

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 17.03.2017

CORAM

THE HONOURABLE MR. JUSTICE S.NAGAMUTHU

and

THE HONOURABLE DR.JUSTICE ANITA SUMANTH

H.C.P No.1652 of 2016

Subbiah

.. 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 Superintendent of Prisons,
Central Prison,
Palayamkottai,
Tirunelveli District.

...Respondents

Habeas Corpus Petition filed under Article 226 of the Constitution of India to issue a writ of Habeas Corpus to direct the respondents to produce the petitioner namely Subbiah, s/o Sivan aged about 46years, life convict, confined in the Central Prison, Palayamkottai, Tirunelveli District before this Court and direct the respondents to consider the petitioner immediately under G.O.Ms.No.1155 Home (Prison-IV) Department dated 11.09.2008 for premature release and set him at liberty.

For Petitioner : Mr.M.Radhakrishnan,
for Mr.P.Pugalenthi

For Respondents : Mr.V.M.R. Rajentren,
Additional Public Prosecutor

ORDER

(Order of the Court was made by S. NAGAMUTHU, J.,)

The petitioner is a life convict. The learned I Additional Sessions Judge, Chennai had convicted the petitioner in S.C.No.317 of 2001, for offence under Section 302 r/w 149 I.P.C., and sentenced him to undergo imprisonment for life. The above sentence was later on confirmed by this Court, on an appeal, filed by the petitioner. He has been lodged in Central Prison, Palayamkottai, Tirunelveli District.

2. According to the petitioner, he has completed actual imprisonment of more than seven years as on 15.09.2008. The Government of Tamil Nadu, issued G.O.Ms.No.1155 Home (Pri.IV, Department) dated 11.09.2008, granting premature release of life convict prisoners, on the occasion of the birth centenary of Perarinar Anna, on 15.09.2008.

3. As per the said Government Order, the Government considered the case of the life convicts who had completed seven years of actual imprisonment as on 15.09.2008, and who are aged 60 years and above and have completed five years of actual imprisonment as on 15.09.2008 and granted premature release on the satisfaction of the following:-

- "(i) That their general behaviour in the prison should be satisfactory.
- (ii) That the life of the convict would be safe if released;
- (iii) That they would be accepted by the members of their family or any other social organization which can give guarantee for the safety of their lives.
- (iv) That their cases should not come under Section 435 Cr.P.C., and
- (v) That they will execute the bonds as per usual terms and conditions."

4. The Government has proposed to grant premature release to the eligible life convicts. While considering the said issue, the Government has reported that as many as 1340 life convict prisoners who have completed seven years of actual imprisonment, as on 15.09.2008, including three life convict prisoners of Tamil Nadu undergoing their sentence in the prisons of Kerala State on reciprocal basis and another list of 66 life convicts who are aged 60 years and above and have completed 5 years of actual imprisonment, as on 15.09.2008, are eligible for premature release.

5. According to the petitioner, since, as on 15.09.2008, he had also completed seven years of actual imprisonment and since, he satisfied the conditions enumerated in the said Government Order, he should also been released by granting the benefit of premature release as on 15.09.2008. But, without taking into account the period of actual imprisonment undergone by the petitioner as an under trial prisoner, the respondents have not extended the benefit to the petitioner.

6. In this regard, the petitioner has filed a miscellaneous petition in CrI.M.P.No.5509 of 2009 before the learned I Additional Sessions Judge, Chennai, seeking a specific direction to the respondent therein to give set off under Section 428 Cr.P.C., of the period spent by the petitioner as under trial prisoner. That was allowed by the learned I Additional Sessions Judge, by order dated 17.07.2009, thereby directing the respondent therein to take into account the period of sentence undergone by the petitioner from 21.12.1996 to 07.04.1997 and from 21.08.2001 to 14.11.2002 also.

7. It is the further grievance of the petitioner that despite the specific direction issued by the learned I Additional Sessions Judge, the respondents herein have not extended the benefit of the said Government Order to him. Therefore, the petitioner has come up with this Habeas Corpus Petition before this Court.

