

IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDERS RESERVED ON : 02.03.2021

PRONOUNCING ORDERS ON : 11.03.2021

CORAM

THE HONOURABLE MR.JUSTICE N.ANAND VENKATESH

W.P.No.1306 of 2021

B.Salma Mahajabeen

...Petitioner

.Vs.

- 1.The Government of Tamil Nadu,
Rep.by ts Secretary to Government,
Home (Prison IV) Department,
Fort St.George,
Chennai-9.
- 2.The Additional Director General of Prisons,
Thalamuthu Natarajan Maaligai,
2nd Floor, Gandhi Irwin Road,
Egmore, Chennai.
- 3.The Deputy Inspector General of Prison,
Kovai Zone (Central Prison),
Kovai.
- 4.The Superintendent of Central Prison,
Coimbatore.

..Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India, for issuance of a Writ of Mandamus, directing the respondents to grant parole for 30 days without escort to my husband namely; Mohammed Ali, S/o.Khaja Mohideen, aged aged about 49 years, Life Convict No.10727, detained at Central Prison, Coimbatore.

For Petitioner : Mr.A.P.Sathya Murthy

Amicus curiae : Mr.B.A.Sujay Prasanna
Mr.V.Lakshmi Narayanan
Mr. Sharath Chandran

For Respondents : Mr.M.Mohamed Riyaz
Additional Public Prosecutor

ORDER

1. A vexed question which puts the jail authorities in a quandary every time they deal with a leave petition submitted by a convict who is convicted under laws which fall under the Executive Power of the Union and also to which the Executive Power of the State extends, is attempted to be given a definite answer. This will be the most appropriate case, since the convict has been convicted and sentenced under laws referable to List I, List II and List III of Schedule VII of the Constitution of India, 1950 (hereinafter referred to as "the Constitution").

2. When the matter came up for hearing on 25.01.2021, this Court passed the following Order and this Order captures the purpose for which the present Writ Petition was filed before this Court.

This Writ Petition has been filed for the issue of a writ of mandamus directing the respondents to grant emergency leave to the husband of the petitioner, who is a life convict, on the ground that the marriage of their son is going to be held on 31.01.2021.

2.The learned counsel for the petitioner submitted that there was some urgency in the present case and hence a writ petition has been directly filed before this Court without giving any representation to the 4th respondent. The learned counsel further submitted that the petitioner is seeking for an emergency leave under Rule 6 and 7 of the Tamil Nadu Suspension of Sentence Rules, 1982, in order to enable her husband, who is a life convict to conduct the marriage of his son, which is fixed to be held on 31.01.2021.

3.The learned Additional Public Prosecutor appearing on behalf of the respondents submitted that as and when a representation is received in this regard, the same will be considered in accordance with law. The learned Additional Public Prosecutor further submitted that such a leave cannot be granted without the permission of the State Government. For this purpose, the learned Additional Public Prosecutor relied upon the circular issued by the ADGP dated 24.07.2018. The learned Additional Public Prosecutor submitted that there is a larger issue that requires consideration in the present case.

4.Taking into consideration the limited period available, since the marriage is proposed to be

conducted on 31.01.2021, there shall be a direction to the petitioner to make a representation to the 4th respondent along with the relevant documents and the 4th respondent shall consider the application in line with Rule 6 and 7 of the Tamil Nadu Suspension of Sentence Rules, 1982 and grant leave for 15 days with minimum Escort, subject to the usual conditions that can be imposed by the 4th respondent. The convict shall be released from the Prison at 10.00 a.m. on 29.01.2021 and he shall return back to the Prison on 12.02.2021 at 5.p.m. This will be without prejudice to the main contention raised by the learned Additional Public Prosecutor on granting leave in cases of this nature wherein, a Central enactment is involved and the convict has also been punished for the same.

5. Post this case for further hearing on 09.02.2021 at 2.15 p.m. In the meantime, a counter shall be filed along with all the relevant documents.

3. It was brought to the notice of this Court by the learned Additional Public Prosecutor, that the convict has surrendered before the jail authorities on the date and time fixed by this Court.

4. Considering the importance of the issue involved in the present Writ Petition, this Court requested the assistance of Mr. B.A. Sujay Prasanna, Mr. V. Lakshmi Narayanan, Mr. Sharath Chandran and Mr. M. Mohammad Riyaz, Additional Public Prosecutor to assist this Court as *amicus*. They readily expressed their willingness and provided immense assistance to this Court by submitting all the relevant materials and explaining the prevailing law on the issue.

