



IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON	30.07.2021
DELIVERED ON	02.09.2021

CORAM:

THE HON'BLE MR.JUSTICE.P.N.PRAKASH
AND
THE HON'BLE MR.JUSTICE R.PONGIAPPAN

W.P.NO.14685 OF 2021

S.Santhosam

... Petitioner

.Vs.

1. State by:
The Secretary to Government,
Home, Prohibition and Excise Department,
Secretariat,
Chennai - 600 009.
2. The Deputy Inspector General of Prisons,
Coimbatore Range,
Coimbatore - 18.
3. The Superintendent of Prisons,
Central Prison,
Salem - 7.

... Respondents

PRAYER:-

Writ Petition filed under Article 226 of the Constitution of India seeking a writ of mandamus directing the respondents to grant 10 days emergency leave by considering the petitioner's representation dated 19.06.2021 and release her brother, viz., Gunasekaran @ Udayakumar @ Kumar, S/o Ramar, aged 32 years, Life Convict, now confined in the Central Prison, Salem.

For petitioner : Mrs.S.Nadhiya

For respondents : Mr.R.Muniyapparaj
Government Advocate (Crl. Side)



ORDER

P.N. PRAKASH, J.

WEB COPY

The petitioner is the sister of one Gunasekaran @ Udayakumar @ Kumar. Gunasekaran was prosecuted in Pappireddipatti P.S. Cr.No.37 of 2010 and he faced trial in S.C.No.39 of 2010 in the Court of the Principal Sessions Judge, Dharmapuri, in which, he was convicted on 26.10.2016 of the offences under Sections 302 and 394 IPC and was sentenced to two terms of imprisonment, the maximum being imprisonment for life. The appeal preferred by him thereagainst in CrI.A.No.267 of 2017 was dismissed by this Court on 10.01.2020. After his conviction and sentence, he was lodged in the Central Prison, Vellore, as a convict prisoner for undergoing the sentence. Since Gunasekaran was facing trial in two other cases, viz., S.C.No.210 of 2011 for the offence under Sections 395 read with Section 397 IPC before the I Additional Sessions Court, Salem and S.C.No.334 of 2017 for the offences under Sections 120, 379, 302 and 414 IPC in the Court of the II Additional District Judge, Salem, he was transferred from the Central Prison, Vellore, to the Central Prison, Salem, so that it will be convenient for the prison authorities to produce him for trial before the said two Courts in Salem on the hearing dates.

2. While that being so, the petitioner addressed a representation dated 19.06.2021 to the Home Secretary, Government of Tamil Nadu, the Deputy Inspector General of Prisons, Coimbatore Range and the Superintendent, Central Prison, Salem, seeking 10 days emergency leave for her brother Gunasekaran to visit their mother Kasiammal, aged 82 years, whose health condition is said to be critical. Pending that representation, the petitioner has filed the instant writ petition for a mandamus to the respondents to grant 10 days emergency leave to Gunasekaran by considering her representation dated 19.06.2021.

3. Heard Mrs.S.Nadhiya, learned counsel for the petitioner and Mr.R.Muniyapparaj, learned Government Advocate (CrI. Side) appearing for the respondents.

4. Mr.M.Senthilkumar, Superintendent of Prisons, Central Prison, Salem, has filed a counter affidavit dated 29.07.2021, wherein, he has inter alia stated that in the light of Rule 35 of the Tamil Nadu Suspension of Sentence Rules, 1982 (for brevity "the Sentence Suspension Rules"), Gunasekaran is not entitled to any kind of leave, as he is facing trial in two cases, as stated above.



5. This Court gave its anxious consideration to the rival submissions.

6. Mrs. Nadhiya submitted that under Rule 40 of the Sentence Suspension Rules, the Government has got the power to grant exemption and that is why, the petitioner's representation dated 19.06.2021 was addressed to the Home Secretary as well and in a case of this nature, it would be in the fitness of things for the Government to grant exemption and consequently, grant leave to Gunasekaran to visit his ailing mother.

7. Before proceeding to decide as to whether Gunasekaran is entitled to emergency leave or not, it is felicitous to trace the genesis of the Sentence Suspension Rules. Section 432 (5) Cr.P.C. appears to be the source of power for the Sentence Suspension Rules and it reads as under:

"432 Power to suspend or remit sentences:

(5) The appropriate Government may, by general rules or special orders give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with:

Provided that in the case of any sentence (other than a sentence of fine) passed on a male person above the age of eighteen years, no such petition by the person sentenced or by any other person on his behalf shall be entertained, unless the person sentenced is in jail, and-

(a) where such petition is made by the person sentenced, it is presented through the officer in charge of the jail; or

(b) where such petition is made by any other person, it contains a declaration that the person sentenced is in jail."

