

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 19.08.2016

PRONOUNCED ON: 30.08.2016

CORAM:

THE HON'BLE MR. JUSTICE P.N. PRAKASH

W.P. No.26605 of 2016

N. Bhuvaneswari

Petitioner

vs.

1 The State of Tamil Nadu
represented by its Secretary
Home Department
Fort St. George, Chennai 600 009

2 The Inspector General of Prisons
CMDA Tower-II
Egmore, Chennai 600 008

3 The Superintendent of Police
Central Prison, Vellore

Respondents

Writ Petition filed under Article 226 of the Constitution of India seeking a writ of certiorarified mandamus calling for the records of the third respondent in issuance of letter dated 12.07.2016 in No.2330/Tha.Ku.3/2016 and quash the same and thereby, direct the respondents to grant ordinary leave under Section 20(iv) of the Tamil Nadu Suspension of Sentence Rules, 1982 for making arrangements, participating and solemnising marriage of our (sic) the petitioner's daughter Ms.Narthika.

For petitioner Mr. S.R. Rajagopal
for Mrs. Vijayalakshmi Rajagopal

For respondents Mr. C. Emalias
Additional Public Prosecutor

ORDER

This writ petition is filed questioning the legality and validity of the letter dated 12.07.2016 in No.2330/Tha.Ku.3/2016 and for a direction to the respondents to grant ordinary leave to the petitioner's husband under Section 20(iv) of the Tamil Nadu Suspension of Sentence Rules, 1982 (for brevity "the

Suspension of Sentence Rules") for making arrangements, participating and solemnising marriage of the petitioner's daughter Ms. Narthika.

2 The incontrovertible facts in this case are as follows:

2.1 The petitioner's husband Nagarajan @ Koola Nagarajan is a life convict no.2330 undergoing imprisonment for life, pursuant to his conviction and sentence by the I Additional District and Sessions Judge, Salem in S.C. No.34 of 1999 on 20.10.2004 for various offences, including the offence under Section 302 IPC (5 counts). His appeal to this Court in Crl.A. No.140 of 2005 was dismissed on 01.02.2007 with a modification that the sentences imposed by the Trial Court should run concurrently, instead of consecutively.

2.2 According to the petitioner, her husband Nagarajan is in prison for the last 16 years. While so, a case in Mettur P.S. Crime No.105 of 2011 was registered against him for offences under Sections 120-B, 148, 341 and 302 IPC and final report was filed against him. The case was taken on file and is pending trial in S.C. No.302 of 2015 before the II Additional District and Sessions Judge, Salem. At this juncture, the petitioner made a representation to the Government for granting ordinary leave to Nagarajan under the Suspension of Sentence Rules, which was rejected by the impugned order on the ground that he will not be entitled to leave as he is facing trial in S.C. No.302 of 2015 before the II Additional District and Sessions Court, Salem. The impugned order relies upon Rule 35 of the Suspension of Sentence Rules to deny leave to Nagarajan, challenging which, this writ petition has been preferred by Nagarajan's wife, with a further relief of a direction to the respondents to grant ordinary leave to Nagarajan under Rule 20(iv) of the Suspension of Sentence Rules.

3 Heard Mr. S.R. Rajagopal, learned counsel for the petitioner and Mr.C.Emalias, Additional Public Prosecutor appearing for the respondents.

4 In the counter affidavit filed by the State, it is averred that Nagarajan was granted leave in 2011 and on his release, he had planned the murder of a person, pursuant to which, the second case in Mettur P.S. Crime No.105 of 2011 was registered against him, which is pending trial in S.C. No.302 of 2015. In the counter, various acts of indiscipline committed by Nagarajan in the prison have also been catalogued. Of course, this need not detain this Court any further, because, the impugned order is only on the ground of prohibition envisaged by Rule 35 of the Suspension of Sentence Rules.

