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WP(MD)No.1246 of 2021

Date of Reservation	03.02.2021
Date of Judgment	04.02.2021

CORAM:

**THE HONOURABLE MR.JUSTICE K.KALYANASUNDARAM
AND**

**THE HONOURABLE MR. JUSTICE G.ILANGOVAN
W.P. (MD)No.1246 of 2021**

Mrs.M.Rajeshwari

: Petitioner

Vs.

1.The Additional Director General of Police (Prison),
Gandhi Irwin Road,
Egmore, Chennai.

2.The Superintendent of Special Prison for Women,
Special Prison for Woman,
Madurai.

3.Government of Tamilnadu,
Rep by the Secretary to the Government,
Home Department,
(Prison-4),
Chennai-9.

4.The Additional Director General of Police/
Inspector General of Prison,
Whannels Road,
Egmore, Chennai-8.

: Respondents

(R3 and R4 are impleated as respondents *suo-motu*
today)

PRAYER: Petition is filed under Article 226 of the Constitution of India praying for the issue of a Writ of Mandamus to direct the respondents to grant leave (Parole) to the petitioner's sister namely Mrs.Subbulakshmi (FCP No.106) wife of Kumaragurubaran, under Terminally Ill Prisoner category who is undergoing sentence in Special Prison for Women, Madurai.



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For Petitioner : Mr.Karthick R.J

For Respondents: Mr.R.Anandharaj
Additional Public Prosecutor

ORDER

(Order of the Court was made by G.ILANGO VAN, J)

This writ petition has been filed to direct the respondents to grant leave (Parole) to the petitioner's sister namely Mrs.Subbulakshmi (FCP No.106) wife of Kumaragurubaran, under Terminally Ill Prisoner category who is undergoing sentence in Special Prison for Women, Madurai .

2.Heard Mr.Karthick R.J, learned counsel appearing for the petitioner and Mr.R.Anandharaj, learned Additional Public Prosecutor appearing for the respondents.

3.The case of the petitioner is that the convict by name, Subbulakshmi, wife of Kumakuruparan, is the sister of the petitioner and she was married. But her life was not successful, which ended in the death of her husband. The convict was convicted by the IV Additional Sessions Judge, Dindigul, on 16.11.2017, for the offenses punishable under Section 302 of IPC for having murdered her husband and sentenced to undergo life imprisonment and for Section 201 of IPC, sentenced to undergo 5 years imprisonment and Rs.1000/- fine was imposed. Against the judgment, the convict preferred Cr.A.No.66 of 2018 before this Court and this Court, by judgment dated 16.12.2019, modified the said conviction and sentence to one under Section 304 (i) of IPC and sentenced to undergo four years imprisonment and one thousand rupees fine. The same sentence was imposed for offense under section 201 IPC also. Both sentences were ordered to run concurrently. Pursuant to the same, now the convict is confined in Special Prison for Women, Madurai.



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4. She is affected by lung infection while she was in imprisonment and underwent medical treatment in Tirunelveli Medical College hospital for the treatment and as per the investigation, it is seen that she is in the advanced stage of lung cancer , requires chemotherapy.

5. Hence, in the circumstances, the convict is entitled for ordinary leave as per the Provisions of Tamil Nadu Suspension of Sentence Rules. The health condition is getting worst day-by-day and she requires immediate special care, which is not possible under prison conditions. She is a terminally ill prisoner. So, she approached for parole. That was not considered. So, the petitioner gave a representation on 28.12.2020 seeking parole for the convict for a period of 30 days for arranging medical treatment. That was also not considered.

6. In a like situation, Calcutta High Court in W.P.A.No.7552 of 2018 dated 08.01.2021 has permitted the terminally ill prisoners to be shifted to their home with certain conditions. As per the Article 21 of Constitution of India, the convict is entitled for proper medical care. The Government of India, Ministry of Home Affairs, issued a circular dated 13.08.2010 in Circular No.V17014/5/2010-PR, wherein, they directed all the Chief Secretaries and concerned Authorities of the Governments and Union Territories Administrations to amend the legislation/rules and make policies and procedures to provide for community sanctions and measures for terminally ill prisoners. But, that was not considered by the respondents. So, this petition is filed seeking Writ of Mandamus or direction or writ directing the respondents to grant leave (parole) to the petitioner's sister namely, Mrs. Subbulakshmi (FCP No.106), wife of Kumarakurubaran, under terminally ill prisoner category.

