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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 11.01.2018

Coram :-

THE HON'BLE DR.JUSTICE S.VIMALA

and

THE HON'BLE MRS.JUSTICE T.KRISHNAVALLI

Habeas Corpus Petition No.1837 of 2017

Mrs.Meharaj

... Petitioner

-vs-

1. The State represented by its
Secretary to Government of Tamil Nadu,
Home Department, Fort St.George,
Chennai-9.

2. The Additional Director General of Prison,
C.M.D.A. Towers, Egmore,
Chennai-600 008.

3. The Deputy Inspector General of Prisons,
Madurai Zone,
Madurai-625 016.

4. The Superintendent,
Central Prison,
Palayamkottai.

... Respondents

Prayer: Writ petition under Article 226 of the Constitution of India is filed praying for issuance of a writ of Habeas Corpus, calling for the entire records pertaining to impugned order of the 3rd respondent in No.2358/U Tha.2/2017 dated 20.09.2017 and quash the same and consequently directing the respondents to produce the detenu Siddhiqe Ali @ Sulthan, S/o.Mr.Dheen, Convict No.7368 aged about 40 years detained at Palayamkottai Central prison before this Honorable Court and to grant leave for 30 days to the detenu for medical treatment and arrangement of livelihood.

For petitioner : Mr.R.Narayanan

For respondents : Mr.C.Ramesh

Addl. Public Prosecutor

O R D E R

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

"No one truly knows a nation until one has been
imprisoned in its jails. A nation should not be judged by how it
treats its highest citizens, but its lowest ones" -
Nelson Mandela.



Whether inside prison or outside, a person shall not be deprived of his guaranteed freedom save by methods, right, just and fair - so said the Hon'ble Supreme Court in the case of Menakha Gandhi, reported in 1978 (1) SCC 248 at 284.

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2. This application has been filed by the wife of the detenu, namely, Siddique Ali @ Sulthan, aged 40 years, seeking to quash the impugned order of the third respondent dated 20.09.2017, declining leave for her husband and seeking a direction to the respondents to produce her husband/detenu, who is a life convict detained at Central Prison, Palayamkottai, before this Court and to grant him leave for 30 days to assist her in the infertility treatment to be undergone by her.

3. It is stated that previously, a Habeas Corpus Petition was filed before this Court in HCP(MD) No.1121/2017 praying to grant leave for 60 days to the detenu. This Court, by order dated 31.08.2017, had directed the respondents to take a decision for consideration of leave within a period of one week from the date of receipt of the copy of the order. By the letter dated 20.09.2017, the leave was declined by giving two reasons, namely,

(i) neither the Inspector of Police nor the Probation Officer recommended the leave, and

(ii) The personal life of the detenu will be put to danger.

This order is under challenge in this application.

4. As regards the maintainability of this Petition is concerned, the learned counsel for the petitioner submitted that in Sunil Batra v. Delhi Administration reported in AIR 1980 SC 1579, when such similar issue arose for consideration, the Hon'ble Supreme Court has held that a Habeas Corpus Petition is maintainable. The relevant paragraph reads as under:

"One component of fair procedure is natural justice. Thus it is now clear law that a prisoner wears the armour of basic freedom even behind bars and that on breach thereof by lawless officials, the law will respond to his distress signals through 'writ' aid. The Indian human has a constant companion-the court armed with the Constitution. The weapon is 'habeas', the power is Part III and the projectile is Batra, 1978 (4) SCC 494 at Pg.No.495 (AIR 1978 SC 1675). No iron curtain can be drawn between the prisoner and the Constitution."

5. In Prince v. Attorney General for New South Wales, initial conviction and consequent imprisonment, though is in accordance with law, whether the denial of leave for 30 days, during the period of incarceration would amount to



illegal custody and thus bring the case of the petitioner within the category of Habeas Corpus is the issue that arose for consideration in this petition, which is answered by the dictum laid down in the case of Sunil Batra.

6. Therefore, it is clear that when the rights of the prisoner is not protected, this Court can exercise the writ jurisdiction, if the humanistic approach obscure the sense of realities.

7. The learned Additional Public Prosecutor appearing for the State would however oppose this application on the ground that security of the detenu is in danger, which is evident from the report of the Probation Officer.

8. This Court has perused the report filed by the Probation Officer.

9. The main objection raised by the Probation Officer is on the ground that the security of the prisoner himself is in danger and therefore, he cannot be sent on leave. This objection has no logical basis. It is stated in the report that the whereabouts of the family of the deceased is not known. If at all there is any danger and life threat to the prisoner, it could be mainly expected from the family of the deceased and since the whereabouts of the family of the deceased is not known to the Probation Officer, then the issue regarding threat to life of the detenu is very remote and even if there is any life threat, prisoner should be saved by the Police.

10. The 2nd objection is that there is no provision under the Jail Manual for the grant of leave on the ground stated by the petitioner herein. Rule 20 of the Tamil Nadu Suspension of Sentence Rules, 1982, prescribes eight grounds, under which, the 7th ground is 'any other extraordinary reason'. Therefore, whether the claim made by the petitioner is an extraordinary reason or not should be considered. In the absence of any other rule, providing for release of prisoner for the purpose of procreation of a child with the available law, it must be interpreted that the request is covered under extraordinary reasons. Even assuming that this reason is not extraordinary, Article 21 of the Constitution of India would very much available for this Court to consider the claim made by the wife.

11. The wife / petitioner is aged 32. The prisoner is undergoing imprisonment (life) and he is in custody for a period of 18 years. The fact remains that they are not blessed with a child, may be because the husband is not at all living with his wife. The Doctor has given assurance to the wife that with the help of infertility treatment, it is possible to beget a child.