5 Mr. S.R. Rajagopal, learned counsel for the petitioner, placed strong reliance on the following judgments and contended that the right under Article 21 of the Constitution of India is available to a prisoner in all its forms and that cannot be diluted by any law, much less a subordinate legislation.

i Sunil Fulchand Shan vs. Union of India and Others [(2000) 3 SCC 409];

ii Poonam Lata vs. M.L. Wadhavan and others [(1987) 3 SCC 347];

iii Sheela Barse vs. State of Maharashtra [(1983) 2 SCC 96];

iv Francis Coralie Mullin vs. Administrator, Union Territory of Delhi and others [(1981) 1 SCC 608];

v P. Nedumaran vs. The State of Tamil Nadu, represented by Secretary to Government (Home) Department, Chennai and another [2001 (4) CTC 549] (Single Bench judgment of this Court);

vi Javed Ahmed Abdul Hamid Pawala vs. State of Maharashtra [(1985) 1 SCC 275];

vii D. Bhuvan Mohan Patnaik and others vs. State of Andhra Pradesh and others [1975) 3 SCC 185];

viii State of A.P. vs. Challa Ramkrishna Reddy and others [(2000) 5 SCC 712]; and

ix Sunil Batra vs. Delhi Administration and others [(1978) 4 SCC 494].

6 Mr. Rajagopal relied upon paragraph nos. 22 to 24 in Challa Ramkrishna Reddy's case (supra) of which much emphasis was placed on paragraph 24.

"22 Right to Life is one of the basic human rights. It is guaranteed to every person by Article 21 of the Constitution and not even the State has the authority to violate that Right. A prisoner, be he a convict or under-trial or a detenu, does not cease to be a human being. Even when lodged in the jail, he continues to enjoy all his Fundamental Rights including

the Right to Life guaranteed to him under the Constitution. On being convicted of crime and deprived of their liberty in accordance with the procedure established by law, prisoners still retain the residue of constitutional rights.

23 "Prison" has been defined in Section 3(1) of the Prisons Act, 1894 as any jail or place used permanently or temporarily under the general or special orders of State Government for the detention of prisoners. Section 3 contemplates three kinds of prisoners. Sub- clause (2) of Section 3 defines "criminal prisoner" as a prisoner duly committed to custody under the writ, warrant or order of any court or authority exercising criminal jurisdiction or by order of a court martial. "Convicted criminal prisoner" has been defined in Section 3(3) as a prisoner under sentence of a court or court martial and includes a person detained in prison under the provisions of Chapter VIII of the Code of Criminal Procedure, 1882 or under the Prisoners Act, 1871. The corresponding provision in the new Code of Criminal Procedure is not being indicated as it is not necessary for purposes of this case. "Civil prisoner" has been defined in Section 3(4) as a prisoner who is not a "criminal prisoner".

24 Thus, according to the definition under the Prisoners Act, there is a convict, there is an under-trial and there is a civil prisoner who may be a detenu under preventive detention law. None of the three categories of prisoners lose their Fundamental Rights on being placed inside a prison. The restriction placed on their right to movement is the result of their conviction or involvement in crime. Thus, a person (prisoner) is deprived of his personal liberty in accordance with the procedure established by law which, as pointed out in *Maneka Gandhi vs. Union of India*, (1978) 1 SCC 248 = 1978 (2) SCR 621 = AIR 1978 SC 597, must be reasonable, fair and just."

7 The learned counsel for the petitioner contended that Nagarajan is on bail in S.C. No.302 of 2015 and that bail cannot be extinguished by Rule 35 of the Suspension of Sentence Rules. He developed his argument by contending that the word "prisoner" used in Rule 35 of the Suspension of Sentence Rules could only mean a "convict prisoner" and it will not apply to a "remand prisoner".

