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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 07.12.2021
DELIVERED ON : 23.12.2021

CORAM :

THE HON'BLE MR.JUSTICE P.N. PRAKASH
and
THE HON'BLE MRS.JUSTICE R. HEMALATHA

W.P. No.7795 of 2020 & W.M.P. No.24705 of 2020

Sikkander

...Petitioner

vs.

1.The State represented by its:
Secretary to Government of Tamil Nadu
Department of Home
Fort St. George
Chennai 600 009

2.The Additional Director General of Prisons
CMDA Towers
Egmore
Chennai 600 008

3.The Superintendent
Central Prison
Puzhal, Chennai

...Respondent

Writ Petition filed under Article 226 of the Constitution of India seeking a writ of certiorarified mandamus to call for the records pertaining to the impugned order in G.O. (D) No.143, Home (Prison-IV) Department dated 07.02.2019, quash the same and consequently direct the respondents to release the detenu A. Ibrahim, Convict No. 4661, S/o Abdul Razak, aged about 42 years, confined at the Central Prison, Puzhal-I, Chennai, prematurely, as per G.O. (Ms.) No.1155, Home (Prison-IV) Department dated 11.09.2008 and G.O.(Ms.) No.64, Home (Prison-IV) Department dated 01.02.2018.

For petitioner : Mr. S. Sheik Ismail

For respondents : Mr. Hasan Mohamed Jinnah
State Public Prosecutor
assisted by Mr. R. Muniyapparaj
Addl. Public Prosecutor



ORDER

P.N. PRAKASH, J.

This is a petition under Article 226 of the Constitution of India filed by one A.Sikkander, calling into question the legality and validity of G.O.(D) No.143, Home (Prison-IV) Department dated 07.02.2019 (for short "G.O.143") and for a consequential direction to the respondents to release the petitioner's brother/detenu, viz., A.Ibrahim @ Koolai Ibrahim, Convict No. 4661, (for short "Ibrahim") confined at the Central Prison, Puzhal-I, Chennai, prematurely, as per G.O.(Ms.) No.1155, Home (Prison-IV) Department dated 11.09.2008 (for short "G.O.1155") and G.O.(Ms.) No.64, Home (Prison-IV) Department dated 01.02.2018 (for short "G.O.64").

2 This case has a chequered history. The facts, in brief, run thus:

a. Ibrahim (Convict Prisoner No.4661) was allegedly involved in the murder of a BJP party functionary on 02.11.1997 in connection with which a case in Coimbatore B1-Bazaar Police Station Cr.No.1548 of 1997 was registered against him. He was prosecuted along with two others in S.C.No.201 of 1999 before the II Additional Sessions Court, Coimbatore. He was convicted on 06.02.2001 and sentenced to undergo life imprisonment for the offence under Section 302 IPC and one year rigorous imprisonment for the offence under Section 148 IPC and, in addition, to pay a fine of Rs.1,000/-, in default whereof, to undergo one month rigorous imprisonment. The said sentences were ordered to run concurrently.

b. Ibrahim assailed his conviction and sentence before this Court in Crl.A. No.963 of 2001 which was dismissed on 15.10.2004. It is stated that his appeal before the Supreme Court in Crl.A.No.1308 of 2014 is still under consideration.

c. Ibrahim was also involved in another case in Tiruppur South Police Station Cr.No.191 of 2008. He was prosecuted and convicted by the Special Court for Bomb Blast Cases, Coimbatore in S.C. No.2 of 2003 on 23.08.2005 for the offences under Section 4(b) and 6 of the Explosive Substances Act and was sentenced to undergo 7 years rigorous imprisonment. His appeal to this Court in Crl.A. No.832 of 2005 was allowed on 26.02.2013 and he was acquitted of the said charges.

d. While so, the Government of Tamil Nadu framed a premature release scheme for release of convicts in G.O. 64 (supra) on the occasion of the birth centenary of Dr. M.G. Ramachandran. Since Ibrahim was not released under G.O.64 (supra), his sister Nadira Banu filed H.C.P. No.260 of 2018 to set him at liberty under G.O. 64 (supra), wherein, this Court, by order dated 10.07.2018, directed the authorities to consider Nadira Banu's representation within a period of four weeks from the date of receipt of a copy of the order.



e. However, Nadira Banu filed another habeas corpus petition in H.C.P.No.2166 of 2018 praying for premature release of her brother Ibrahim under G.O. 1155 (supra) and G.O. 64 (supra), wherein, a Division Bench of this Court passed the following order on 17.12.2018:

"5. There is no dispute over the fact that the convict prisoner would be entitled to release under G.O.(Ms).No.64, Home [Prison IV] Department dated 01.02.2018. However, he has been denied the benefit thereof since the Probation Officer's report informs danger to the life of the Convict Prisoner, if he be let at large. Refusing release of a prisoner on the ground that his safety is at risk would amount to denying him the same not owing to any fault of his but on an apprehension of possibility of wrong doing by others. This, we consider unreasonable. In such cases, we would recommend that prisoners be released but in doing so be informed of the possibility of harm to them.