5. Before going into any further discussion, it is noticed that the term "parole" is being used quite often while seeking relief and even in the present Writ Petition, the Petitioner seeks a mandamus to grant parole. The prayer for parole faces an immediate impediment in view of the decision of a full bench of this Court in *State v. Yesu* reported in 2011 (5) CTC 353, wherein it was held that in the absence of any statutory rules, the State cannot grant parole to a convict prisoner. This is because, parole does not amount to a remission or suspension of sentence and is, therefore, outside the net of Section 432 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "Cr.P.C."). The full bench held that parole cannot be granted by the State Government or any other authority in the absence of any statute or statutory rules to that effect. In view of this authoritative pronouncement of the full bench, any form of temporary release, even if labelled as parole ought to be construed as suspension of sentence and the source of

power is traceable only to the Tamil Nadu Suspension of Sentence Rules, 1982 (hereinafter referred to as "Rules").

6. In the State of Tamil Nadu, the temporary release by way of ordinary or emergency leave to a convict prisoner is solely regulated by the Rules which has been framed by the State in exercise of its power under Section 432(5), Cr.P.C. A reading of Rule 36 makes it clear that the grant of leave, ordinary or emergency, under the Rules operates as a suspension of sentence and the period so granted will not be counted towards the total period of imprisonment actually served by the convict.

7. Rule 7 sets out the eligibility conditions for the grant of emergency leave, one of which is that the prisoner ought to be sentenced by a Court in the State to imprisonment for a term or for life for an offence against any law other than a law relating to a matter to which the executive power of the Union extends. A similar eligibility criterion is prescribed for ordinary leave in Rule 22(i). The expression "relating to a matter to which the executive power of the Union extends" occurring in Rules 7 and 22 of the Rules is similar to the language used in Section 432(7)(a), Cr.P.C., which is discussed, *infra*.

8. Suspension of sentence and parole are not synonymous concepts as was pointed out by the Full Bench in *State v. Yesu* (cited *supra*), wherein it was observed thus:

"Thus, it is crystal clear that what is granted in exercise of power under Section 432 of the Code of Criminal Procedure is suspension of sentence and there is no provision in the Code of Criminal Procedure enabling any authority to grant parole. Parole is undoubtedly a temporary release which is an administrative action. Thus, parole and suspension of sentence are of different connotations operating in different manners. The former does not disrupt the sentence undergone by the prisoner, whereas, the later disrupt the sentence undergone for a temporary period. It is because of the reason that the sentence is not disrupted by the release on parole, the Hon'ble Supreme Court has been consistently holding that parole period shall be counted as sentence period."

The Full Bench also held that the Rules is the sole repository of power to grant suspension of sentence for convicts in the State and concluded as follows:

"In view of the said settled position of law, so far as the State of Tamil Nadu is concerned, since there is a statutory Rule in the form of the Tamil

Nadu Suspension of Sentence Rules, occupying the field of suspension of sentence by grant of either emergency leave or ordinary leave, the executive power of the State under Article 162 of the Constitution cannot be exercised by the State in derogation of the said Rules. To put it otherwise, outside the scope of the said Rules, the Government or any other Authority of the Government shall not grant any suspension of sentence to a prisoner."

9. The substantive source of power to suspend, commute or remit sentences is found in Chapter XXXII-E, Cr.P.C. Suspension and remission of sentences is governed by Section 432, Cr.P.C., whereas commutation is governed by the succeeding Section 433, Cr.P.C. This is followed by Sections 433-A, 434 and 435, Cr.P.C. which provide some variations/exceptions to the general powers set out in Sections 432 and 433, Cr.P.C

10. Section 432(1), Cr.P.C., empowers the "appropriate Government" to suspend the execution of the sentence or remit the whole or any part of the punishment to which the convict has been sentenced. The "appropriate Government", in the context of Section 432 and 433, Cr.P.C. is defined in Section 432(7), Cr.P.C., and reads thus:

"(7) In this section and in section 433, the expression "appropriate Government" means,—
(a) in cases where the sentence is for an offence against, or the order referred to in sub-section (6) is passed under, any law relating to a matter to which the executive power of the Union extends, the Central Government;
(b) in other cases, the Government of the State within which the offender is sentenced or the said order is passed."

