

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.09.2020

CORAM :

THE HON'BLE MR.A.P.SAHI, CHIEF JUSTICE
AND
THE HON'BLE MR.JUSTICE SENTHILKUMAR RAMAMOORTHY

W.A.No.292 of 2019

- 1.Dhanasekari
- 2.Thulasi @ Iyyappan
- 3.Manikandan

..Appellants

Vs.

1. Union Territory of Puducherry,
rep. by its Secretary,
Office of the Lieutenant Governor,
Pondicherry.
2. Union Territory of Puducherry,
rep. by its Secretary,
Office of the Chief Secretary,
Pondicherry.
3. Union Territory of Puducherry,
rep. by its Secretary,
Office of the Home Department,
Pondicherry.
4. The Station House Officer,
Mudaliarpet Police Station,
Puducherry.

5. Venkatesh @ Dhanasekar
6. Sathish
7. Narayanan
8. Madhan
9. Sankar @ Jai Shankar

..Respondents

Prayer: Appeals filed under Clause 15 of the Letters Patent against the order dated 2.1.2019 made in W.P.No.23103 of 2018. Writ Petition praying to writ of Mandamus forbearing the Respondents herein from granting remission / Premature release for the life convicts in criminal case pertaining to Crime No. 101/2004 on the file of the 4th Respondent Police.

For Appellants : Mr.P.Dinesh Kumar
For Respondents : Mr.Bharathachakravathy
Special Government Pleader
for respondent Nos.1 to 4
: Mr.K.Gandhi Kumar
for respondent Nos.5 to 8
: Mr.G.Mohanakrishnan
for respondent No.9

JUDGMENT

The Hon'ble Chief Justice

The present appeal has raised an interesting question to be answered in the field of administrative law and the jurisprudence of natural justice, as the appellants claim right of personal hearing in a matter of remission by convicts from the State in exercise of its statutory power under Section 432/433A of the Code of Criminal Procedure, 1973.

2. The appellants claim to be the victims of the crime committed by the convicts Respondent Nos.5 to 9 herein, who are seeking remission, and also apprehend threat to their lives in the event remission is granted to them. This led to their filing representations and objections contending that the convicts in all likelihood are planning to take revenge on the appellants and their family members and it is for this reason that the pre-mature release request of these convicts was being resisted by the appellants.

3. The learned Bench, which entertained the writ petition, dismissed the same holding that the appellants have no right of being personally heard at the time of consideration by the Government, but also observed that since the appellants have already put forth their objections, and the State has also taken a stand that it would consider those objections, the same did not warrant an opportunity of hearing, much less personal hearing at the time of such consideration. The writ petition was disposed of on 2.1.2019, whereafter, the present appeal was filed and the following question was framed by the Division Bench in paragraph (13) while passing an interim order on 6.2.2019 restraining the Government from processing the applications for remission and pre-mature release submitted by the respondents 5 to 9. Paragraphs (13) and (14) are extracted herein under:

"13. The legal question involved in this case is that though the decision to be taken by the Committee constituted for considering the cases of

premature release of the life convicts being an administrative or executive decision, whether the appellants are entitled to be heard in the matter.

14. No doubt, the said Government Order does not provide for the same. However, should the principles of natural justice be read into the case so as to enable the appellants, who are aggrieved persons, to place relevant materials before the Committee for consideration. Admittedly, there is no vested right for the life convicts to seek for premature release. Thus, we are satisfied that an important question of law arises for consideration in this appeal and therefore, we are entertaining this appeal. During the pendency of the appeal if the application for premature release is ordered and if the Committee is of the view that the life convicts are liable to be released prematurely, then the appeal itself will become infructuous. Thus, we are convinced that the appellants have made out a prima facie case for grant of an interim order."

This is how the appeal has come up for hearing before us.