6. This Court considers it appropriate and direct the respondents to consider the representation given by the sister of the petitioner and dispose of the same, within a period of two weeks from the date of receipt of a copy of this order.

7. Accordingly, this Habeas Corpus Petition shall stand disposed of. Consequently, connected miscellaneous petition is also closed."

(emphasis supplied)

f. When Ibrahim's appeal in CrI.A. No.1308 of 2014 came up for hearing before the Supreme Court on 05.02.2019, it was brought to the notice of the Supreme Court that the Government was not complying with the order dated 17.12.2018 that was passed in H.C.P. No.2166 of 2018 and therefore, the Supreme Court directed (i) the Home Secretary, Government of Tamil Nadu, (ii) Additional Director General of Prisons and (iii) the Superintendent of Prisons, Central Prison, Puzhal-I, Chennai, to show cause as to why contempt proceedings should not be initiated against them under the Contempt of Courts Act, 1971. Thereafter, on 07.02.2019, the State Government passed G.O.143 (supra) rejecting Nadira Banu's representation, aggrieved by which, the present writ petition has been filed by Sikkander, Ibrahim's brother.

3. Heard Mr. Sheik Ismail, learned counsel for the petitioner and Mr.Hasan Mohamed Jinnah, learned Public Prosecutor appearing for the respondents/State.



4. The Joint Secretary to Government and the Under Secretary to Government have filed a counter affidavit dated 26.08.2021 and the Superintendent of Prisons, Central Prison, Puzhal, Chennai, has also filed an additional counter affidavit dated 15.11.2021 cataloguing the various acts of indiscipline that were committed by Ibrahim in the prison from 2003 to 2014.

5. Mr. Sheik Ismail, learned counsel for the petitioner, attacked the impugned order primarily on two grounds. He contended that when the Division Bench of this Court, in the order dated 17.12.2018 in H.C.P. No.2166 of 2018, has held that refusal to release a prisoner on the ground of risk to his life would amount to denying him the relief for no fault of his, the authorities cannot raise the same bogey in the impugned order. The second ground is that Ibrahim was granted 6 days emergency leave without escort by this Court in W.P. No.3193 of 2021 and at that time, nothing had happened to him and he had reported to the prison on 26.02.2021. He also added that Ibrahim has passed the SSLC examination, Plus Two examination and diploma course in Refrigeration and Air Conditioning Technician from the prison, which shows that he is disciplined and is a person of fine behavior and has turned over a new leaf.

6. Mr. Sheik Ismail filed a typed set of papers on 16.11.2021, in which he has enclosed a communication dated 10.08.2017 from the Superintendent of Prisons, Central Prison, Puzhal, Chennai, in response to an application under the Right to Information Act that was filed by Ibrahim, asking the Prison authorities to furnish the particulars about the number of times he was granted leave. Apart from that, he has also filed a typed set of papers dated 07.12.2021, in which, he has enclosed four communications dated 04.10.2017, 16.11.2017, 25.11.2017 (in English) and 25.11.2017 (in Tamil), which are replies given by the Inspector of Police, Coimbatore B1 Bazaar Police Station, on the applications of Nadira Banu under the Right to Information Act. The said replies in the aforesaid four communications were pressed into service by the learned counsel for the petitioner to contend that actually there is no threat to the life of Ibrahim, as projected in the impugned order.

7. Per contra, Mr. Hasan Mohamed Jinnah submitted that premature release under G.O.64 (supra) or G.O.1155 (supra) is not a right vested with the prisoner, but, only a privilege available with the prisoner on fulfilling certain conditions, as laid down in a catena of judgments of the Supreme Court, the last of which is the Home Secretary (Prison) and others vs. H. Nilofer Nisha¹ which was an appeal from an order of this Court

¹ (2020) 14 SCC 161



concerning the interpretation of the very same G.O.64 (supra). He further submitted that the scope of judicial review of the impugned Government Order is very limited and that the same can be judicially reviewed only when it is shown that the impugned order is, on the face of it, perverse or illegal and not otherwise.

8. This Court has carefully considered the rival submissions.

9. At the outset, it must be clarified that Ibrahim is essentially claiming premature release under G.O.64, dated 01.02.2018 on account of the fact that he was ineligible when the earlier G.O.1155 was passed on 11.09.2008 as he had not completed the minimum period of sentence as on the date of coming into force of the said Government Order.