On a close reading of the twin limbs of the definition clauses under Section 432(7), Cr.P.C., it is clear that the offence, the sentence in respect of which the convict seeks remission or commutation, is the test for determining the "appropriate Government". If the sentence which is sought to be remitted or commuted is in respect of an offence relating to a matter to which the executive power of the Union extends, the appropriate Government is the Central Government under Section 432(7)(a), Cr.P.C. In all other cases, the appropriate Government is the State Government where the offender is sentenced as set out in Section 432(7)(b), Cr.P.C. The definition in Section 432(7), Cr.P.C. is, however, merely referential for it does not enumerate the nature of offences to which the executive power of

the Union extends. To unlock this puzzle, we must turn to the Constitution.

11. A classic exposition of what constitutes "executive power" was explained by Chief Justice Bijan Kumar Mukherjea in the following passage from *Ram JawayaKapur v. State of Punjab* reported in AIR 1955 SC 549:

"It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away.

....The executive function comprises both the determination of the policy as well as carrying it into execution"

12. Article 53 of the Constitution declares that the executive power of the Union shall vest in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. Similarly, Article 154 of the Constitution declares that the executive power of the State shall vest in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. It is a settled proposition that the executive power is co-extensive with the power of the Union and the State legislature to make laws.

13. The scope of the executive power of the Union is set out in Article 73 of the Constitution. The default position is set out in Article 73(1) which declares that the executive power of the Union shall extend to:

a. Matters with respect to which Parliament has the power to make laws ie., any of the matters set out in List I or List III of Schedule VII of the Constitution.

b. To exercise such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement.

However, the general power under Article 73(1), alluded to *supra*, is "subject to the provisions of the Constitution". This is on account of the fact that, de-hors Articles 73 and 154, the

Constitution confers the executive power on the Union and each of the States as regards three specific matter viz., carrying on of any trade or business (Article 298), acquisition, holding and disposal of property (Article 298) and making of contracts (Article 299).

14. Then follows the all-important proviso which clarifies that the executive power referred to in Article 73(1) (a) of the Constitution shall not, *save as expressly provided in the Constitution or by any law made by Parliament*, extend to matters in List II and List III of Schedule VII of the Constitution. The expression "*save as expressly provided by the Constitution*" occurring in Article 73(1) was considered by a Constitution Bench of the Supreme Court in *Union of India v. V. Sriharan* reported in (2016) 7 SCC 1 and Articles 247, 249, 250, 277, 286 and 369 of the Constitution were cited as examples of this kind. The effect of the proviso to Article 73(1) (a) was considered and explained in the following passage from the judgment of U.U. Lalit, J (concurring on this point with the majority) in *Sriharan's case*, (cited supra):

206. As regards sub-clause (b) of Article 73(1) there is no dispute that in such matters the Executive Power of the Union is absolute. The area of debate is with respect to sub-clause (a) of Article 73(1) and the proviso to Article 73(1) and the interrelation with Article 162. Sub-clause (a) of Article 73(1) states that the Executive Power of the Union shall extend to the matters with respect to which Parliament has power to make laws. Parliament has exclusive power in respect of legislative heads mentioned in List I of the Seventh Schedule whereas in respect of the entries in the Concurrent List, namely, List III of the Seventh Schedule, both Parliament and the State have power to legislate in accordance with the scheme of the Constitution. The proviso to Article 73(1) however states, subject to the saving clause therein, that the Executive Power so referred to in sub-clause (a) shall not extend in any State to matters with respect to which the legislature of the State has also power to make laws. The expression "also" is significant. Under the Constitution, the State has exclusive power to make laws with respect to List II of the Seventh Schedule and has also concurrent power with respect to entries in Concurrent List, namely, List III of the Constitution. The proviso thus deals with situations where the matter relates

to or is with respect to subject where both Parliament and the Legislature of the State are empowered to make laws under the Concurrent List. Subject to the saving clause mentioned in the proviso, it is thus mandated that with respect to matters which are in the Concurrent List, namely, where the Legislature of the State has also power to make laws, the Executive Power of the Union shall not extend. The saving clause in the proviso deals with two exceptions, namely, where it is so otherwise expressly provided in the Constitution or in any law made by Parliament. In other words, only in those cases where it is so expressly provided in the Constitution itself or in any law made by Parliament, the Executive Power of the Union will be available. But for such express provision either in the Constitution or in the law made by Parliament which is in the nature of an exception, the general principle which must govern is that the Executive Power under sub-clause (a) of Article 73 shall not extend in any State to matters with respect to which the Legislature of the State has also power to make laws. In the absence of such express provision either in the Constitution or in the law made by Parliament, the normal rule is that the Executive Power of the Union shall not extend in a State to matters with respect to which the Legislature of the State has also power to make laws.