4. Learned counsel for the appellants, reiterating his submissions in the background of the heinous nature of crime committed, passionately and vehemently contended that once a right of personal hearing is given, the appellants would be able to really explain the extent of threat being faced by them, including that of elimination in case the convicts are extended the benefit of pre-mature release. He therefore submits that Article 14 of the Constitution of India deserves to be observed for ensuring fairness in hearing more particularly in such a matter, where hearing is a necessity. He therefore insists that this Court may allow and grant this relief to the appellants for availing of the remedy of an opportunity of oral hearing before the respondent State whenever the matter is considered on merits.

5. Learned counsel for the State of Puducherry, Shri Bharathachakravathy, contends that the picture on the other side is equally gloomy, as the narration of facts would indicate that the appellants as well as the convicts were both practically engaged in what is commonly known as a gang war and therefore, the causality as inflicted allegedly by the appellants on the side of the convicts indicates that the appellants have no less adverse antecedents so as to claim that they stand on a better pedestal taking shelter of fairness.

6. He submits that the injunction granted by this Court is a mandate against law and there is no apprehension that can be gathered to presume that the Government will not take a rational decision based on an objective consideration. He submits that the writ petition was absolutely pre-mature and therefore, the learned Single Judge rightly observed that the objections of the appellants shall be taken into account, to which part the Government had also conceded and stands recorded in the judgment of the learned Single Judge. In view of the provisions of the Code of Criminal Procedure regarding remission, there is no scope of any oral hearing or affording a personal opportunity to the appellants. In the absence of any such express or implied provision, the stand taken by the appellants is totally misconceived and not available in law.

7. The same arguments have been advanced on behalf of the respondents 5 to 9 contending that the writ petition had been rightly disposed of, and the Division Bench, while entertaining this appeal, without considering these aspects granted the interim order, which has continued for long and deserves to be vacated. They submit that the appeal has to be dismissed with liberty to the Government to take an appropriate decision in terms of the statutory prescription.

8. The moot question is as to whether the principles of natural justice that were long ago enunciated by the House of Lords in the case of Ridge v. Baldwin and others, (1963) 2 All E.R. 66 would still be attracted to the extent as claimed by the appellants or not?

9. The principle of English Law was considered for the first time by our Supreme Court in the case of Associated Cement Companies Limited v. P.N.Sharma and others, AIR 1965 SC 1595, wherein it was observed that the nature of the decision which had to be undertaken and the area of the applicability of the rules of natural justice have to be followed are relevant considerations to be taken into account. It is, thus, the nature of the jurisdiction conferred on the authority, the scheme and policy of the statute and the character of the rights of persons affected that had to be taken into account for invoking the principles of natural justice. This was again emphasised in the case of Lala Shri Bhagwan and another v. Shri Ram Chand and another, AIR 1965 SC 1767 (paragraph 5) and then again reiterated in the judgment of the Apex Court in the case of Union of India v. P.K.Roy and others, AIR 1968 SC 850.

10. Coming to the later decisions of the Apex Court, reference be had to the judgment in the case of Oriental Bank of Commerce v. R.K.Uppal, (2011) 8 SCC 695, wherein in paragraph (22), it was observed as follows:

"22. It is now fairly well settled that the requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with and so forth. In the words of Ramaswami, J. (Union of India v. P.K. Roy [AIR 1968 SC 850]) the extent and application of the doctrine of natural justice cannot be imprisoned within the straitjacket of a rigid formula. The application of the doctrine depends upon the nature of jurisdiction conferred on the administrative authority, upon the character of the rights of the persons affected, the scheme and policy of the statute and other relevant circumstances disclosed in the particular case."

11. On the issue of personal hearing, the Apex Court, in the case of Carborundum Universal Limited v. Central Board of Direct Taxes, 1989 Supp (2) SCC 462, in paragraph (6) observed as under:

"6. There is no procedural statutory requirement of a hearing for the disposal of an application under Section 220(2-A) of the Act. The legal position is that where a statutory provision does not exclude natural justice the requirement of affording an opportunity of being heard can be assumed, particularly when the proceedings are quasi-judicial. Exclusion, however, can either be by a clear provision or inferred from the scheme, as also the nature of power which is being exercised. We have already noticed that the power of the Board which was invoked was discretionary. It was to be exercised on the basis of the recommendation of the Commissioner and the material provided by the assessee. Personal hearing in every situation is not necessary and there can be compliance of the requirements of natural justice of hearing when a right to represent is given and the decision is made on a consideration thereof. Keeping the nature of the power invoked for exercise, the fact that the petitioner had an opportunity to represent its case in writing and the further fact that the Board had taken into consideration the report of the Commissioner in the background that it is not the allegation of the petitioner that the Commissioner's recommendations were different, we do not think in the facts of the case it can be held that the petitioner was entitled to a right of being personally heard before its petition under Section 220(2-A) of the Act was disposed of as

aforesaid. The petitioner has claimed that he was entitled to a notice of the Commissioner's report and an opportunity to canvass that the contents thereof, to the extent they went against it, were incorrect. We do not think there is scope to contend that the assessee is entitled to such a procedural safeguard. Our conclusion is, however, confined to the facts of the case and as and when the question arises in a different situation, the matter may be open to examination."

12. The power of remission, which is to be exercised under Section 432/433A of the Code of Criminal Procedure is guided by principles incorporated in the guidelines coupled with a judicious discretion. There is an exercise contemplated according to Pondicherry Prison Rules, 1969, which is already in place. Rule 302 of the said Rules is extracted herein under:

"302. Consideration and recommendation by the Board.- (1) The Board should consider the social history of the offender, the circumstances of his criminal behaviour, conduct in the prison, response to training and treatment, marked changes in habits, attitudes and character, degree of criminality, health and mental condition, and the possibility of his resettlement after conditional release. The Board may also take into consideration such circumstances as were not before the court when the sentence was awarded. The opinion of the District Magistrate and the District Superintendent of Police should be carefully considered. On the basis of such an overall examination of the case, the Board should forward its recommendations to Government;

(2) In the event of the Board recommending conditional release of the offender against the opinion of the District Superintendent of Police and the District Magistrate detailed reasons in justification of such recommendation shall be included in the Board's report;

(3) If the Board decides not to recommend a case for release the period after which that case shall again be reviewed, shall be, specified by the Board. Cases of offenders sentenced to imprisonment for life or whose aggregate sentence is more than fourteen years and who have not been recommended for release, shall be reviewed every year after the initial review by the Board. Other cases shall be reviewed on dates fixed by the Board;

(4) Minutes of the Board meetings shall be recorded and a copy thereof shall be sent to Government for necessary orders. In case of ex-military prisoners, relevant portions of the proceedings of the Board meeting shall be forwarded through the Government to the Government of India for necessary orders."

13. The guidelines in this regard that have been issued by the National Human Rights Commission, dated 26.9.2003, and which are applicable in the Union Territory of Puducherry is also extracted herein under:

"PROCEDURE/ GUIDELINES ON PREMATURE RELEASE OF PRISONERS

The Commission vide its Letter No. 233/10/97-98(FC) dated 26.9.2003 issued a circular containing procedure/ guidelines on premature release of prisoners to all the Chief Secretaries/ Administrators of the States/ UTs.

All the States/ UTs were requested to review the existing practice and procedure governing premature release of life convicts and bring it in conformity with the guidelines issued by the Commission.

By Speed Post

Case No.233/10/97-98(FC)

NATIONAL HUMAN RIGHTS COMMISSION
(LAW DIVISION - IV)

M.L. ANEJA Sardar Patel Bhavan
JOINT REGISTRAR(LAW) Sansad Marg, New Delhi
Tel. No.011 336 1764
Fax No.011 336 6537

Dated the September 26, 2003

To

All the Chief Secretaries/Administrators of States/UTs.

Sub : Procedure/Guidelines on premature release of prisoners.

Ref. : Commission's letter of even number dated 8.11.99.