10. Prior to the introduction of G.O.64 on 01.02.2018, the power of executive clemency was governed by various circulars issued by the Government of Tamil Nadu, from time to time, to commemorate the birth centenary of its leaders. For the present, it may suffice to note that the earliest of these was G.O. (Ms) No. 873, Home (Prison-IV) Department dated 14.09.2006, followed by G.O. (Ms) 1326, Home (Prison-IV) Department dated 12.09.2007 and G.O. 1155 (supra).

11. One Mariammal had filed H.C.P. No.3433 of 2015 seeking premature release of her brother, Sekar, under G.O.1155 (supra). This petition was allowed by a Division Bench of this Court (S.Tamilvanan and C.T.Selvam,JJ.) on 14.09.2015. The State took the matter on appeal to the Supreme Court in Criminal Appeal No.865 of 2016. By an order dated 08.09.2016, the Supreme Court declined to interfere with the release of the convict. However, the Supreme Court granted leave to appeal and disposed of the matter with the following direction:

"We may state at this juncture that the High Court had directed to release the respondent as he had spent 17 years in custody. We have already expressed that we are not inclined to interfere with the same as he has been set at liberty. However, we would direct the State of T.N. to bring fresh circulars keeping in view the provisions contained in 433-A Cr.P.C. and the judgments rendered in Epuru Sudhakar and another v. Govt. of A.P. and others , Maru Ram and others v. Union of India and Union of India v. Sriharan @ Murugan and others. The appeal is accordingly disposed of."

12. In response to the aforesaid directive, the State of Tamil Nadu passed G.O.64, on 01.02.2018 setting out the



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parameters for a general amnesty scheme by way of premature release of life convict prisoners under Article 161 of the Constitution/Section 433-A of the Cr.P.C. on the occasion of the birth centenary of the former Chief Minister Dr. M.G. Ramachandran.

13. It is well settled that while exercising constitutional power under Article 161 of the Constitution of India to grant remission, the Governor acts on the aid and advice of the Council of Ministers as contemplated under Article 163, *ibid*. This position is made clear by the decision of the Supreme Court in *Maru Ram vs. Union of India and others*², wherein, it is observed thus:

"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."

14. Instances have, however, not been found wanting where the exercise of power under Article 161, coming as it does from a high constitutional functionary, have been tainted with irrelevant and extraneous considerations. The decision in *Epuru Sudhakar vs. State of Andhra Pradesh*³ is a good example where a "pariah became a messiah" on account of a change in Government, and had obtained clemency largely on account of the fact that the prisoner's wife was a sitting MLA in the then ruling dispensation.

15. In this backdrop, the object of G.O.64 and Government Orders of a like nature is to provide objective standards for exercise of power under Article 161 of the Constitution of India/Section 433-A of the Cr.P.C. The power under Article 161 to grant remission is not uncanalised as was pointed out by Krishna Iyer, J. in the following passage from *Maru Ram* (*supra*):

"We have no hesitation to reject the notion that Articles 72/161 should remain uncanalised. We have to direct the provisional acceptance of the remission and short-sentencing schemes as good guidelines for exercise of pardon power – a jurisdiction meant to be used as often and as systematically as possible and not to be abused, much as the temptation so to do may press upon the pen of power."

² (1981) 1 SCC 107

³ (2006) 8 SCC 161



16. Objective standards serve another valuable purpose. They operate as checks on arbitrariness, nepotism and abuse of power, and provide constitutional courts with the relevant benchmarks with which the exercise of constitutional power under Article 161 or statutory power under Section 433-A Cr.P.C. could be tested on the anvil of the rule of law.

17. The scheme contemplated under G.O. 64 is a general amnesty on a case to case basis. The expression "case to case" finds emphasis in more than one place, and is indicative of the intent that the Government Order cannot be construed as a rogue's charter to indiscriminately seek premature release by all and sundry. The scheme contemplates a District Committee (second level) headed by the Superintendent of Prisons of the Central Prison concerned and the Additional Superintendent of Prisons, Jailor, Administrative Officer and Probation Officer as its members. The Range Deputy Inspector General of Prisons concerned and Regional Probation Officer of the region concerned shall examine the proposal of the District Committee and forward the same to the State Level Committee along with its recommendation. The State Level Committee is headed by the Inspector General of Prisons, the Deputy Inspector General of Prisons (Hqrs.) and Administrative Officer (Hqrs.) as its members. It is on the basis of their recommendations that the executive headed by the Council of Ministers tenders its advice to the Governor for release of eligible prisoners under the Government Order. The District and State Level Committees serve as fact-finding bodies to collect data and provide intelligence inputs in order to enable the Cabinet to take an informed decision on releasing or refusing to release a convict under G.O.64. It must, therefore, follow that the recommendations of these Committees do not constitute binding edicts on the Cabinet or on the Governor.