The default position, therefore, is that the executive power of the Union shall not extend to any of the matters in List II or List III, save a provision to the contrary is expressly provided in the Constitution or by any law made by Parliament.

15. To complete the picture, it may also be necessary to notice Article 162 of the Constitution which declares that, subject to the provisions of the Constitution, the executive power of the State shall extend to all matters with respect to which the Legislature of the State has the power to make laws (i.e., matters prescribed in List II and III). The proviso to Article 162, however, qualifies the executive power of the State with respect to matters in the Concurrent List by declaring that for such matters falling within List III, the executive power of the State shall be subject to, and limited by, the executive power conferred by the Constitution or by any law made by Parliament.

16. In the light of the foregoing discussion, the position under the Constitution may be summed up as under:

a. Subject to the provisions of the Constitution, the Executive power of the Union extends to all matters falling in List I;

b. The Executive power of the Union does not extend to any of the matters falling in List II;

c. The Executive power of the Union does not extend to any of the matters falling in List III except where a provision to the contrary is made in the Constitution or by any law made by Parliament; and

d. The Executive power of the State extends to all matters in List II and List III. However, in view of the proviso to Article 162, the executive power of the State in respect of matters falling in List III may be limited by the Constitution or by any law made by Parliament. [See paragraph 222 of V. Shriharan's case (cited supra)].

17. At this juncture, it may be necessary to notice Entry I of List III of Schedule VII of the Constitution which deals with "Criminal Law" and reads as under:

"1. Criminal law, including all matters included in the Indian Penal Code at the commencement of this Constitution but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power."

18. The scope of Entry I of List III of Schedule VII of the Constitution came up for consideration before the Supreme Court in *Kartar Singh v. State of Punjab* reported in (1994) 3 SCC 569, wherein Sahai, J observed as under:

"From the language used it is apparent that the entry is couched in very wide terms. The words following the expression 'criminal law' enlarge the

scope to any matter which can validly be considered to be criminal in nature. The exercise of power under this entry, therefore, has to be construed liberally so as to give full play to the legislative activity. The width of the entry, however, is controlled by the latter expression which takes away the power of either legislature to legislate in respect of offences against laws with respect to any of the matters specified in List I or List II. Since this part restricts and narrows the ambit of the entry it has to be construed strictly. Since under the federal structure the law made by the Parliament has supremacy (See *Union of India v. H.S. Dhillon* [(1971) 2 SCC 779 : AIR 1972 SC 1061]) any enactment made in exercise of power under entry in Concurrent List shall have overriding effect subject to restrictions that may be spelt out from the entry itself. A legislation by Union Parliament to be valid under this entry must satisfy two requirements; one, that it must relate to criminal law and the offence should not be such as has been or could be provided against laws with respect to any of the matters specified in List II. What is a criminal law? Any Act or rule dealing with crime, "(The) criminal justice system is a firmly societal defensive reaction to intolerable behavior. From the beginning it was considered as a tool designed to protect an established order of values attuned to the political organisation of the community. Transgression of some important norms reflecting these values was seen as a crime and, as such, demanded punishment."

19. Thus, criminal law, under the Constitution, is a concurrent matter with the result that it is the executive power of the State which must ordinarily prevail. This general rule is, however, subject to:

i) the power under Entry 93 of List I which empowers the Union to legislate with respect to offences against laws with respect to any matter in the Union List;

ii) the power of the State under Entry 64 of List II to legislate with respect to offences against laws in the State List; and

iii) The power does not extend to the use of naval, military or air forces or any other armed forces of the Union in the aid of civil power. It has, however, been

clarified that the armed forces are not immune from the general criminal law of the land. This is clear from the judgment of a Division Bench of the Punjab and Haryana High Court in *Jagjit Singh v. State of Punjab*, reported in 1978 SCC OnLine P&H 143 : ILR (1978) 2 P&H 335, wherein it was held as under:

"(9) Construing the aforesaid entry 1 in the light of these judgments, it is plain that the power to legislate with regard to general criminal law has been vested in Parliament and the State Legislature. It is obvious that the word 'criminal law' used in the very opening part of this entry is one of wide-ranging nature. While expressly including the general criminal law in the Penal Code, 1860 within the same, what has been specifically excluded from the ambit of the concurrent power are only specific offence against laws with respect of any of the matters specified in the Union and State Lists and the armed forces of the Union of India. It seems manifest that the legislative powers under entries 70 and 93 of the Union List I and entries 41 and 64 of the State List are essentially restricted to service laws pertaining to the constitution of services and other allied and ancillary matters, as also the constitution of the Public Service Commissions, etc. The exclusive legislative power herein, therefore, does not cover all types of offences that may be committed by the public servants. Consequently, the aforesaid entries cannot be considered as barring Parliament and the State Legislatures to enact laws relating to crime generally, which clearly falls within the wide scope of entry 1 of the Concurrent List III."

20. From the aforesaid discussion, it would follow that the Indian Penal Code, being the general criminal law, would fall within the net of Entry I of List III. In *State of Maharashtra v. Lalji Rajshi Shah* reported in AIR 2000 SC 937, the Hon'ble Supreme Court observed that it was open to the State legislature to amend Section 21 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") since such a power was directly referable to Entry I of List III. It has become necessary to emphasize this point to dispel the prevailing fallacy that the "appropriate Government" under Section 432, Cr.P.C., must be reckoned with reference to the legislature that passed the law. Accepting this logic would imply that the "appropriate government" under Section 432, Cr.P.C., for IPC offences would be the Central Government since the IPC is a Central law.

21. It is, however, not necessary to labour any further on this point in view of the authoritative pronouncement of the Constitution Bench of the Hon'ble Supreme Court in *V. Shriharan's* case (cited *supra*), where an identical argument was raised and rejected. In his concurring opinion, Justice U.U. Lalit observes:

"214. It was submitted on behalf of the petitioner that if the Executive Power is coextensive with the Legislative Power and the law-making power of the State must yield to the Legislative Power of the Union in respect of a subject in the Concurrent List, reading of these two principles would inevitably lead to the conclusion that the Executive Power of the Union takes primacy over that of the State thereby making it i.e. the Central Government the appropriate Government under Section 432(7) CrPC. It was further submitted that it was Parliament which made law contained in CrPC in exercise of power relatable to Entries 1 and 2 of List III and that the provisions in the Penal Code, 1860 (existing law under Article 13) and under CrPC, both relatable to the powers of Parliament, which provide for "appropriate Government" as prescribed in Section 55-A IPC and Section 432(7) CrPC without any validly enacted conflicting or amending law by the State, would clearly show that it is the Union which has the primacy. In our considered view, that is not the correct way to approach the issue. For the purposes of Article 73(1) it is not material whether there is Union law holding the field but what is crucial is that such law made by Parliament must make an express provision or there must be such express provision in the Constitution itself as regards Executive Power of the Union, in the absence of which the general principle as stated above must apply. If the submission that since IPC and CrPC are relatable to the powers of Parliament, it is the Executive Power of the Union which must extend to aspects covered by these legislations is to be accepted, the logical sequitur would be that for every offence under IPC the appropriate Government shall be the Central Government. This is not only against the express language of Article 73(1) but would completely overburden the Central Government."

22. An exception to the aforesaid principle would be a case where the offence, in respect of which remission is sought, is in respect of a law to which the executive power of the Union extends. Thus, even though the IPC is a general law, there may

be instances where some of the offences in the IPC are relatable to the power of the Union under Entry 93 List I to legislate in respect of offences against laws in that list. Such a situation arose in *G.V Ramaniah v. Superintendent of Central Jail, Rajahmundry* reported in (1974) 3 SCC 531, where the accused was convicted and sentenced for the offences under Sections 489-A to D of the IPC. The Supreme Court held that though the offence was under the IPC, an offence relating to counterfeit currency and bank notes was referable to the power of the Union under Entries 36 and 93 of List I of Schedule VII to the Constitution. Consequently, the appropriate government was the Central Government.

23. Another qualification is contained in Section 435 (1), Cr.P.C., which requires the State Government to consult the Central Government before granting remission or commutation of sentences for the classes of cases falling within that provision. In *V. Sriharan's case*, the Hon'ble Supreme Court has held that the word "consultation" occurring in Section 435(1), Cr.P.C., implies concurrence. Therefore, a State Government cannot remit or commute a sentence without the concurrence of the Central Government in the following classes of cases:

- a.where the offence was investigated by the CBI under the Delhi Special Police Establishment Act, 1946 or any other agency under a Central Act other than the Cr.P.C;
- b.where the offence involves misappropriation, or destruction of, or damage to any property belonging to the Central Government; and
- c.where the offence was committed by a person in the service of the Central Government while acting or purporting to act in discharge of his official duty.