7. A detailed counter affidavit has been filed, wherein it has been stated that the convict has



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undergone two years and one month sentence as on 30.01.2021. She sent a representation dated 27.12.2020 seeking one month ordinary parole leave on medical grounds. As per the Rule 22 of Tamil Nadu Suspension of Sentence Rule, 1982, ordinary leave can be granted only when the prisoner completed three years of imprisonment from the date of initial imprisonment. But, the convict has undergone only two years and one month of sentence. So, she has not satisfied the requirement. She was given a regular medical treatment in the prison hospital and also referred to Government Rajaji Hospital, Madurai by the Prison Medical Officer for better treatment. Moreover, there is no rule for granting ordinary leave for taking self medical treatment in the private hospital. So, prays for the dismissal of the petition.

8. The points to be considered are, whether the convict, the sister of the petitioner, is a terminally ill prisoner and the right available.

"the journey which commenced in 1966 has thus, during the last 30 years, planted many milestones. But it seems there are vet promises to keep and miles to go before one can sleep. And how can one sleep with wailings of prisoners getting louder and louder which requires a sentinel on the qui-vive, as this Court is so far as fundamental rights are concerned, to take note of agony and to lay down what is required to be done to make prisons match the expectations of society."

- Honble supreme court in, **Rama Murthy Vs Karnataka AIR 1997 SC 1739**, about the prison reforms.

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9. Quarter century passed; Rights of prisoners have traversed hither to unknown path ; reached mile stone in recognizing the conjugal rights of the prisoners. Still, wailing of prisoners goes unabated, getting some times louder and sometimes in silence - as this case stands in testimony-still miles to go.



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10. The benefit of Article 21 of Constitution of India, was extended to the prisoners ; the concept that right to life is not mere animal existence, the dignity, enures through out one's life, at the time of death and even after that is well recognized. In the case, cited above, the Hon'ble Supreme Court suggested that throughout the nation, there must be a uniform model prison manual, as per report of **Mulla Committee for Prison Reforms (1980 - 1983)**. But, that suggestion was not accepted by the Central Government. It appears that a draft model of prison manual 2013 and 2016 were circulated to all states. Rules of remissions, leaves and parole rules are not uniform.

11. The cause of terminal ill inmates was drawn to the attention of High Court of Delhi and by its judgment in, **Court in its own motion Vs State in NCT Delhi** has given direction to the Union of India to formulate a concrete policy to deal with the terminally ill prisoners in jails. In pursuance of the same, since the subject, happened to be the State subject, **The Government of India/Bharat Sarkar Ministry of Home Affairs/Grih Mantralaya (CS Division)** dated 13.08.2010, circulated a letter of advisory to all the States by formulating the steps to be taken by the State Governments in this regard. The response from the States are still awaited.

12. Again the Calcutta High Court, in a Judgment, in its own motion, in WPA 7252 of 2018 with WPA 4510 of 1997 with WPA 5440 of 2020 IANo.CAN/1/2020 (OLD No.CAN 3147 of 2020) with WPA 8573 of 2018, took up the issue of over crowd in prison and by the judgment dated 08.01.2021, extracted the circular of the Government of India and directed the State Government to give full effect.