12. Man is a social animal. He needs a family as well as a society to live in. The man needs both to share his emotions and feelings. Being human beings, prisoners also would like to share their problems with their life partner as well as with the society. Just because, they are termed as prisoners, their right to dignity cannot be deprived.

13. Out of four theories of punishment, India has accepted the theory of reformation also. The concept of reformatory theory is best, as it says that the human being to be reformed would become the productive member of the society. If that is to be done, prisons have to be transformed as homes for the purpose of giving training morally as well as intellectually, so that the prisoners are denuded of the qualities of a criminal. The psychologists and psychiatrists believe that the frustration, tension, the ill feelings and the heart burnings can be reduced and a human being can be better constructed if they are allowed conjugal relationship even rarely. Therefore, while considering the merits and demerits of allowing conjugal visits or permitting leave for the purpose of artificial insemination, the advantages are more than the disadvantages.

14. Conjugal visit leads to strong family bonds and keep the family functional rather than the family becoming dysfunctional due to prolonged isolation and lack of sexual contact.

15. It is also reported that there are innumerable cases of HIV / AIDS in jails, because of sexual intercourse in between the same gender. This evil is happening because of deprivation of conjugal relationship for a prisoner. Therefore, it is a right time that the Government should constitute a committee to consider the possibility of providing conjugal visit and analyze the merits and demerits of permitting conjugal visits and to provide the facility for conjugal visits to eligible prisoners subject to the precautions / safety measures to be taken.

16. Conjugal visits of the spouse of the prisoners is also the right of the prisoner. This right is recognized at least in few countries of the world. When the prisons are overcrowded providing place for conjugal visits may be a problem, but the Government has to find out a solution. Today, conjugal visits are called extended family visits (or, alternately, family reunion visits). The official reason for these extended family visits is three-fold: to maintain the relationship between the prisoner and the members of his family, to reduce recidivism, and to motivate or to provide an incentive for the good behavior.

<https://hcservices.ecourts.gov.in/hcse/Times/> Internationally, it becomes a well accepted rule that the correctional mechanism in criminal justice administration should comply with reformatory policies. International Covenant on



Civil and Political Rights, 1966, Art. 10 (3) mandates that the essential feature of correctional system should be reformation and rehabilitation of prisoners.

18. In 2015, Government of India passed legislation stating that conjugal visits are a right and therefore, it is not a privilege for married inmates. These inmates are also entitled, if they wish, to give their sperm to their spouse for artificial insemination.

19. Apart from that, even though the wife is not under incarceration, but a suffering person outside the prison on account of the marital relationship with the prisoner and her legitimate expectation to have a child cannot be declined.

20. The next question is, whether permission should be granted in the name of parole or by way of suspending the sentence. This distinction between parole and suspension of sentence has been explained by a full bench of this court, wherein the observation reads as under:

"We hold that until a legislation is made or appropriate rules are issued by the Tamil Nadu government regulating the grant of parole (temporary release), there shall be no temporary release of any prisoner on parole." The term parole as repeatedly used in Chapter XIX of the Tamil Nadu Prisons Rules is not relating to the temporary release of a prisoner, but it is a release by granting remission.

So far no rules have been issued by the government of Tamil Nadu by way of administrative instructions under Article 162 regarding grant of parole. Thus, in Tamil Nadu, as of now, neither the government nor any other statutory authority has power to grant parole for want of rules or a statute. The government and the authorities under the Tamil Nadu Suspension of Sentence Rules have got power only to grant suspension of sentence and not parole.

Parole and suspension of sentence are of different connotations operating in different manners. Parole does not disrupt the sentence undergone by the prisoner, whereas the later disrupt the sentence undergone for a temporary period.

21. Under the stated circumstances, this petition is disposed of and the convict prisoner, namely, Siddique Ali @ Sulthan, S/o. Deen (Convict No. 7368) is permitted to go on temporary leave initially for a period of two weeks, i.e. from 20.01.2018 to 03.02.2018. Till such time, the sentence remains suspended and the respondents 3 and 4 are directed to release the husband of the petitioner on 20.01.2018 upto 03.02.2018, subject to the following conditions:



i) The respondents 3 and 4 shall follow all the usual procedures and safeguarding measures in accordance with the Prison Manual;

ii) During leave, the Prison authorities shall provide escort to the prisoner and the police escort shall be in civil dress. After the leave period, the prisoner shall be taken back to the Central Prison, Palayamkottai before 6.00p.m. on 03.02.2018.

22. It is made clear that if the preliminary investigation by the Doctors reveals that there is a possibility of getting a child and further treatment is necessary, then this Court will consider the extension of time by another two weeks. In case of further treatment, the petitioner shall make request to the jail authorities. The petitioner is also at liberty to move this Court as and when necessary. The expenses for escort shall be borne out by the State Government.

Sd/-

Assistant Registrar(CS-II)

/True Copy/

Sub Assistant Registrar

To:

- 1.The Secretary to Government
State of Tamil Nadu,
Home Department,
Fort St.George,
Chennai-9.
- 2.The Additional Director General of Prison,
C.M.D.A. Towers,
Egmore,
Chennai-600 008.
- 3.The Deputy Inspector General of Prisons,
Madurai Zone,
Madurai-625 016.
- 4.The Superintendent, (By Fax)
Central Prison,
Palayamkottai.
(In Duplicate Communicate to Detenu)
- 5.The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.

+1cc to M/S.R.Narayanan, Advocate SR.No. 41934

H.C.P. (MD) .No.1837 of 2017

11.01.2018