaction of the Governor for the exercise of any power or function, the satisfaction required by the Constitution is not personal satisfaction of the Governor but the satisfaction in the constitutional sense under the cabinet system of Government. [see *Samsher Singh v. State of Punjab*, (1974) 2 SCC 831].

13. As already pointed out, the State Government, in the counter affidavit, took a stand that the Home Department had addressed a letter dated 19.02.2014 to the Ministry of Home Affairs of the Government of India to indicate their views as to the grant of remission to the convicts in Rajiv Gandhi's Assassination Case which includes the petitioner and it has been

put to challenge in W.P.(Crl.)No.48 of 2014. The State Government also took a stand that since the crime was investigated by the Central Bureau of Investigation, the appropriate Government shall be the Central Government and accordingly it's views have been sought and it is also put to challenge in W.P.Crl.)No.48 of 2014 and in terms of the impugned order dated 09.07.2014, it has been made clear that the said order shall not be made applicable to the respondents which include the petitioner.

14. If the prayer sought for by the petitioner is granted, this Court has to impliedly direct the Governor to perform the constitutional functions in a particular manner and there cannot be such kind of direction and that apart, the investigation of the said case was conducted by the Central Bureau of Investigation (CBI) and though the first respondent, vide letter dated 19.02.2014, has requested the Government of India, Ministry of Home Affairs to indicate its views on the proposal to remit the sentence of life imprisonment and to release the seven persons which include the petitioner also, challenge was made by filing W.P.(Crl.)No.48 of 2014 wherein the Hon'ble Supreme Court of India, while modifying the interim order has specifically indicated that the said order dated 09.07.2014 shall not be applicable to the respondents in W.P.(Crl.)No.48 of 2014 which include the writ petitioner also.

15. In the light of the fact that the investigation of the case was conducted by the Central Bureau of Investigation coupled with the order dated 09.07.2014 made in W.P.(Crl.)No.48 of 2014, this Court, for the present, cannot direct the State Government to consider the representation of the petitioner dated 22.02.2014 in terms of the letter of the Home Department in Letter (FS)No.1358 dated 10.11.1994. In the considered opinion of the Court, unless and until W.P.(Crl)No.48 of 2014 reaches finality, the prayer sought for by the petitioner cannot be granted.

16. In the result, this Writ Petition is disposed of and the first respondent is at liberty to consider the representation of the petitioner dated 22.02.2014 in accordance with law subject to the outcome of W.P.(Crl)No.48 of 2014. No costs.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

jvm

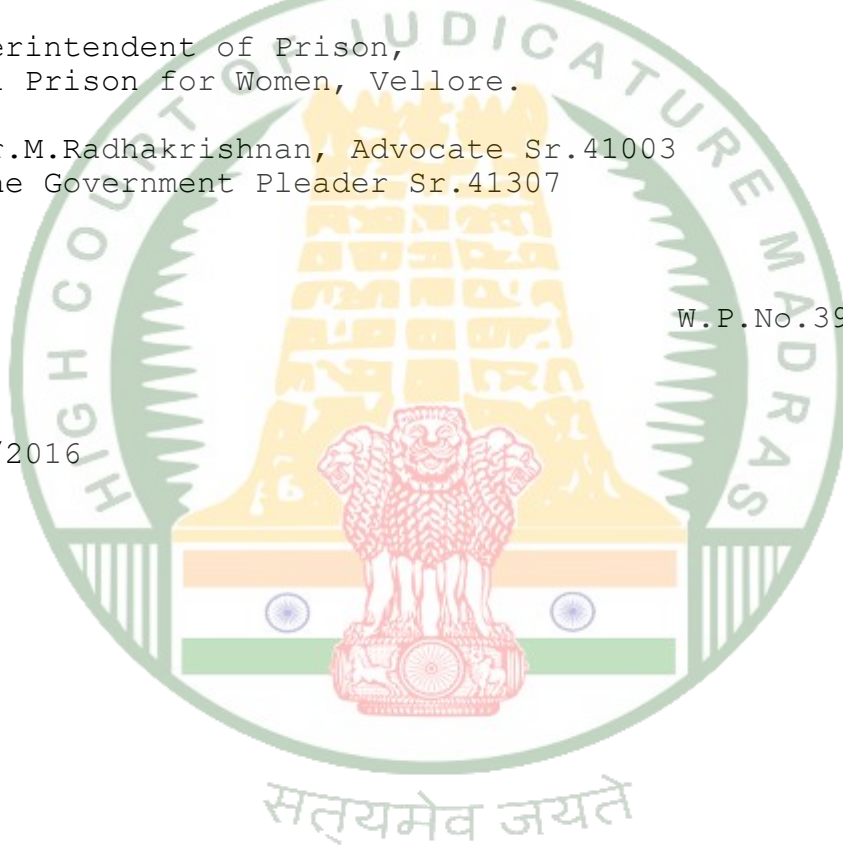
To

- 1.The Secretary to Government,
The State of Tamil Nadu,
Home, Prohibition and Excise Department,
Secretariat, Chennai-600 009.
- 2.The Additional Director General of Police &
Inspector General of Prisons,
Gandhi Irwin Road, Egmore, Chennai-600 008.
- 3.The Superintendent of Prison,
Special Prison for Women, Vellore.

+1cc to Mr.M.Radhakrishnan, Advocate Sr.41003
+1cc to the Government Pleader Sr.41307

W.P.No.39328 of 2015

ad[co]
srg 01/08/2016



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