13. By the order of the High Court, terminally ill prisoners were identified and directions were issued, para 10 of the judgment is extracted here:-

"However, insofar as the TIPS who have



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been identified and named in the State's affidavit dated 09 October, 2020, are concerned, they should be handed over to their next of kins in terms of this order immediately and in any event within a week from date so that they can be nursed and extended due comfort at their respective homes. Needless to say, the said TIPs shall be kept confined in their respective homes and the respective jurisdictional police shall ensure that they do not move out of their homes except for visiting hospitals/clinics/medical centres for treatment. The Authorities may obtain bonds or such other guarantee (non-financial) from the next of kins of the TIPs as the administration may deem necessary. However, given that the whole object is to give some level of comfort to the TIPs as the administration may deem necessary. However, given that the whole object is to give some level of comfort to the TIPs before they depart from this world, it is expected that the administration shall take a sympathetic and lenient view of the matter. "

- and in the concluding para,
has ordered thus:-

"However, the measures in relation to TIPs as discussed in this order, should be taken immediately, since if the State waits till such amendment takes place, many or all of the TIPs may die in jail in desolate and very unhappy conditions without the minimum human dignity."

This judgment gives the complete picture about the present position on the subject.

Position in Tamilnadu:-

14. At the time of hearing, learned Additional Public Prosecutor would submit that the steps to amend the relevant rules are underway. So, it appears that it is not finalised so far.

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For our purpose, the relevant portions of the advisory of the Government of India are extracted here,

" (I) As a first step, identify all the terminally ill prisoners/inmates (TIPs) in all the prisons of the State/UT. For this purpose a special District Level Medical Board and State Level Medical Board with suitable medical experts may be constituted within 30 days. All cases of terminal illness of prisoners/inmates may be examined, identified and certified by the District level Medical Board within the next 60 days subject to any guidelines prescribed by the Medical Council of India (MCI), Ministry of Health and Family Welfare and the Health and Family Welfare Department of the State/Ut concerned regarding terminal illness and confirmed by the State level Medical Board within say 15 days thereafter.

(ii) All patients with terminal illness have special medical needs relating to their disease. Such patients also need special psychological counseling and spiritual support since they face the prospect and trauma of impending death. Such needs are further intensified in the isolated environment of a prison, where the medical needs of each TIP must also be identified in consultation with the District State Medical Board. State Governments and UT Administrations are responsible for making available/providing reasonable medical care facilities/aid to the TIPs on a need basis, either in the prison or through a specialty/super-specialty Government hospital or in the nearest Medical Centre, as would be available to a free person outside the prison. All TIPs should be, as far as possible, shifted to a prison in a place where maximum/best medical care



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facilities could be made available to them.

(iii).....

(iv).....

((v).....

(VI) The State Governments/UT Administrations are, therefore, advised to amend legislation/rules and make policies and procedures to provide for community sanctions and measures for TIPs, at all stages of the criminal justice process, to enable them to receive the medical care they need and to die in dignity, surrounded by their family members and friends rather than in the desolate environment of prisons. Such amendment in legislation / rules / policies /procedures should, as a minimum, include clear criteria and procedures relating to:

a. Identification and certification of TIPs by a competent authority;

b. Segregation of such terminally ill prisoners/inmates (TIPs), and assessment of their special medical, psychological, legal and social needs and

c. Making reasonable and adequate provisions for such special needs, including special health care facilities within the legal administrative and financial constraints of the State;

a.....

b.

c.

d. Provisions for non -custodial measures and alternatives to imprisonment could also be pleaded before the Court for TIPs in case they do not pose any risk to the society. Alternatively, such TIPs could be shifted to the open jails as far as possible under a court order.



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e. To enable TIPs to receive the support of family and friends during the extremely distressing period to death, the State Governments and UT Administrations may consider amendments in their Prison Acts/Rules/Manuals to make special provisions on compassionate grounds for more frequent visits by their family members and friends, their release on parole or other similar provisions for the remaining period of the sentence.

f. The State Governments/UT Administrations may also consider release of such prisoners as a part of general amnesty. Provisions of special leave may be made applicable to TIPs, as is prescribed in Prison Manuals of the respective States.

g. The TIPs and their families should be made aware of the special powers of the President and Governor under Article 72 and 161 of the Constitution of India, respectively, to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State, and in certain cases of the Union, extends and all necessary help must be rendered to enable such TIPs to submit a petition to the President or the Governor, as the case may be.

h.....

d.....

e.....

f.....

g. All the State Governments/UT Administrations are requested to take effective measures in this regard. The



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aforesaid measures are only indicative and the State Governments/UT Administrations may take any additional measures for the terminally ill prisoners/inmates. This Ministry may also be kept apprised of any special measures/mechanisms introduced in their respective jurisdictions so that the same could be circulated to the other State Governments and UT Administrations for consideration/adoption."

