



WEB COPY

H.C.P(MD)No.308 of 2019

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 10.04.2019

PRONOUNCED ON : 20 .09.2019

CORAM:

THE HONOURABLE MR.JUSTICE P.N.PRAKASH

and

THE HONOURABLE MR.JUSTICE B.PUGALENDHI

H.C.P(MD)No.308 of 2019

Chittammal

... Petitioner

Vs.

1.The State of Tamil Nadu

Represented by the Home Secretary (Prison),
Secretariat, Fort St George,
Chennai - 9.

2.The Additional Director General of Police (Prisons) /
The Inspector General of Prisons,
CMDA Tower, Gandhi Irwin Road,
Egmore, Chennai - 600 008.

3.The Superintendent of Prison,
Central Prison,
Palayamkottai,
Tirunelveli District.

... Respondents

Prayer: Habeas Corpus Petition filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Habeas Corpus, directing the respondents to produce the petitioner's brother namely Gandhi @ Kumar, life convict No.2135, aged about 66 years, now confined in the Central Prison, Palayamkottai, Tirunelveli District, before this Court and set him at liberty under Rule 341(7) of Tamil Nadu Prison Rules 1983, the Advisory Board Scheme, for premature release and considering the petitioner's representation dated 14.11.2017.

For Petitioner : Mr.R.Russelraj

For Respondents : Mr.M.Chandrasekaran,
Additional Public Prosecutor



ORDER

(Order of the Court was made by **B.PUGALENDHI, J.**)

This Habeas Corpus Petition has been filed by the sister of one Gandhi Kumar, a life convict to issue a Writ of Habeas Corpus to produce her brother Gandhi Kumar, who is confined in the Central Prison, Palayamkottai, Tirunelveli District, before this Court and set him at liberty under Rule 341(7) of Tamil Nadu Prison Rules, 1983 under the Advisory Board Scheme, for premature release, considering her representation dated 14.11.2017.

2.The case of the petitioner is that her brother Gandhi Kumar was an accused in Crime No.282 of 1999, on the file of the Inspector of Police, Thackalay Police Station and he was tried for an offence under Section 302 IPC, before the Sessions Court, Kanyakumari at Nagercoil in S.C.No.236 of 2002 and by order dated 14.06.2011, the trial Court found him guilty for the offence under Section 302 IPC, convicted and sentenced him to undergo, life imprisonment and to pay a fine of Rs.5,000/-, in default, to undergo simple imprisonment for one year.

3.As against the order of conviction, the convict Gandhi Kumar has filed an appeal in Crl.A(MD)No.217 of 2011 and the same was dismissed by confirming the conviction and sentence imposed by the trial Court.

4.According to the petitioner, her brother / life convict has completed six years of actual imprisonment as on 13.12.2017 and he is also aged about 66 years. The petitioner further submits that as per Rule 341(7) of Tamil Nadu Prison Rules, 1983, whether male or female undergoing sentence of life imprisonment shall be eligible to be considered for premature release from prison immediately after serving out sentence of two years and six months of actual imprisonment i.e., with remission. Since the petitioner's brother has completed 66 years of age and he is also suffering from terminal illness AIDS, this petition is filed for premature release under Rule 341(7) of Tamil Nadu Prison Rules, 1983.

5.Per contra the learned Additional Public Prosecutor raises objections with regard to the maintainability of this Habeas Corpus Petition in view of the proviso to Rule 341(2).

6.Heard the learned Counsel appearing for the petitioner and the learned Additional Public Prosecutor appearing for the respondents and also perused the materials placed before this Court.

7.The petitioner's brother Gandhi Kumar, referred as detenu in this case is a life convict. He was charged for the offence under Section 302 IPC along with two other accused and since the other two



accused were absconding, the case against this petitioner was alone spilt up and trail was conducted by the Principal sessions Judge, Kanyakumari at Nagercoil in S.C.No.236 of 2002 and he was found guilty for the offence under Section 302 IPC, convicted and sentenced to life imprisonment by order dated 14.06.2011. The appeal preferred by the accused in CrI.A(MD)No.217 of 2011 was also dismissed, confirming the conviction and sentence imposed by the trial Court.