(emphasis supplied)

8. A reading of the above shows that the Government may, by general rules or special orders, give directions for suspension of sentence for a person who has been convicted of an offence and sentenced therefor. In other words, once a person has been convicted of an offence and sentenced therefor by a Court of law, a duty is cast upon the executive, viz., in this case, the prison authorities, to ensure that the person undergoes the sentence that has been imposed on him by the Court. Thus, the role of the executive to execute a judicially pronounced sentence commences when adjudication by the judiciary ends.



9. Section 432 Cr.P.C. gives power to the appropriate Government to suspend the execution of or remit the sentence imposed on a person for good reasons. The expression "suspension of sentence" used herein is not akin to the usage of the expression used in Section 389 Cr.P.C. Section 389 (1) Cr.P.C. deals with the power of the appellate Court to suspend the sentence, pending disposal of the appeal preferred by the sentenced person.

10. In exercise of the power under Section 432(5) Cr.P.C., the Government of Tamil Nadu has framed the Sentence Suspension Rules for regulating the procedure for grant of leave (suspension of sentence) to convicted prisoners. As regards remand prisoners, the Sentence Suspension Rules would not apply. A remand prisoner can be released from custody only by way of an order of bail granted by a Court of law. The expression "bail" has been expatiated by a Constitution Bench of the Supreme Court in Sunil Fulchand Shah vs. Union of India and others¹ as under:

"24. Bail and parole have different connotations in law. Bail is well understood in criminal jurisprudence and Chapter XXXIII of the Code of Criminal Procedure contains elaborate provisions relating to grant of bail. Bail is granted to a person who has been arrested in a non-bailable offence or has been convicted of an offence after trial. The effect of granting bail is to release the accused from internment though the court would still retain constructive control over him through the sureties. In case the accused is released on his own bond such constructive control could still be exercised through the conditions of the bond secured from him. The literal meaning of the word "bail" is surety. In Halsbury's Laws of England [Halsbury's Laws of England, 4th Edn., Vol. 11, para 166.] , the following observation succinctly brings out the effect of bail:

The effect of granting bail is not to set the defendant (accused) at liberty but to release him from the custody of law and to entrust him to the custody of his sureties who are bound to produce him to appear at his trial at a specified time and place. The sureties may seize their principal at any time and may discharge themselves by handing him over to the custody of law and he will then be imprisoned.

1 (2000) 3 SCC 409



11. Thus, the word "bail" is synonymous to the word "surety". If, after giving surety, the accused absconds, the Court takes upon itself, the responsibility to secure him, by taking coercive steps like issuing a non bailable warrant, proclamation, etc.

12. The objective behind formulating the Sentence Suspension Rules is that a convict prisoner should not be dehumanized by being kept in complete incarceration, without being provided a ventilator for reformation. The idea of sentencing a person to undergo imprisonment is not only to punish him for the offence committed by him, but also to ensure that he turns a new leaf. One way of promoting reformation is to permit convict prisoners to go on leave, off and on, to spend time with their families and return to the prison rejuvenated. However, be it noted that a convict prisoner does not have a fundamental right, much less a right, for temporary release. Rule 3 of the Sentence Suspension Rules makes this clear when it states that leave cannot be claimed as a matter of right and that it is only a concession granted to the prisoner.

13. In the aforesaid backdrop, we now propose to analyse Rule 35 of the Sentence Suspension Rules which reads as follows:

"35. Pending cases:

No prisoner on whom a case is pending trial shall be granted leave."

14. What is the *raison d'etre* behind Rule 35 of the Sentence Suspension Rules?

15. If a convict prisoner has, to his credit, another criminal case in which he is facing trial, a duty is cast upon the prison authorities to produce him before the trial Court from time to time. This is limpid from Rule 832 of the Tamil Nadu Prisons Rules, which reads as under:

"832. Production before Court:-

(1) The duty of ascertaining the time at which a prisoner committed to the Sessions is to be produced before the Sessions Court, and of providing the necessary escort for this purpose, rests with the police.

(2) The Superintendent is responsible for the production in Court, at the appointed time, of a prisoner remanded pending a magisterial inquiry or



WEB COPY

trial, and shall make suitable arrangements with the Police for the provision of the necessary escort. When possible, a prisoner shall be conveyed to and from the Court in a special conveyance

(2A) If a prisoner remanded pending a magisterial enquiry or trial refuses to attend the Court at the appointed time or resists endeavour to produce him or attempts to evade his production before the Court such minimum force as may be considered necessary by the Superintendent may be used to encounter such resistance of the accused so as to produce him before the Court which has directed the production of the accused.