18. It is well settled that the right to apply for premature release does not give the convict any vested right to be released. This position was put beyond the ken of controversy by a Constitution Bench of the Supreme Court in *Union of India v. V. Sriharan*⁴, wherein, it was observed thus:

"The right to apply and invoke the powers under these provisions does not mean that he can claim such benefit as a matter of right based on any arithmetical calculation as ruled in *Godse [Gopal Vinayak Godsev. State of Maharashtra, AIR 1961 SC 600 : (1961) 1 Cri LJ 736 : (1961) 3 SCR 440]*. All that he can claim is a right that his case be considered. The decision whether remissions be granted or not is entirely left to the discretion of the authorities

⁴ (2016) 7 SCC 1



concerned, which discretion ought to be exercised in a manner known to law. The convict only has right to apply to competent authority and have his case considered in a fair and reasonable manner."

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Paragraph VII of G.O.64 reiterates this position.

19. Before advertng to the case of Ibrahim, it is necessary to notice the scheme of classification contemplated by the G.O 64. G.O.64 classifies convicts into three types : the first group consists of (a) lifers who have completed 10 years of actual imprisonment as on 25.02.2018 and (b) lifers who are aged 60 years and above and who have completed 5 years of actual imprisonment as on 25.02.2018; the second group consists of life convict prisoners who have completed 20 years of actual imprisonment as on 25.02.2018 and the third group consists of life convict prisoners who suffer from various types of medical infirmities.

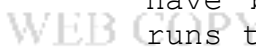
20. Admittedly, the case of the petitioner's brother Ibrahim is stated to fall within the first group in G.O.64. There is no doubt that he has crossed the threshold eligibility of 10 years prescribed in paragraph II of the Government Order. However, sub clauses (1) to (7) of paragraph II prescribe further conditions which the convict must satisfy in order to make out a case for consideration for premature release. For instance, a convict may have served an actual period of 10 years imprisonment thereby satisfying paragraph II, but his case may fall under paragraph II (A) disentitling him from consideration as the offences for which he is convicted is excepted from the terms of the Government Order. It is only when his case is not hit by any of the disqualifications set out in the order, does the convict get a right to be considered for premature release.

21. In the facts of this case, we may notice the following conditions set out in clauses (4) and (6) of paragraph II of G.O.64 which run thus:

"4 That there is safety for the prisoner's life, if released

6) That there is safety of life of the family which was affected by the prisoner, if released."

Thus, the safety of the convict prisoner's life and that of the family of the victims are factors which are expressly made germane while considering a case of premature release under G.O.64. Thus, the functionaries such as the probation officer and the District and State Level Committees are obliged to provide their inputs on these aspects as well. Furthermore, in the absence of any challenge to these conditions, the convict



22. The reasons set out for rejecting the case of Ibrahim have been set out in paragraph 7 of the impugned order which runs thus :

Perusal of the judgment in CrI.A. No.963 of 2001 dated 15.10.2004 reveals that the above life convict prisoner was involved in the murder of one Thiru. Palanisamy alias Kannan, a lottery vendor, who used to canvass during election period. As a retaliation on the attack of Muslims by some Hindus, the above convict along with two others, decided to teach a lesson to Hindus by attacking some Hindu persons. They ultimately designed to murder the deceased Palanisamy alias Kannan as revenge. This extremely violent murder which (was purely) had communal overtones in a communally sensitive area added to social tension and the release of such a person involved in communal violence would disturb the peace and harmony in the area. Further, considering the fact that the Additional Director General of Police/Inspector General of Prisons, has not recommended for the premature release life convict prisoner no.4661, Ibrahim @ Koolia Ibrahim, S/o Abdul Razaak, the Government reject the request of Tmt. N.Nadira Banu, brother of Life Convict prisoner No.4661, Ibrahim @ Koolai Ibrahim, S/o Abdul Razaak, confined in Central Prison-I, Puzhal, for premature release under G.O. (Ms.) No.64 Home (Pri-IV) Department dated 01.02.2018." (emphasis supplied)

<https://hcservices.ecourts.gov.in/hcservices/>



a communal problem in the area. This conclusion was not based on the ipse dixits of the Probation Officer, but, was on the basis of a report given by the Commissioner of Police, Coimbatore, who is obviously best placed to give inputs on law and order issues in the area. The Second Level/District Committee headed by the Superintendent of Prisons, Central Prison, Puzhal, has also not recommended his release. The State Level Committee also has concurred with the aforesaid conclusion of the Second Level/District Committee. It is on the basis of the aforesaid material that the Governor has rejected the application of Nadira Banu for granting premature release for her brother Ibrahim under G.O.64.