15. Tamil Nadu Prison Rule 632 and 633 are as follows:-

"632. Release of sick prisoners:- (1) If the Medical Officer considers (I) that any prisoner is dangerously ill and that his illness has not been purposely caused or aggravated by the prisoner himself; (ii) that his illness, whether caused by imprisonment or not, will be so aggravated by further imprisonment as to render his early death likely; and (iii) that the prisoner will have a reasonable chance of recovery, if released, he shall record a certificate in the following form namely:

" 1 A.B hereby certify that convict No. (Name) is in my opinion dangerously ill, suffering from (name of disease). His illness has not been caused or aggravated by any acts committed by him in order to procure release, and I sincerely declare that in my opinion he is likely to die if he remains in confinement, but that he will have a reasonable chance of recovery if he is released" in order to be accepted by Government, the certificate must strictly be in accordance with the terms of this rule. To it, the Medical Officer shall append a full statement of the medical case



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and of the reasons which lead him to the belief expressed in the certificate.

(2) The Superintendent shall at once consult the Collector of the district to which the prisoner belongs, about the desirability of releasing the prisoner and then forward the papers to the Inspector-General for submission to Government together with a nominal roll of the prisoner showing the amount of remission earned and any remarks relevant to the case the Superintendent may desire to add. A certificate to the effect that the for, shall accompany the other documents.

633. Release of prisoner in danger of death:- (1) if the Medical Officer considers that any prisoner is in danger of death from sickness not due to infectious disease and that there is no hope of recovery within or without the prison, he shall record a certificate in the following form namely:-

"I.A.B hereby certify that
convict No.....
Name:..... is in my
opinion, in danger of death from
sickness not due to infectious
disease. There appears to be no
chance of his recovery within or
without the prison"

In order to be accepted by the Government, the certificate must be strictly in accordance with the terms of this rule. To it, the Medical Officer shall append a full statement of the medical case and of the reasons which lead him to the belief expressed in the certificate.

(2) If the Superintendent and the Medical



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Officer consider it desirable to give such prisoner the comfort of dying at home, the Superintendant shall at one consult the Collector of the district to which the prisoner belongs about the desirability of releasing the prisoner and then forward the papers to the Inspector General for submission to the Government together with a nominal roll of the prisoner showing the amount of remission earned if any, any remarks relevant to the case, the Superintendent may desire to add. A certificate to the effect that the convict will, if released be suitable cared for by his friends or relatives shall accompany the document.

(3) Great care shall be exercised in recommending release of prisoners under this rule and the report to the Government shall contain full particulars showing that on humanitarian grounds the balance of advantage lies in allowing the prisoner to die at home. In such cases the nature of medical relief which the prisoner is likely to be able to command at his home is an important consideration which should not be overlooked.

(4) All release under this rule shall be counted as death in the statistical records of the prison.

(5) All references under this rule shall be treated specially urgent at all stages by the office concerned."

16. The combined reading of these rules and the Government of India advisory shows that they are more or less similar, in respect of terminally ill prisoners. But the problem lies in its execution.

17. As per the judgment of the Calcutta High Court, a convict must come within the category of the
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terminally ill prisoner. What is meant by terminally ill prisoner has also been defined in the circular issued by the Government of India referred above, the definition runs like this:-

"'Terminal illness' is a medical term to describe an active and progressive illness that cannot be cured or adequately treated and that is reasonably expected to result in the death of the patient. It is also described as a malignant disease for which there is no cure and the prognosis is fatal. As defined by the American Cancer Society, "Terminal illness" is an irreversible illness that without life-sustaining procedures, will result in death in the near future or a state of permanent unconsciousness from which recovery is unlikely. Some examples, among others, of terminal illness may include advanced cancer, advanced heart disease, full blown AIDS etc., "