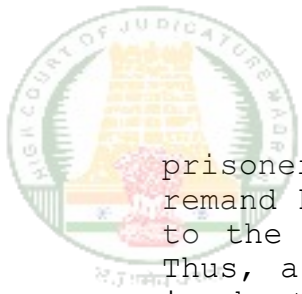
(3) A receipt in Form No.60 shall be obtained from the senior police officer of the escort whenever a prisoner, whether committed to the Sessions or under remand, is made over to the charge of such police officer for production in Court.

(4) The police are responsible for the safe custody of any prisoner committed to their charge under the preceding sub rule of this rule till he is returned to the prison or discharged from custody in due course of law. It is for the police to decide whether such prisoner shall be handcuffed or not.

(5) When an undertrial or remand prisoner has to be brought back to the prison even in the event of his acquittal or discharge, the senior police officer of the escort should be informed of the fact and the receipt in form No.61 substituted.

(6) When female undertrial or remand prisoners are taken from Courts to prisons or vice versa, they shall be provided with conveyance where the distance to be traversed by them exceeds 1.6 k.m. Conveyances may also be provided for the shorter distances in cases in which, for reasons of health or custom or other valid reason failure to make such provision would cause undue hardship to them."

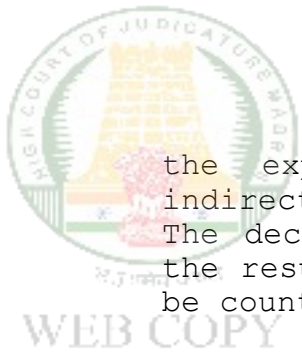
If such a convict prisoner is already on bail in that case, the trial Court would ensure his attendance by issuing a Prisoner's Transfer Warrant under Section 267 Cr.P.C. If the convict



prisoner is not on bail in that case, the trial Court would remand him to custody under Section 309 Cr.P.C. with a direction to the prison authorities to produce him on a particular date. Thus, a convict prisoner who is facing trial in a Court of law, is kept in the custody of the prison authorities under the orders of the Court for that case. It would, therefore, be impermissible for the executive to circumvent a judicial order by releasing the prisoner on leave. That would, ex facie, amount to an interference in the administration of justice by the Court. It would also fall foul of the principle of separation of powers enshrined in Article 50 of the Constitution of India. Rule 35 of the Sentence Suspension Rules, thus, strikes a balance. The executive power to suspend a sentence by granting leave is unavailable qua a person facing trial before a competent Court.

16. Coming to the case in hand, after the confirmation of the conviction and sentence in S.C. No.39 of 2010 by the High Court, Gunasekaran was lodged as a convict prisoner in the Central Prison, Vellore. Since his presence before the trial Courts in Salem District was necessary, he was transferred from the Central Prison, Vellore, to the Central Prison, Salem as ENR convict (En route convict) and that is why, he is referred to as ENR convict no.504. The Superintendent, Central Prison, Salem, is required to produce Gunasekaran before the two trial Courts on the hearing dates. While that being so, if leave is granted to Gunasekaran, the Superintendent, Central Prison, Salem, may not be able to produce him before the trial Courts and that would clearly amount to violation of the orders of the Courts.

17. The next submission of Mrs. Nadhiya is that the State should invoke Rule 40 of the Sentence Suspension Rules to exempt the petitioner's brother from the operation of Rule 35, *ibid.* We are, however, afraid that this does not cut ice with us. The scope of Rule 40, *ibid.*, came up for consideration before a Full Bench of this Court in *State vs. Yesu²*, wherein, at paragraph 42, it was held that if Rule 40, *ibid.* was exercised to exempt a person from the Sentence Suspension Rules, the resultant position was that the State Government would have no power to grant suspension of sentence at all. This is because the Full Bench, at paragraph 52, has observed that "outside the scope of the Tamil Nadu Suspension of Sentence Rules, no authority has got any power to grant suspension of sentence in any form." Ex consequenti, the power to exempt cannot be used to grant leave outside the four corners of the Sentence Suspension Rules, as there exists no plenary power with the State Government to grant leave dehors the provisions of the Sentence Suspension Rules. What cannot be done on account of



the express bar contained in Rule 35, *ibid.*, cannot be indirectly circumvented through the back door of Rule 40, *ibid.* The decision of the Full Bench in *Yesu (supra)*, binds us, with the result that the contention premised on Rule 40, *ibid.* cannot be countenanced.

In view of the discussion aforemade, this writ petition fails and is accordingly dismissed as being devoid of merits. Costs made easy.

Sd/-

Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

cad

To

1. The Secretary to Government,
Home, Prohibition and Excise Department,
Secretariat,
Chennai - 600 009.
2. The Deputy Inspector General of Prisons,
Coimbatore Range,
Coimbatore - 18.
3. The Superintendent of Prisons,
Central Prison,
Salem - 7.
4. The Public Prosecutor,
Madras High Court,
Chennai - 600 104.

W.P.NO.14685 OF 2021

NR(CO)
PBS/22/09/2021
PBS/27/09/2021