8. We have heard Mr.M.Radhakrishnan, learned counsel for the petitioner and Mr.V.M.R.Rajentren, learned Additional Public Prosecutor, appearing for the State and we have also perused the records carefully.

9. There is no dispute over the fact that from 21.12.1996 to 07.04.1997 and from 21.08.2001 to 14.11.2002, the petitioner was in prison either as under trial prisoner or as a convict prisoner, until he was released on bail. There is also no controversy over the fact that if these two periods are taken into account as on 15.09.2008, he had completed more than seven years of actual imprisonment, that is in fact admitted in paragraph No.7 of the counter affidavit filed by the first respondent. But, in the counter affidavit, the first respondent has stated that since, the period of sentence already undergone by the petitioner from 21.12.1996 to 07.04.1997 and from 21.08.2001 to 14.11.2002 was not ordered to be given set off as required under Section 428 Cr.P.C., by the trial Court, the said period was not given set off to the petitioner, as on 15.09.2008. In the counter affidavit, it has been further stated that since, the order of the learned Judge was received only in the year 2009, i.e., much after the Government Order, the same

could not be given effect. These contentions of the first respondent is quite strange. In this regard, we may refer to Section 428 Cr.P.C., which mandates that period of detention undergone by the accused to be set off against the sentence of imprisonment. The said provision reads as follows:-

"428. Period of detention undergone by the accused to be set off against the sentence of imprisonment. Where an accused person has, on conviction, been sentenced to imprisonment, for a term ¹ [not being imprisonment in default of payment of fine,] the period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case and before the date of such conviction shall be set off against the term of imprisonment imposed on him on such conviction, and the liability of such person to undergo imprisonment on such conviction shall be restricted to the remainder, if any, of the term of imprisonment imposed on him."

10.A cursory perusal of the above provision would make it ipso facto clear that setting of period of sentence already undergone is by means of legislative mandate under Section 428 Cr.P.C., and it is not require any judicial order by the trial Court or by the Appellate Court. Unlike Section 427 Cr.P.C., require such judicial order. Section 428 Cr.P.C., does not even indicate the need for such an order from the Court. It is for the Executive Authority to take into account the period of sentence already undergone by the convict as already undergone by him as under trial prisoner and to account the same for the purpose of giving set off.

11.In the case on hand, though, the learned I Additional Sessions Judge, passed an order directing the respondents to give set off to the petitioner, as per the legislative mandate contained in Section 428 Cr.P.C., set off should have been given by the respondents to the petitioner even before 15.09.2008. Had it been done, undoubtedly, as on 15.09.2008, since, the petitioner had completed more than seven years of actual imprisonment, he should have been included in Annexure I to the Government Order and he should have been given the benefit of premature release provided, if he satisfy the other conditions imposed by the Government. In our considered view, we find justification in the submissions made by the petitioner.

12.In the result, the Habeas Corpus Petition is allowed in the following terms:-

(i)The respondents are directed to declare that the petitioner is entitled for being considered for premature release in terms of G.O.Ms.No.1155 Home (Pri.IV, Department) dated 11.09.2008;

(ii)The respondents shall consider the case of the petitioner and if they are satisfied that the petitioner has satisfied the requirements such as general behaviour etc., as indicated in G.O.Ms.No.1155 Home (Pri.IV, Department) dated 11.09.2008, the respondents shall grant him premature release, in terms of the said Government Order and set him at liberty and

(iii)At any rate, the above exercise shall be completed by the respondents, within a period of four weeks from the date of receipt of a copy of this order.

Sd/-

Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

jbm
To

1.The Secretary to Government,
Home, Prohibition and Excise Department,
Secretariat, Chennai - 600 009.

2.The Superintendent of Prisons,
Central Prison, Palayamkottai,
Tirunelveli District.

3.The Public Prosecutor,
High Court, Chennai.

+1cc to Mr.P.Pugalenth, Advocate Sr.16745

H.C.P.No.1652 of 2016

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srg 13/04/2017