8 This Court gave its anxious consideration to the rival submissions.

9 It is beyond any pale of doubt that a prisoner serving out his sentence is not stripped off the fundamental right guaranteed under Article 21 of the Constitution of India. There can be no two opinions on this. The short point that falls for consideration of this Court is whether Rule 35 of the Suspension of Sentence Rules impinges on the fundamental right guaranteed under Article 21 of the Constitution of India and also the right of Nagarajan to be granted ordinary leave. It must be borne in mind that, in this writ petition, the constitutional validity of Rule 35 of the Suspension of Sentence Rules, is not under challenge.

10 The contours of Article 21 of the Constitution of India have been elaborately explained by the Supreme Court in *Maneka Gandhi vs. Union of India* [(1978) 1 SCC 248] and in subsequent rulings. To appreciate the argument of Mr. Rajagopal, it may be necessary to extract Rule 35 of the Suspension of Sentence Rules as under:

"35. Pending cases:

No prisoner on whom a case is pending trial shall be granted leave."
(emphasis supplied)

11 The liberty guaranteed under Article 21 of the Constitution of India can be taken away only via a procedure established by law. Nagarajan was tried in S.C. No.34 of 1999 and was convicted and sentenced to undergo imprisonment for life, pursuant to which, he is now a life convict prisoner in the jail. His conviction and sentence have been upheld by the superior Courts. Thus, by a procedure established by law, his liberty to be a free man has been taken away and he is now a convict prisoner in prison.

12 It is the duty of prison authorities to implement the judgments of Courts and make the convicts undergo the sentence imposed upon them by the Courts. Only in that context, Nagarajan is now serving the sentence in a prison that has been established under the Prisons Act. The remedies available to him for obtaining release via appeals to superior courts have been exhausted. Under Section 433-A, Cr.P.C., he should have to serve a minimum period of 14 years in prison. The order of the Court cannot be easily cut short by an executive fiat as that would amount to one limb of the State, setting at naught, the lawful orders passed by another limb, viz., the judiciary.

Nagarajan can earn his freedom either by an order of remission by the appropriate Government under Section 432, Cr.P.C. or by an order of the President under Article 72 of the Constitution of India or by an order of the Governor of the State under Article 161, *ibid.* These are the three avenues by which he can get over the edict of the Court.

13 In this context, it is profitable to quote Section 432 (5), Cr.P.C. which reads as follows:
"432 Power to suspend or remit sentences:

5 The appropriate Government may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with.:

Provided that in the case of any sentence (other than a sentence of fine) passed on a male person above the age of eighteen years, no such petition by the person sentenced or by any other person on his behalf shall be entertained, unless the person sentenced is in jail, and, --

(a) where such petition is made by the person sentenced, it is presented through the officer in charge of the jail; or

(b) where such petition is made by any other person, it contains a declaration that the person sentenced is in jail."

14 From a reading of the above provision, it is manifest that the Government may, either by general rules or special orders, give directions as to the suspension of sentence. The expression "suspension of sentence" means temporarily suspending the ordeal of undergoing sentence and permitting a person to move out of jail for a particular period and thereafter, to get him back to undergo his sentence. This suspension of sentence should not be confused with the power of the Court to grant suspension of sentence and bail under Section 389, Cr.P.C. Under Section 432 (5) Cr.P.C., the Government is empowered to temporarily suspend the sentence of a person and release him from prison enabling him to meet certain exigencies like marriage, a death in his family, etc. If such a residuary power is not given to the Government and if it is ordained that a prisoner can never go out of jail under any circumstance, it may dehumanise him and will be antithetical to the avowed policy of reformation of a convict. Hence, suspension can be given by the

Government under Section 432(5), Cr.P.C. on a case-to-case basis. The Tamil Nadu Government thought it fit to frame general rules under Section 432(5), Cr.P.C., rather than leaving the area unchartered so as to prevent arbitrary exercise of powers. Therefore, the Suspension of Sentence Rules was put in place and it is a general rule which governs all facets of temporary release of a convict prisoner.