Sir,

The National Human Rights Commission has received a number of representations pointing out that the State Governments are applying differing standards in the matter of premature release of prisoners undergoing life imprisonment. After examining the vexed question of disparities and differing standards applied by the various States in considering the cases of prisoners serving life imprisonment for premature release under the provisions of section 432, 433 and 433 A of Cr.P.C., the Commission had issued broad guidelines vide its letter of even number dated 8.11.1999 for the purpose of ensuring uniformity in the matter. After considering the response received from a number of States/UTs, the Commission vide their letter of even number dated 4 April 2003 put these guidelines on hold for the time being pending re-examination of the entire issue. The Commission has now decided to modify paras 3 & 4 of its guidelines issued vide its letter of even number dated 8.11.99. Para 3 as modified is as follows:

3. Eligibility for premature release

3.1 Every convicted prisoner whether male or female undergoing sentence of life imprisonment and covered by the provisions of Section 433A Cr.PC shall be eligible to be considered for premature release from the prison immediately after serving out the sentence of 14 years of actual imprisonment i.e. without the remissions. It is, however, clarified that completion of 14 years in prison by itself would not entitle a convict to automatic release from the prison and the Sentence Review Board shall have the discretion to release a convict, at an appropriate time in all cases considering the circumstances in which the crime was committed and other relevant factors like;

- a) whether the convict has lost his potential for committing crime considering his overall conduct in jail during the 14 year's incarceration;
- b) the possibility of reclaiming the convict as a useful member of the society; and
- c) Socio-economic condition of the convict's family.

With a view to bring about uniformity, the State/UT Governments are, therefore, advised to prescribe the total period of imprisonment to be undergone including remissions, subject to a minimum of 14 years of actual imprisonment before the convict prisoner is released. The Commission is of the view that total period of incarceration including remissions in such cases should ordinarily not exceed 20 years.

Section 433A was enacted to deny premature release before completion of 14 years of actual incarceration to such convicts as stand convicted of a capital offence. The Commission is of the view that within this category a reasonable classification can be made on the basis of the magnitude, brutality and gravity of the offence for which the convict was sentenced to life imprisonment. Certain categories of convicted prisoners undergoing life sentence would be entitled to be considered for premature release only after undergoing imprisonment for 20 years including remissions. The period of incarceration inclusive of remissions even in such cases should not exceed 25 years. Following categories are mentioned in this connection by way of illustration and are not to be taken as an exhaustive list of such categories:

- a) Convicts who have been imprisoned for life for murder in heinous cases such as murder with rape, murder with dacoity, murder involving an offence under the Protection of Civil Rights Act 1955, murder for dowry, murder of a child below 14 years of age, multiple murder, murder committed after conviction while inside the jail, murder during parole, murder in a terrorist incident, murder in smuggling operation, murder of a public servant on duty.
- b) Gangsters, contract killers, smugglers, drug traffickers, racketeers awarded life imprisonment for committing murders as also the perpetrators of murder committed with pre-meditation and with exceptional violence or perversity.

c) Convicts whose death sentence has been commuted to life imprisonment.

3.2 All other convicted male prisoners not covered by section 433A Cr.PC undergoing the sentence of life imprisonment would be entitled to be considered for premature release after they have served at least 14 years of imprisonment inclusive of remission but only after completion of 10 years actual imprisonment i.e. without remissions.

3.3 The female prisoners not covered by section 433A Cr.PC undergoing the sentence of life imprisonment would be entitled to be considered for premature release after they have served at least 10 years of imprisonment inclusive of remissions but only after completion of 7 years actual imprisonment i.e. without remissions.

3.4 Cases of premature release of persons undergoing life imprisonment before completion of 14 years of actual imprisonment on grounds of terminal illness or old age etc. can be dealt with under the provisions of Art. 161 of the Constitution and old paras 3.4 and 3.5 are therefore redundant and are omitted.

4. Inability for Premature Release
Deleted in view of new para 3.

All the States/UTs are requested to review their existing practice and procedure governing premature release of life convicts and bring it in conformity with the guidelines issued by the Commission.

Yours faithfully,

Sd/-

Joint Registrar(Law)"

14. According to the notification issued by the Government of Puducherry, the review of such cases for remission is by a Seven Member Committee. The notification dated 2.8.2007 is extracted herein under:

"GOVERNMENT OF PUDUCHERRY

Abstract

Home (Jail) - Constitution of the Advisory Board to Central Prison, Puducherry - Appointment of official members - Orders - Issued.