24. We make it clear that we are not sitting in appeal over the recommendations of the State Level Committee. The present exercise undertaken by us is confined to judicially reviewing the legality and propriety of the order in G.O.143 passed by the Governor of Tamil Nadu. The parameters of judicial review of an order granting or rejecting a case of pardon or remission is well settled, and have been authoritatively articulated in the following passage in Epuru Sudhakar (supra):

"The position, therefore, is undeniable that judicial review of the order of the President or the Governor under Article 72 or Article 161, as the case may be, is available and their orders can be impugned on the following grounds:

- (a) that the order has been passed without application of mind;
- (b) that the order is mala fide;
- (c) that the order has been passed on extraneous or wholly irrelevant considerations;
- (d) that relevant materials have been kept out of consideration;
- (e) that the order suffers from arbitrariness."

25. In applying the aforesaid tests we are, of course, aware that sufficiency of material before the Governor is not a matter for inquiry by the Court, as it lies squarely within the province of the Governor. In our view, this Court cannot sit in judgment over the sufficiency of the materials given by the Cabinet as advice to the Governor, because, if we do that, in a given case, the Cabinet would also go into the sufficiency of the materials in a Court judgment convicting an accused and give advice to the Governor to grant premature release on the ground of insufficiency of materials in the Court judgment. This will lead to a Constitutional impasse between two coordinate Constitutional authorities. Judicial review is certainly available, albeit, on very limited grounds as has been pointed



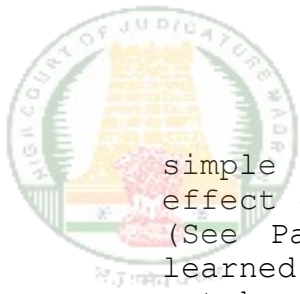
out by the Constitution Bench of the Supreme Court in B.P.Singhal v. Union of India⁵, in the following passage:

"This Court has examined in several cases, the scope of judicial review with reference to another prerogative power—power of the President/Governor to grant pardon, etc. and to suspend, remit or commute sentences. The view of this Court is that the power to pardon is a part of the constitutional scheme, and not an act of grace as in England. It is a constitutional responsibility to be exercised in accordance with the discretion contemplated by the context. It is not a matter of privilege but a matter of performance of official duty. All public power including constitutional power, shall never be exercisable arbitrarily or mala fide. While the President or the Governor may be the sole judge of the sufficiency of facts and the propriety of granting pardons and reprieves, the power being an enumerated power in the Constitution, its limitations must be found in the Constitution itself. The Courts exercise a limited power of judicial review to ensure that the President considers all relevant materials before coming to his decision. As the exercise of such power is of the widest amplitude, whenever such power is exercised, it is presumed that the President acted properly and carefully after an objective consideration of all aspects of the matter. Where reasons are given, the Court may interfere if the reasons are found to be irrelevant. However, when reasons are not given, the Court may interfere only where the exercise of power is vitiated by self-denial on wrong appreciation of the full amplitude of the power under Article 72 or where the decision is arbitrary, discriminatory or mala fide (vide Maru Ram v. Union of India [(1981) 1 SCC 107 : 1981 SCC (Cri) 112], Kehar Singh v. Union of India [(1989) 1 SCC 204 : 1989 SCC (Cri) 86], etc.)."

(emphasis supplied)

26. It now remains to be seen whether the impugned order suffers from any of the infirmities set out above. Having carefully examined the impugned order, we find that the murder committed by Ibrahim and others undoubtedly possessed communal overtones. This, coupled with the fact that the murder was committed in a communally sensitive area, has impelled the authorities to conclude that the premature release of Ibrahim will endanger his life. By no stretch of imagination could these considerations be termed as irrelevant or extraneous for the

⁵ (2010) 6 SCC 331



simple reason that G.O. 64 itself mandates an assessment of the effect of premature release on the safety of the prisoner's life (See Paragraph II (4)). As was pointed out by Mr. Jinnah, learned Public Prosecutor, the validity of this condition has not been assailed. It must, therefore, follow that an assessment of the convict's safety in the event of his release under the Government Order cannot be termed as an extraneous or irrelevant consideration.

27. The learned counsel for the petitioner would, however, contend that the reports of these authorities are vitiated by mala fides. However, we find that a plea of mala fides is sought to be introduced through a sidewind as the pleadings in this case are woefully inadequate to meaningfully adjudicate this issue. In any event, we cannot resort to flights of fancy to assume that the Commissioner of Police, the Probation Officer, the Second Level/District Committee and the State Level Committee have merrily conspired to act in a mala fide manner to ensure that Ibrahim is denied the benefit of premature release. On the contrary, there exists a presumption under Section 114 of the Evidence Act that these officials are presumed to have acted legally within the bounds of their authority. (See *Devender Pal Singh vs. State (NCT of Delhi)*⁶ and *Surinder Kumar vs. State*⁷).