15 A Full Bench of this Court, in the State, represented by the Home Secretary, the Government of Tamil Nadu, Fort St. George, Chennai and 4 others vs. Yesu @ Velaiyan [2011 (5) CTC 353], has held that de hors the Suspension of Sentence Rules, the Government cannot release a person on parole or leave or grant suspension of sentence through special orders.

16 The sum and substance of the aforesaid discussion is that a convict prisoner does not have a fundamental right to be released on leave and it is only a statutory right which is governed by the Suspension of Sentence Rules.

17 Mr. Rajagopal submitted that Rule 21 of the Suspension of Sentence Rules catalogues the categories of prisoners who will not be entitled to be released on ordinary leave and that Nagarajan does not fall under any of the categories enumerated therein. Therefore, he submitted that when Nagarajan is not disqualified under Rule 21 of the Suspension of Sentence Rules, an additional disqualification cannot be proffered via Rule 35 of the Suspension of Sentence Rules.

18 At first blush, his submission did sound appealing, but, on a closer scrutiny of the Suspension of Sentence Rules, it is limpid that the said contention is fallacious. I have no doubt in my mind that the word "prisoner" used in Rule 35 of the Suspension of Sentence Rules can mean only a convict prisoner, for, remand prisoners are not governed by the Suspension of Sentence Rules. Remand prisoners are those who are kept in prison on the orders of the Court, pending decision on their culpability. At any time, the Court can release a remand prisoner on bail. That is not the case with a convict prisoner. As stated above, a convict prisoner who has exhausted his remedies in the hierarchy of Courts cannot be released on bail by executive fiat. The discretion of the executive is governed by the Suspension of Sentence Rules and the sentence can be suspended only in a manner set down therein under the Suspension of Sentence Rules.

19 In the case at hand, Nagarajan is primarily a convict prisoner and incidentally, he also has the feathers of a remand prisoner, because, he is under the valid orders of remand in

S.C. No.302 of 2015. Assuming for a moment that he is not a convict prisoner, he would have been outside the jail and would have been attending the trial in S.C. No.302 of 2015 on the dates of hearing, as he is said to be on bail.

20 The expression "bail" has been succinctly explained by a Constitution Bench of the Supreme Court in Sunil Fulchand Shan vs. Union of India and others, [(2000) 3 SCC 409] as under:

"24. Bail and parole have different connotations in law. Bail is well understood in criminal jurisprudence and Chapter XXXIII of the Code of Criminal Procedure contains elaborate provisions relating to grant of bail. Bail is granted to a person who has been arrested in a non-bailable offence or has been convicted of an offence after trial. The effect of granting bail is to release the accused from internment though the court would still retain constructive control over him through the sureties. In case the accused is released on his own bond such constructive control could still be exercised through the conditions of the bond secured from him. The literal meaning of the word 'Bail' is surety. In Halsbury's Law of England 4th Ed., vol 11, para 166, the following observation succinctly brings out the effect of bail:

"The effect of granting bail is not to set the defendant (accused) at liberty but to release him from the custody of law and to entrust him to the custody of his sureties who are bound to produce him to appear at his trial at a specified time and place. The sureties may seize their principal at any time and may discharge themselves by handing him over to the custody of law and he will then be imprisoned."

21 In short, "bail" means "surety". If the accused absconds, the Court takes upon itself the responsibility and ensures that coercive steps like issuance of non-bailable warrant, proclamation, etc. are taken to get back the accused to the seizin of the Court.

22 Unfortunately, in the case of Nagarajan, he is a convict prisoner who has to undergo sentence in the jail in compliance of judicial orders. In this context, Rule 832 of the Tamil Nadu Prison Rules is worth referring to and the same reads thus:

"832 Production before Court:

1 The duty of ascertaining the time at which a prisoner committed to the Sessions is to be produced before the Sessions Court, and of providing the necessary escort for this purpose, rests with the police.