24. Another category of cases is where an accused has been convicted of offences, some of which relate to matters which the executive power of the Union extends, and who has been sentenced to separate terms of imprisonment which are to run concurrently. Such eventualities are addressed by Section 435 (2), Cr.P.C. which states that any order of suspension, remission or commutation granted by the State Government in such cases shall not have effect unless a corresponding order to that effect has also been made by the Central Government. The effect of Section 435(2), Cr.P.C., was explained by the Supreme Court in *V. Sriharan's case*, wherein it was observed thus:

"213. There is one more provision, namely, Section 435(2) CrPC which needs to be considered at this stage. It is possible that in a given case the accused may be convicted and sentenced for different offences, in respect of some of which the Executive Power of the Union may extend and to the rest the

Executive Power of the State may extend. Since the Executive Power either of the Union or the State is offence specific, both shall be appropriate Governments in respect of respective offence or offences to which the Executive Power of the respective Government extends. For instance, an offender may be sentenced for an offence punishable under an enactment relatable to subject under List I of the Constitution and additionally under the Penal Code, 1860. Such

eventuality is taken care of by sub-section (2) of Section 435 and it is stipulated that even if the State Government in its capacity as an appropriate Government in relation to an offence to which the Executive Power of the State Government extends, were to order suspension, remission or commutation of sentence in respect of such offence, the order of the State Government shall not have effect unless an appropriate order of suspension, remission or commutation is also passed by the Central Government in relation to the offence(s) with respect to which Executive Power of the Union extends. Relevant to note that it is not with respect to a specific offence that both the Central Government and State Government have concurrent power but if the offender is sentenced on two different counts, both could be the appropriate Governments in respect of that offence to which the respective Executive Power extends."

25. From the aforesaid discussion, the following principles emerge:

a. Criminal law being a matter falling within the net of Entry I of List III of Schedule VII of the Constitution, the executive power of the State would ordinarily extend to suspend or remit sentences for offences under all laws falling in this category and the appropriate Government would be the State Government under Section 432(7)(b) Cr.P.C.;

b. An exception to the above rule is where an offence is in respect of a law the source of which is traceable to Entry 93 and any of the other entries in List I of Schedule VII of the Constitution in which case it is the Executive power of the Union which would extend and the appropriate Government would be the Central Government under Section 432(7)(a) Cr.P.C.;

c. Where the sentence is one of death, the powers conferred

on the State Government under Section 432/433 Cr.P.C., may also be exercised by the Central Government (vide Section 434 Cr.P.C);

d. For cases falling within the categories set out in Section 435(1) Cr.P.C., the powers conferred on the State Government to remit or commute a sentence shall not be exercised except after obtaining the concurrence of the Central Government; and

e. Where the offender is sentenced to two different counts, one under a law referable to List I and the other referable to Entry I of List III, then the Central as well as the State Government will be the appropriate governments. Section 435(2) Cr.P.C., takes care of such situations by directing that an order of suspension, remission or commutation passed by a State Government shall not have effect unless a similar order is passed by the Central Government.

26. In the case at hand, the accused has been convicted and sentenced under Sections 120-B (1) r/w 109, 111, 114, 148, 149, 212, 302, 307, 353, 449, 465, 468, 471 of IPC and all of which are referable to Entry I of List III of Schedule VII. The accused has also been convicted and sentenced under Sections 3(1) and 4 of the Tamil Nadu Property (Prevention of Damage and Loss) Act, 1992. The appropriate Government for grant of remission or suspension of sentence for these offences is the State Government. The accused has also been convicted and sentenced under Sections 3, 4 (b), 5 and 6 of the Explosive Substances Act, 1908 and Sections 3 and 25 (1-B)(a) of the Arms Act, 1959. The executive power in respect of offences under these two enactments is directly traceable to Entry 5 read with Entry 93 of List I of Schedule VII to the Constitution with the result that the Central Government would be the appropriate Government for grant of suspension of sentence or remission in respect of these offences. The case is, therefore, squarely covered by Section 435(2) Cr.P.C.