Home Department

G.O.Ms.No.44

Puducherry, dt.02.08.2007

Read: 1)G.O.Ms.No.38, dated 15.7.2004 of
Home Department, Puducherry.

2)I.D.No.59-A/JD/A-1/2006-07, dt.04.05.2007
from the Jail Department, Puducherry.

ORDER

The following Notification shall be published in
the next issue of Official Gazette:-

NOTIFICATION

In order to review cases of eligible inmates in the
Central Prison, Puducherry, Special Sub-Jail,
Karaikal, Sub-Jail, Mahe & Yanam and the prisoners
trasferred to other States by this Administration,
for their release and to recommend to Government
for conditional release, unconditional release,
release on grounds of clemency or such help, if any
as should be extended to prisoners on their release
by Government or an after care agency, if any, the
Lieutenant Governor of Puducherry hereby appoints
the following official members for the constitution
of the Advisory Board as per the Chapter XVIII of
the Puducherry Prison Rules, 1969.

- | | |
|--|-----------|
| 1. Minister in charge of Prison .. | Chairman |
| 2. Chief Secretary .. | Member |
| 3. Secretary (Law) .. | Member |
| 4. Principal District and
Sessions Judge, Puducherry .. | Member |
| 5. Chief Probation Officer .. | Member |
| 6. A Senior Police Officer not
below the rank of Senior
Superintendent of Police
nominated by Inspector
General of Police .. | Member |
| 7. Inspector General of Prisons .. | Secretary |

2. The Advisory Board shall meet at least once in
six months or after on the dates fixed by Chairman.
The Quorum of the Meeting shall be four including
the Chairman.

3. In the absence of the Minister in charge of
Prisons, the Chief Secretary shall preside over the

meeting.

4. In the absence of any of the official members their nominees will be the member of the Board.

5. The Advisory Board shall function as per the Conditions/Instructions stipulated in the Puducherry Prison Rules, 1969 under Chapter XVIII.

6. The Inspector General of Prisons, Member Secretary to the Advisory Board shall dispose of his duties to the Board as stipulated vide Rule 296, 300, 301 of Puducherry Prison Rules, 1969.

7. The Quarterly Report on the performance of the Advisory Board should be submitted to the Government by the Member Secretary of Advisory Board (Inspector General of Prison) without fail.

8. The T.A./D.A. in respect of the Official Members will be met to their respective Head of Account in which their salary is drawn.

(BY ORDER OF THE LIEUTENANT GOVERNOR)

Sd/- xxx

(A.KULLAN)

JOINT SECRETARY TO GOVERNMENT"

15. In the background aforesaid and the nature of the incident as well as the apprehensions expressed, it is no doubt true that the Government has to be cautious while considering the issue of pre-mature release or remission in such matters and should be guided objectively, rather than on a subjective satisfaction for the purpose of grant of release or otherwise. This is not a subject matter where there are no guidelines or prescribed procedures of fairness. The Government has also indicated that the apprehensions and objections of the appellants would be considered.

16. In the said background, to assume that there would not be a genuine or bona fide effort by the Committee enjoined with the duty to assess the claim of remission, would be casting a doubt on a responsible statutory functionary that has to take a collective decision on the basis of the rules prescribed for the same. There is no valid ground to suspect, much less detect a doubt in the performance of the Committee while discharging its duty honestly and in good faith while discussing the issue of remission. To prevent the said Committee from even considering the applications and injuncting it would be

prohibiting the performance of statutory duty enjoined under law, which in our opinion cannot be the role of the Court, keeping in view the nature of the power which is to be exercised. An injunction cannot be issued to make a provision of law redundant.

17. We are, therefore, of the considered opinion that the exercise of power under the provisions aforesaid cannot be prevented.