28. It was on the basis of the aforesaid material that the Governor was advised by the Government to reject the case of Ibrahim for premature release. The reports of the Probation Officer and the District and State Level Committees constituted valid material on the basis of which the Governor could act. Once we find that there existed valid material, whether this material was sufficient or not is not a question for this Court to answer lest, we stray beyond the permissible levels of judicial scrutiny. We are fortified in holding so in the light of the following observations of the Supreme Court in *Epuru Sudhakar (supra)*:

"The President and the Governor are the sole judges of the sufficiency of facts and of the appropriateness of granting the pardons and reprieves. However, this power is an enumerated power in the Constitution and its limitations, if any, must be found in the Constitution itself. Therefore, the principle of exclusive cognizance would not apply when and if the decision impugned is in derogation of a constitutional provision. This is the basic working test to be applied while granting pardons, reprieves, remissions and commutations."

⁶ (2002) 5 SCC 234

⁷ (2020) 2 SCC 563



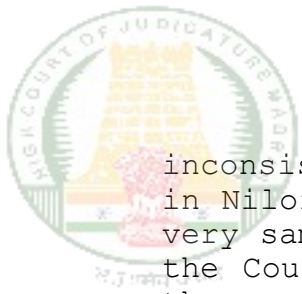
29. The following observations from the decision of the Constitution Bench of the Supreme Court in *Rameshwar Prasad (VI) vs. Union of India*⁸, also merit reproduction:

"Allegation of mala fides without any supportable basis is the last feeble attempt of a losing litigant, otherwise it will create a smokescreen on the scope of judicial review. This is a pivotal issue around which the fate of this case revolves. As was noted in *A.K. Kaul* case [(1995) 4 SCC 73 : 1995 SCC (L&S) 922 : (1995) 30 ATC 174] the satisfaction of the President is justiciable. It would be open to challenge on the ground of mala fides or being based wholly on extraneous or irrelevant grounds. The sufficiency or the correctness of the factual position indicated in the report is not open to judicial review. The truth or correctness of the materials cannot be questioned by the Court nor would it go into the adequacy of the material and it would also not substitute its opinion for that of the President. Interference is called for only when there is clear case of abuse of power or what is sometimes called fraud on power. The Court will not lightly presume abuse or misuse of power and will make allowance for the fact that the decision-making authority is the best judge of the situation." (emphasis supplied)

30. Having regard to the nature of the crime and the manner of its commission in a communally sensitive area, we are of the considered view that the inference drawn by the authorities cannot be termed as one which no reasonable person could have arrived at. While exercising the power of judicial review, it is not open to this Court to substitute its judgment for the decision maker in the absence of any palpable or gross illegality in the decision making process. The plea founded on perversity and arbitrariness must, therefore, fail.

31. The learned counsel for the petitioner contended that in the earlier round, the order dated 17.12.2018 passed by the Division Bench of this Court in H.C.P. No.2166 of 2018 has categorically stated that refusing the release of a prisoner on the ground that his safety is at risk was not tenable. We may venture to point out that when the order dated 17.12.2018 was passed, only the report of the Probation Officer was available before the Division Bench. It appears that the Probation Officer had submitted a report that if Ibrahim is released, there would be risk to his life. The Division Bench concluded that the prisoner should be released after informing them of a possibility of harm to them. This conclusion is clearly

⁸ (2006) 2 SCC 1



inconsistent with the subsequent decision of the Supreme Court in Nilofer Nisha (supra) which was incidentally a case under the very same G.O. 64. The Supreme Court has categorically held that the Court cannot order premature release merely on the basis of the report of the Probation Officer as the decision making process under G.O.64 contemplated further scrutiny by the two committees at the District Level and State Level. The Supreme Court concluded as under:

"We are clearly of the view that the Court itself cannot examine the eligibility of the detenu to be granted release under the Scheme at this stage. There are various factors, enumerated above, which have to be considered by the committees. The report of the Probation Officer is only one of them. After that, the District Committee has to make a recommendation and finally it is the State Level Committee which takes a final call on the matter. We are clearly of the view that the High Court erred in directing the release of the detenu forthwith without first directing the competent authority to take a decision in the matter. Merely because a practice has been followed in the Madras High Court of issuing such type of writs for a long time cannot clothe these orders with legality if the orders are without jurisdiction. Past practice or the fact that the State has not challenged some of the orders is not sufficient to hold that these orders are legal."

32. Much water has flown under the bridge after the order dated 17.12.2018 passed by the Division Bench as the report of the Probation Officer was further supplemented with the recommendations of the District and State Level Committees who have not recommended the release of Ibrahim. It is, therefore, futile to contend that Ibrahim has a right to be released on the basis of the observations made in the order dated 17.12.2018, especially when the decision making process contemplated under G.O.64 was not even complete on that date.