27. It may be recalled that Rules 7 and 22 of the Rules, dealing with the eligibility of emergency and ordinary leave, clearly states that the State has no power to grant suspension of sentence by way of ordinary or emergency leave in respect of offences to which the executive power of the Union extends. At this juncture, it is necessary to notice S.O 3860 (E) issued by the Ministry of Home Affairs, Government of India, which reads as follows:

"MINISTRY OF HOME AFFAIRS

ORDER

New Delhi, the 6th December, 2017

S.O. 3860(E).—In exercise of the power conferred by Sub Section (5) of Section 432 of the Code of Criminal Procedure, 1973 (2 of 1974), the Central Government, in supersession of the notification of Government of India in India in the Ministry of Home Affairs, number S.R.O. 3491, dated the 9th November, 1955, except as respects things done or omitted to be done before such supersession, hereby gives the following directions, namely:—

Where a petition for suspension of the execution of a sentence of imprisonment or for remission of the whole or part of a sentence of imprisonment is made by or on behalf of a person sentenced to

imprisonment of an offence under any law relating to matter to which the executive power of the Union extends and the person sentenced to an imprisonment is in jail, the execution of the sentence shall be suspended and such person released on parole, subject to the conditions specified in paragraph 2, for such period not exceeding fifteen days, if the Government of the State in which such person is detained in jail is satisfied that the immediate release of such person on parole is rendered necessary by reason of any illness constituting a grave threat to the life of such person or of a parent, wife, husband or child of such person.

2. A person released on parole under paragraph 1 shall enter into a bond, undertaking to reside during the period of the parole at a place specified therein and not depart therefrom, without the previous permission of the State Government and to return to the jail in which he is confined on expiry of the period of his parole, and to conform to such other conditions as the Stated Government may consider necessary.

सत्यमेव जयते

[F. No. V-17013/02/2016-PR] T.V.S.N.
PRASAD, Addl. Secy"

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28. A close reading of the aforesaid notification would show that the Union Government, in exercise of powers under Section 432(5), Cr.P.C., has empowered the State Governments to grant parole for a period not exceeding 15 days if the State Government is satisfied that the immediate release of the prisoner is necessary by reason of any illness constituting a grave threat to the life of such person or of a parent, wife, husband or child of such person. Though the

notification directs that the prisoner shall be released by the State Government on parole, such executive orders cannot nullify the effect of the pronouncement of the Full Bench of this Court in *State v. Yesu*, (cited *supra*) wherein it was held that the State Government has no power to release a prisoner on parole. Furthermore, the notification has been issued in exercise of power under Section 432(5), Cr.P.C., which empowers the appropriate Government to issue general rules or special orders for suspension of sentence under that provision. As was pointed out by the Supreme Court in *Sunil Fulchand Shah v. Union of India* reported in 2001 (1) CTC 294, the grant of parole is not regulated by the Cr.P.C. Consequently, the Central Government cannot confer a power to grant parole on the State Government under Section 432(5) Cr.P.C., when the said provision does not cover a case of parole at all. Hence, the power conferred on the State Government by virtue of SO 3860 (E) under Section 432(5) Cr.P.C., can be construed only as enabling the State Government to grant suspension of sentence in respect of offences against laws for which the executive power of the Union extends, in cases of grave illness for a period not exceeding 15 days.

29. The issue taken up for consideration in the present Writ Petition is answered accordingly. This Court will be failing in its duty if assistance rendered by the amicus is not acknowledged and only due to their effective assistance, this Court was able to arrive at a solution for the vexed question.

30. This Writ Petition is disposed of accordingly.
No costs.

Sd/-
Assistant Registrar (CS.VII)

/True Copy/

Sub Assistant Registrar

To

1. The Secretary to Government, Government of Tamil Nadu,
Home (Prison IV) Department, Fort St. George, Chennai-9.
2. The Additional Director General of Prisons, Thalamuthu
Natarajan Maaligai, 2nd Floor, Gandhi Irwin Road, Egmore, Chennai.
3. The Deputy Inspector General of Prison,
Kovai Zone (Central Prison), Kovai.
4. The Superintendent of Central Prison, Coimbatore.
5. The Public Prosecutor, High Court, Madras.

+2cc to Mr. Sujay Prasanna, Advocate SR.No.15498

akm/31.03.21 /17p-8c/

Order in
W.P.No.1306 of 2021
11.03.2021