8.Rule 341 deals with the cases, in which, the prisoners to be placed before the Advisory Board. Rule 341 (7) reads as follows:

"341(7) The cases of all prisoners including life convicts who satisfy the following conditions shall be placed before the Advisory Board for consideration namely:

(1)that the prisoners are over 65 or 55 years of age according as they are male or female prisoners respectively and have served not less than two and a half years of their sentence, including remission; and

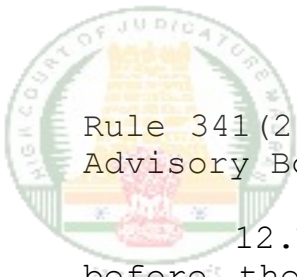
(2) that they are serving sentences for their first and only conviction.

9.Section 433-A of the Criminal Procedure Code restricts the powers of the Government to remission or commutation in certain cases. Section 433-A of CrPC reads as follows:

"433-A Restriction on powers of remission or commutation in certain cases.- Notwithstanding anything contained in section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishment provided by law, or, where a sentence of death imposed on person has been commuted under section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment."

10. As rightly pointed out by the learned Additional Public Prosecutor, the proviso to Rule 341(2) prohibits any premature release that in the case of prisoners, sentenced to imprisonment for life on or after 18th December 1978 for an offence, for which death is one of the punishments awarded by law or in whose case sentence of death imprisonment has been commuted under Section 433 of the Code of Criminal Procedure, 1973 (Central Act 2 of 1974) into one of the imprisonment for life, shall be placed before the Advisory Board only, if they have served at least fourteen years of imprisonment, in view of the provisions under Section 433-A of CrPC.

11.The petitioner's brother Gandhi Kumar is a life convict and he was tried for the offence punishable under Section 302 IPC, which shall be punishable upto death sentence. As per proviso to



Rule 341(2), the petitioner is not eligible to be placed before the Advisory Board.

12. When the vires of Section 433-A of CrPC was challenged before the Hon'ble Supreme Court in **Maru Ram Vs Union of India**, reported in **(1981) 1 SCC 107**, the Hon'ble Supreme Court has concluded as follows:

"72. We conclude by formulating our findings.

1. We repulse all the thrusts on the vires of section 433A. Maybe, penologically the prolonged terms prescribed by the Section is supererogative. If we had our druthers we would have negated the need for a fourteen-year gestation for reformation. But ours is to construe not construct, to decode, not to make a code.

2. We affirm the current supremacy of section 433A over the Remission Rules and short-sentencing statutes made by the various States.

3. We uphold all remissions and short-sentencing passed under Articles 72 and 161 of the Constitution but release will follow, in life sentence cases, only on Government making an order en masse or individually, in that behalf.

4. We hold that s. 432 and s. 433 are not a manifestation of Articles 72 and 161 of the Constitution but a separate, though similar, power, and s. 433A, by nullifying wholly or partially these prior provisions does not violate or detract from the full operation of the constitutional power to pardon, commute and the like.

5. We negate the plea that s. 433A contravenes Article 20(1) of the Constitution.

6. We follow Godse's case to hold that imprisonment for life lasts until the last breath, and whatever the length of remissions earned, the prisoner can claim release only if the remaining sentence is remitted by Government.



7. We declare that s. 433A, in both its limbs (i.e. 'both types of life imprisonment specified in it), is prospective in effect. To put the position beyond doubt, we direct that the mandatory minimum of 14 years' actual imprisonment will not operate against those whose cases were decided by the trial court before the 18th December, 1978 (directly or retroactively, as explained in the judgment) when s. 433A came into force. All 'lifers' whose conviction by the court of first instance was entered prior to that date are entitled to consideration by Government for release on the strength of earned remissions although a release can take place only if Government makes an order to that effect. To this extent the battle of the tenses is won by the prisoners. It follows, by the same logic, that short-sentencing legislations, if any, will entitle a prisoner to claim release thereunder if his conviction by the court of first instance was before s. 433A was brought into effect.