33. Our attention was then invited to an order passed by a Division Bench of this Court in S. Mallika vs. State⁹ to which one of us [PNPJ] was a party. On the strength of this order, it was sought to be contended that the report of the Probation Officer cannot be given much credence to whittle down the benefits under G.O.64. Having examined the aforesaid order, we find that this contention cannot be countenanced. In the first place, the order dated 13.11.2013 was passed in a case concerning G.O. Ms 1155 (supra). Unlike G.O.64 (supra), release under G.O.1155 (supra) was on the basis of the recommendations

⁹ H.C.P.No.2393 of 2012 decided on 13.11.2013



of the Additional Director General of Prisons alone. On the other hand, G.O. 64 contemplates a two-tier scrutiny at the level of the District Committee followed by the State Committee comprising the Inspector General of Prisons and the Deputy Inspector General of Prisons (Hq). The observations of the Supreme Court in Nilofer Nisha, extracted supra, would also apply on all fours. Hence, we are of the considered opinion that the order dated 13.11.2013 passed in H.C.P 2393 of 2013 cannot come to the rescue of the petitioner.

34. We find from the communication dated 10.08.2017 from the Superintendent of Prisons, Central Prison-I, Puzhal, Chennai, that on 18 occasions, Ibrahim was sent on one day emergency leave with escort and was brought back to the prison and only on two occasions, i.e., on 13.07.2017, pursuant to the Court order, he was granted 6 days emergency leave with escort and again, he was granted six days emergency leave without escort pursuant to the order dated 12.02.2021 passed by a learned single Judge of this Court in W.P. No.3193 of 2021.

35. In Saleema vs. State¹⁰, a Division Bench of this Court, to which, one of us (PNP,J) was a member, by placing reliance on a Full Bench judgment of this Court in State vs. Yesu¹¹, has, in no uncertain terms, held that leave, whether emergency or ordinary, can be granted only by the authorities within the framework of the Tamil Nadu Suspension of Sentence Rules, 1982 and not outside of it. It was concluded that the Court can only judicially review the order of the authorities granting or refusing to grant leave and cannot arrogate to itself the power to grant leave. The order of the Division Bench in Saleema (supra) is predicated on the authoritative pronouncement of the Supreme Court in Nilofer Nisha (supra), wherein, the Supreme Court has held that leave is not a matter of right. It has become necessary for us to reiterate this as we find that the Prison authorities had granted only one day leave to Ibrahim on 18 occasions and that too, with police escort. It was only by two judicial fiats, that was he granted six days leave once, with escort, and six days leave once, without escort, as stated above. Just because nothing untoward happened to him when he was granted leave by the Court, it cannot be inferred that there is no basis for the apprehension of the Prison administration.

36. We now come to the information obtained by the convict prisoner and his sister under the Right to Information Act, which has already been alluded to in paragraph 6 (supra). There are four replies dated 14.10.2017, 16.11.2017, 25.11.2017 and 25.11.2017, given under the Right to Information Act by the

¹⁰ 2021 (1) MWN (Cr.) 198(DB)

¹¹ 2011 (5) CTC 353



Inspector of Police, Coimbatore B-1 Bazaar Police Station. We reproduce below the same, for the sake of better appreciation.

Communication dated 14.10.2017:

Question	Whether any complaint received against the brother Ibrahim who have been punished for life imprisonment at prison for 20 years that his release will affect the law and order under the jurisdiction of your police station? Whether any complaint received when he was out on urgency leave or parole granted as per the order of the Hon'ble High Court at Madras? Please furnish the above details.
Answer	It is informed that no petition received by stating that law and order is affecting. That, the applicant's brother Kulai Ibrahim would visit on leave from the prison often, with proper protection and security personal, hence no apprehension.

Communication dated 16.11.2017:

Question	Whether any complaint have been received from anybody having any life threat through myself in the circumstances of my leave granted by the Government Secretary, parole granted by Madras High Court and in the ordinary leave granted by Jail authority which is under your police station jurisdiction, and returned to the prison?
Answer	In the circumstances of your arrival and return there was a proper protection and security arrangements made hence no complaint received at B-1 Bazaar Station (L & O).

Communication dated 25.11.2017:

Question	Whether the family members of Kannan, who was murdered in the registered case in Cr. No.1548/1997 under Sections 302, 148 of IPC at B-1, Bazaar Street, Coimbatore City has preferred any complaint or complaint report at B-1 Police Station by stating that they have life threatening from the petitioner brother A. Ibrahim @ Kulai Ibrahim? If yes, need the copy of the complaint and report.
Answer	It is informed that no complaint or report preferred by the family members of the murdered Kannan in the above case by stating that they have any life threat from the petitioner brother A. Ibrahim @ Kulai Ibrahim.