18. So, the question which arise for consideration is whether the convict will come under the definition as mentioned, as per the petitioner, she is affected by lung cancer. As per the medical report furnished by the Assistant Surgeon, Central Prison, Madurai, it is stated that she was admitted in Tirunelveli Medical College Hospital on 27.01.2020 due to complaints of breathlessness and diagnosed to have squamous cell carcinoma- right lung with CT-chest showing possibility of metastasis in bilateral upper and right lower lobe. It is further stated that medical oncologist opinion has obtained and he has suggested palliative chemotherapy as she has stage IV lung carcinoma. It is further stated that first cycle of chemotherapy was completed on 18.12.2020, the second cycle on 16.01.2021. So, from the report it is seen that two cycles of chemotherapy are completed and third cycle of chemotherapy was fixed yesterday. The medical reports shows the advanced stage of lung cancer. Since palliative chemotherapy was suggested she requires



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proper care, attention, treatment and follow up action. Moreover, as per medical scientific data, the survival rate in such cases is 4.7 only depending upon the age of the patient. Even though in the medical report, the Assistant Surgeon has not mentioned that the convict comes under the category of terminally ill patient the stage of the cancer shows that she fits into that category of terminally ill patient.

19.The Calcutta High Court has also observed that the imprisonment need not be in a prison. According to the High Court in the extreme cases, a person may be kept imprisoned in his own home, in, very exceptional circumstances subject to the satisfaction of the Judicial Authority or State Executive on humanitarian or compassionate grounds. The terminally ill prisoner, who is counting his days, could be handed over to his kin for keeping home confined within the four walls of his home.

20.So, according to the High Court, imprisonment not necessarily must be prison or jail. But, in exceptional circumstances, the convict can be imprisoned in his own home and subject to some safeguards and conditions.

21. In this case, the convict is counting her days and she has been put on liquid diet only and her health does not permit solid food to be taken which shows the extreme health condition of the convict.

22.The next point which is stressed by the Calcutta High Court is that only in very exceptional cases such a measure must be taken. The next question which arises for consideration is whether this is an exceptional case which requires the exceptional measure of directing the authorities to confine the convict in home of the petitioner. The learned counsel for the petitioner during the course of argument has also informed the Court that she is ready to take the convict to her home and visit to hospital for chemotherapy and other treatment, the convict must be permitted to move out of her home. We are of the



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considered view that this is an exceptional case which requires an exceptional remedy.

23. The other circumstance, which weights in favour of the convict, is that she is not a hardened criminal. A family dispute arose between her and her husband and out of that, the occurrence took place. So, she was convicted under Section 304 (I) and 201 IPC and sentenced to undergo four years imprisonment. So, if she is confined in the petitioner's home no law and order problem will arise since the character of the convict also is not dangerous to the society.

24. Taking into account all these factors, we are of the considered view that this is the exceptional case, to which, the exceptional remedy must be extended as one which was extended by Calcutta High Court in the judgment cited above. The petitioner has filed an affidavit stating that she is prepared to take the convict to her home and confined her in her home, which situated in Door No.3/67, South Street, Vallaramapuram, Kilaveerasingamani, Sankarankovil Taluk, Tenkasi District. She has also given an undertaking through this affidavit that the convict will not be taken out of the home except for visiting hospitals and she is also ready to inform the jurisdictional police station namely, Sernthamaram Police Station and also ready to abide any condition that may be imposed by this Court.

25. Even though, Rule 632 and 633 of Tamil Nadu Prison Rule, 1983, gives power only to executive to release the convict, any direction for consideration if given by this Court, it will be a time consuming process, since the file has to move through many officials level. Hence, we are of the considered view that it may not be proper for this Court to issue a Writ of Mandamus directing the authorities to take measures as provided Rules 632 and 633 at this extreme emergence situation. Even though, the petitioner has sought an order of writ of mandamus for direction to the respondents to grant parole to the convict, for the reasons stated above, we are of the considered opinion that any such direction will also consume time. So, in the facts and circumstance of the case and in the light



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of the emergent situation we deeming fit to mould the relief and issue the following directions:-

(i) We direct the respondent to hand over the convict, namely Mrs.Subbulakshmi, (FCP No.106), wife of Kumarakurubaran, to the petitioner immediately in the presence of Secretary, District Legal Service Authority attached to the Principal District Court, Madurai.