8. The power under Articles 72 and 161 of the Constitution can be exercised by the Central and State Governments, not by the President or Governor on their own. The advice of the appropriate Government binds the Head of the State. No separate order for each individual case is necessary but any general order made must be clear enough to identify the group of cases and indicate the application of mind to. the whole group.

9. Considerations for exercise of power under Articles 72/161 may be myriad and their occasions protean, and are left to the appropriate Government, but no consideration nor occasion can be wholly irrelevant, irrational, discriminatory or mala fide.. Only in these rare cases will the court examine the exercise.

10. Although the remission rules or short-sentencing provisions proprio vigore may not apply as against s. 433A, they will override s. 433A if the Government, Central or State, guides itself by the selfsame rules or schemes in the exercise of its constitutional power. We regard it as fair that until fresh rules are made in keeping with experience gathered, current social conditions and accepted



penological thinking- a desirable step, in our view- the present remission and release schemes may usefully be taken as guidelines under Articles 72/161 and orders for release passed. We cannot fault the Government, if in some intractably savage delinquents, s. 433A is itself treated as a guideline for exercise of Articles 72/161. These observations of ours are recommendatory to avoid a hiatus, but it is for Government, Central or State, to decide whether and why the current Remission Rules, should not survive until replaced by a more wholesome scheme.

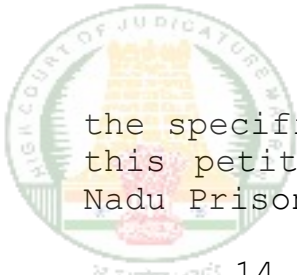
11. The U. P. Prisoners' Release on Probation Act, 1938, enabling limited enlargement under licence will be effective as legislatively sanctioned imprisonment of a loose and liberal type and such licensed enlargement will be reckoned for the purpose of the 14-year duration. Similar other statutes and rules will enjoy similar efficacy.

12. In our view, penal humanitarianism and rehabilitative desideratum warrant liberal paroles, subject to security safeguards, and other humanizing strategies for inmates so that the dignity and worth of the human person are not desecrated by making mass jails anthropoid zoos. Human rights awareness must infuse institutional reform and search for alternatives.

13. We have declared the law all right, but law-in- action fulfils itself not by declaration alone and needs the wings of communication to the target community. So, the further direction goes from this court that the last decretal part is translated and kept prominently in each ward and the whole judgment, in the language of the State, made available to the inmates in the jail library.

14. Section 433A does not forbid parole or other release within the 14-year span. So to interpret the Section as to intensify inner tension and taboo intermissions of freedom is to do violence to language and liberty."

13. In view of the provisions under Section 433-A of CrPC and



the specific bar under Rule 341(2) of Tamil Nadu Prison Rules, 1983, this petition for premature release under Section 341(7) of Tamil Nadu Prison Rules, 1983 is not maintainable.

14. In the result, this Habeas Corpus Petition is dismissed as not maintainable.

Sd/-

Assistant Registrar (AD I)

// True Copy //

Sub Assistant Registrar (CS)

dsk

To

1. The Home Secretary (Prison),
Secretariat, Fort St George,
Chennai - 9.

2. The Additional Director General of Police (Prisons) /
The Inspector General of Prisons,
CMDA Tower, Gandhi Irwin Road,
Egmore, Chennai - 600 008.

3. The Superintendent of Prison,
Central Prison,
Palayamkottai,
Tirunelveli District.

4. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.R.RUSSEL RAJ, Advocate (SR-88298[F] dated 20/09/2019)

H.C.P (MD) No. 308 of 2019

20.09.2019

KK/SAR/30.09.2019/7P-6C/