Communication dated 25.11.2017:

Question	கோவை மாநகர பி 1 கடைவீதி காவல் நிலைய குற்ற எண் 1548/1997 ச/பி 302, 148 இதர பிரிவுகள் கீழ் பதியப்பட்ட வழக்கில் கொலையுண்டு இறந்த கண்ணன் அவர்களின் குடும்பத்தினர் சம்பவத்திற்குப்பின் தங்கள் காவல் நிலைய சரகத்திற்கு எல்லைக்குட்பட்ட பகுதியில் இருந்து தங்கள் வீட்டை காலி செய்துகொண்டு இடம் பெயர்ந்து எந்த ஆண்டில் இருந்து எந்த ஊரில் எந்த முகவரியில் வசித்து வருகின்றனர் என்கின்ற தக்க முகாந்திரம் தங்கள் பி1 கடைவீதி காவல் நிலையத்தால் அறியப்படும் அல்லது அறியப்படாமலும் சென்றது என்ற விபரம் தேவை.
Answer	மேற்படி வழக்கில் கொலையுண்டு இறந்து போன கண்ணன் குடும்பத்தினர் மற்றும் உறவினர்களின் இருப்பிடம் பற்றி பி1 காவல்நிலையத்திற்கு தெரியப்படுத்தவில்லை. அவர்கள் எங்கு சென்றார்கள் என்ற விபரமும் தெரியவில்லை என்று தெரியப்படுத்தப்படுகிறது.

37. A reading of the above replies shows that the Inspector of Police, Coimbatore B-1 Bazaar Police Station, has stated that during the visits of Ibrahim on leave, proper police protection was given and therefore, there was no apprehension. In other words, whenever the police received prior information from the Prison authorities that Ibrahim is coming out from the prison, they were making security arrangements to give him proper protection so that he returns to the prison safely. This, coupled with the fact that a police escort accompanied Ibrahim on every one of the 18 occasions that he was given one day leave by the prison authorities, would show that the concerns relating to the safety and security of Ibrahim are not fanciful and cannot be brushed aside as tell tales unworthy of any credence.

38. Furthermore, we are of the view that the attempt made to discredit the impugned order on the strength of RTI responses is clearly misconceived. The RTI queries were addressed to and replied by the Inspector of Police, Coimbatore B-1 Bazaar Police Station. We are at a loss to understand as to how the replies given by the Inspector of Police, Coimbatore B1- Bazaar Police Station, who is not even a consultee under the scheme contemplated under G.O. 64, can possibly jettison the satisfaction arrived at by the Committees at the District and State Levels.

39. During the course of arguments, it was suggested to us, by a learned member, that even in Nilofer Nisha (supra), the Supreme Court had dealt with the case of individual convict prisoners and had granted the relief of remission to some of them and therefore, this Court must follow the same course. We invited his attention to the relevant observations in Nilofer Nisha (supra) which clearly show that the Supreme Court had



invoked its plenary powers under Article 142 of the Constitution of India, and granted reliefs to certain convict prisoners. It would be stating the obvious to say that the law, as it presently stands, does not enable the High Court to exercise powers akin to Article 142, *ibid*.

40. It was, however, contended that the power of this Court under Article 226, *ibid*., is also equally wide and could be wielded in much the same way as the Supreme Court's powers under Article 142, *ibid*. We are afraid that this argument, bordering as it does on rank flattery, cannot be countenanced. There is no doubt that the powers of a High Court under Article 226 are wide. But, it is equally well settled that the powers of the High Court under Article 226, *ibid*., cannot be used to subvert the law. The constitutional powers under Article 226, *ibid*. do not enable the High Courts to proclaim infinite sky high powers akin to those exercised by the "Sun King" Louis XIV.

41. Finally, the learned counsel for the petitioner relied upon the judgment of the Supreme Court in *Laxman Naskar vs. Union of India and others*¹² wherein at paragraph 7, the Supreme Court has held that the rejection on the ground of objection by police was not acceptable and submitted that hence, in this case also, this Court should reject the opinion of the Probation Officer. In the same judgment, the Supreme Court has clearly held in paragraph 3 that a convict does not acquire a right to be released prematurely and that such release can only be under the rules or scheme framed by the Government. In the instant case, G.O.64 is a scheme framed by the Government, wherein, there is a clear condition that, "there is safety for the prisoner's life, if released". That apart, in the impugned order, besides the above reason, other reasons have also been assigned, the sufficiency of which cannot be gone into by this Court.

42. For all of the aforesaid reasons, we find absolutely no ground to interfere with the impugned G.O.143.

In the result, the writ petition fails and is accordingly dismissed. Costs made easy. Connected W.M.P. stands closed.

Sd/-
Assistant Registrar (CS-IX)

// True Copy //

Sub Assistant Registrar

cad

¹² (2000) 2 SCC 595



To

1.The Secretary to Government
Home Department
Government of Tamil Nadu
Fort St. George, Chennai 600 009

2.The Additional Director General of Prisons
CMDA Towers
Egmore, Chennai 600 008

3.The Superintendent
Central Prison
Puzhal, Chennai.

4.The Public Prosecutor,
High Court, Madras.

W.P.No.7795 of 2020

KSM(CO)
RVM(06/01/2022)