2 The Superintendent is responsible for the production in Court, at the appointed time, of a prisoner remanded pending in a magisterial inquiry or trial, and shall make suitable arrangements with the police for the provision of the necessary escort. When possible, a prisoner shall be conveyed to and from the court in a special conveyance.

3 A receipt in Form No.60 shall be obtained from the senior police officer of the escort whenever a prisoner, whether committed to the Sessions or under remand, is made over to the charge of such police officer for production in Court.

4 The police are responsible for the safe custody of any prisoner committed to their charge under the preceding sub rule of this rule, till he is returned to the prison or discharged from custody in due course of law. It is for the police to decide whether such prisoner shall be handcuffed or not.

5 When an undertrial prisoner has to be brought back to the prison even in the event of his acquittal or discharge, the senior police officer of the escort should be informed of the fact and the receipt in Form No.61 substituted.

6 When female undertrial prisoners are taken from courts to prisons or vice versa, they shall be provided with conveyance where the distance to be traversed by them exceeds 1.6 k.m. Conveyances may also be provided for shorter distances in cases in which, for reasons of health or custom, or other valid reason failure to make such provision would cause undue hardship to them."

23 During the trial of a person, if he is convicted and sentenced to undergo imprisonment in another case, pursuant to which, he is lodged in prison, it is the duty of the State to inform the Court where he is facing trial, so that the Trial Court could issue a Prisoner Transfer Warrant under Section 267, Cr.P.C. Pursuant to the issuance of a Prisoner Transfer Warrant

under Section 267, Cr.P.C., the Superintendent of Prisons is required to produce the prisoner before the said Court. If the accused is already on bail in the trial case, for every hearing date, there will be an order of the Trial Court under Section 267 Cr.P.C. for production of the accused. If the bail is cancelled, then, the accused will be on remand under Section 309, *ibid*.

24 In the light of Rule 832 of the Tamil Nadu Prison Rules, a duty is cast upon the Prison authorities to produce Nagarajan before the II Additional District and Sessions Court, Salem, in S.C. No.302 of 2015 on all hearing dates. That is why, Rule 35 of the Suspension of Sentence Rules uses the expression "trial" and it does not use the expression "investigation" or "enquiry". In other words, if only an FIR is pending against a convict prisoner, Rule 35 will not come into play. Rule 35 will come into play only when the convict prisoner is facing trial.

25 Rule 35 is intended to ensure that the Executive does not release a convict prisoner on ordinary leave during the pendency of trial against him and thus, shirk the responsibility to produce him before the Trial Court, irrespective of whether a person is on bail in that case or not.

26 To put it even simpler, the executive power to release a convict prisoner on leave, is subject to the responsibility of the jail authorities to produce him before the Trial Court for hearings. In the teeth of the legislative interdict under Rule 35 of the Suspension of Sentence Rules, if unbridled power is given to the Executive to grant leave to a convict prisoner, ignoring the responsibilities to produce him before the Court for trial, that may lead to an abuse of executive powers, which cannot be countenanced.

27 At this juncture, it may be apposite to point out that in the recent Constitution Bench judgment in *Union of India vs. Sriharan @ Murugan and others* [2015 (13) Scale 165], the Supreme Court has very clearly held that even for releasing a prisoner under Section 432(1), Cr.P.C., the opinion of the convicting Judge should be obtained under Section 432(2), Cr.P.C., without which the Government, cannot move its little finger even. Therefore, in the considered opinion of this Court, Rule 35 cannot be interpreted to mean that it will not apply to a convict prisoner, who, incidentally is also a remand prisoner, whether, he is on bail or otherwise.

In view of the aforesaid discussion, the writ petition is liable to be dismissed as being devoid of merits and is accordingly dismissed. Costs made easy.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

cad

To

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+1 CC to M/s. Vijayalakshmi Rajagopal, Advocate, Sr.No.48881

W.P. No.26605 of 2016

EV (CO)

MD : 16/09/2016

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