(ii) The petitioner shall keep the convict in her home at Door No.3/67, South Street, Vallaramapuram, Kilavirasigamani, Sankarankovil Taluk, Tenkasi District and the convict is not permitted to move out of her home except for medical treatment.

(iii) The jurisdictional police, namely, the Station House Officer, Seranthamaram Police Station, Tenkasi Taluk shall ensure that the convict is not taken out or moving out of her home of the petitioner except for medical treatment.

(iv) The Secretary District Legal Service Authority attached to the Principal District Court, Tirunelveli is directed to visit the convict once in 10 days and file a report about the health condition and other facts which may be necessary in the circumstances of the case to the Registry by marking a copy to the Collector of Tirunelveli and Madurai Districts and the jurisdictional Police.

(vi) The petitioner is directed to execute a bond for a sum of Rs.25,000/- (Rupees Twenty Five Thousand Only) along with two sureties for like sum to the satisfaction of the second respondent herein.

(vii) The photographs, duly attested by the second respondent herein, of the convict and the photograph of the petitioner attested by her counsel must be furnished to the following persons.

- 1) The Superintendent of Special Prison for Women, Special Prison for Woman, Madurai.
- 2) The Secretary District Legal Service Authority, Madurai.
- 3) The Secretary District Legal Service Authority, Tirunelveli.



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4) Station House Officer, Jurisdictional Police,
Seranthamaram Police Station, Tenkasi Taluk.

26. In the facts and circumstances of the case, since final orders have to be passed by the Government of Tamil Nadu, as per Rule 632 & 633 of Tamil Nadu Prison Rule, we deem it fit to *suo-motu* implead the Government of Tamil Nadu and the Inspector General of Prison as the third and fourth respondents.

27. Further, the petitioner is directed to give a fresh representation on behalf of the convict to the concerned authorities to enable them to pass orders under Rules 632 & 633 of Tamil Nadu Prison Manual, 1983. After receiving the representation from the petitioner, the authorities shall take into account the health condition of the convict and the observations made in this order at the time of considering the representation of the convict and pass orders within a period of three months from the date of receipt of representation of the petitioner.

28. This order will be in force till final orders are passed by the respondent No.3 as indicated above.

29. Post the matter on 24.02.2021 for reporting compliance.

Sd/-

Assistant Registrar (P & A)

// True
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Sub Assistant Registrar(CS)

Dss

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In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate / litigant concerned.

To

- 1.The Additional Director General of Police (Prison),
Gandhi Irwin Road,
Egmore, Chennai.
- 2.The Superintendent of Special Prison for Women,
Special Prison for Woman,
Madurai.
- 3.The Secretary to the Government,
Government of Tamilnadu,
Home Department,
(Prison-4),
Chennai-9.
- 4.The Additional Director General of Police/
Inspector General of Prison,
Whannels Road,
Egmore, Chennai-8.

Copy to:-

- 1) The Superintendent of Special Prison for Women,
Special Prison for Woman,
Madurai.
- 2) The Secretary District Legal Service Authority,
Madurai.

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- 3) The Secretary District Legal Service Authority,
Tirunelveli.
- 4) Station House Officer, Jurisdictional Police,
Seranthamaram Police Station, Tenkasi Taluk.
- 5) The District Collector,
Madurai.
- 6) The District Collector,
Tirunelveli.
- 7) The Superintendant of Police,
Tenkasi.
- 8) The Section Officer,
Writ Section,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.R.J.KARTHICK, Advocate (SR-3379[F] dated
04/02/2021)

Order made in
W.P. (MD)No.1246 of 2021

04.02.2021

SMV (CO)

NR (05/02/2021) 19P : 14C