18. The question of oral hearing or personal hearing is not contemplated, nor can it be read into the said provision. It is upon consideration of the material that is placed before the Committee that it applies its mind to the background of the case and thereafter takes a decision. This is not to say that any subsequent developments after the conviction cannot be taken into consideration.

19. The Committee or the Government is not prevented from ascertaining any relevant fact relating to the request of remission and studying the impact about the prospective release of a detenu on a pre-mature basis. The Government and the Committee enjoined with the said duty is entitled to take into consideration all such materials that may be relevant for the grant of pre-mature release/remission to a convict, more particularly, in the case of a heinous crime.

20. We have no reason to doubt at least at this stage, nor there is any malafide to be construed either expressly or impliedly against the decision making authority for the purpose of any interference under Article 226 of the Constitution of India. There is also no material brought forth before us to establish that the Committee or the Government would fail in its duty to act faithfully in proceeding to consider the objections raised on behalf of the appellants. We hope and trust that the Committee and the Government will abide by its promise extended before the learned Single Judge to consider all objections as have been raised by the appellants before the grant or refusal thereof to the private respondents and take an appropriate decision in accordance with law.

21. What can be conveyed personally about any apprehension or threat need not be secret for being disclosed in writing. The authorities do not conduct a hearing, as the convicts also do not have a right of being personally heard in matters of remission. There is, therefore, no justification for the appellants to claim personal hearing when the convicts themselves are evenly placed in the matter of such consideration by the authority concerned.

22. In order to claim a right of hearing, one may have to demonstrate prejudice or the likelihood thereof. The scales of opportunity to be offered to the convict and the victim have to be evenly balanced. The remission to be considered is a discretion to be exercised as per some settled parameters and not as a routine exercise. The convict has only an opportunity for consideration for pre-mature release as it touches upon the concept of liberty. He cannot, as a matter of fundamental right, claim absolute liberty in as much as he is suffering incarceration under valid law. But if otherwise contingencies exist, this period of incarceration can be remitted by the Sovereign. This consideration, which is an unilateral act of discretion, is not akin to adversarial proceedings where the presence of two or more sides may require a dialogue or a hearing. The process is not of adjudication, but of consideration through discretion. Thus, a right of personal hearing either to the convict or the victim does not appear to be contemplated before the authority at the time of consideration. There is nothing to suggest from the nature of the proceedings that prejudice can be caused or likely to be caused if oral personal hearing is not extended. A physical participative process by inviting the convict or the victim for oral hearing does not appear to be envisaged in the decision making process by the authority. The authority while conducting the said exercise is neither a Court nor a Tribunal, even though the administrative power exercised by it is ordained under the Code of Criminal Procedure to be exercised in the manner provided therein. The insertion of the definition of victim in Section 2(wa) of the Code of Criminal Procedure with effect from 31.12.2009 has not suggested any change in the process of decision making for grant of remission, recognising any right of personal hearing to a victim or the victim's family, guardian or legal heir before the authority.

23. We hope and trust that keeping in view the serious nature of the incident, the concerned authority shall take into consideration all such relevant material, including the objections that have been raised on behalf of the appellants, and which has also been conceded to for being considered by learned counsel for the Government before the learned Single Judge.

24. Accordingly, we see no reason to keep this appeal pending that can be disposed of in the same terms as that of the learned Single Judge without interfering with the impugned judgment, which is hereby upheld. The appeal is, accordingly, consigned to records and the interim order dated 06.02.2019 is

discharged. No costs. Consequently, C.M.P.Nos.2866 and 17574 of 2019 are closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. The Secretary,
Union Territory of Puducherry,
Office of the Lieutenant Governor,
Pondicherry.
2. The Secretary,
Union Territory of Puducherry,
Office of the Chief Secretary,
Pondicherry.
3. The Secretary,
Union Territory of Puducherry,
Office of the Home Department,
Pondicherry.
4. The Station House Officer,
Mudaliarpur Police Station,
Puducherry.

+1cc to Mr.Gandhi Kumar, advocate in SR.NO..31232



W.A.No.292 of 2019

MG (CO)
RV (07/10/2020)

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