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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 22.02.2022
PRONOUNCED ON : 25.03.2022

CORAM

THE HONOURABLE Mr.JUSTICE P.N.PRAKASH
AND
THE HONOURABLE Mr.JUSTICE A.A.NAKKIRAN

W.P.No.796 of 2021

K.Prema Devi .. Petitioner/Wife of the detenue
Vs.

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

2.The Superintendent
Central Prison
Trichy

.. Respondents

Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus, calling for the records relating to impugned G.O.(D).No.720 Home (Prison-IV) Department, dated 03.07.2019, passed by the 1st respondent and quash the same and consecutively direct the respondents to release the detenu viz., Kannan, S/o.Subramani, life convict No.20124, prematurely confined at the Central Prison, Trichy, as per G.O.(Ms).No.64 dated 01.02.2018.

For Petitioner Dr.S.Manoharan

For Respondents Mr.R.Muniyapparaj
Additional Public Prosecutor



O R D E R

P.N.PRAKASH, J.

Challenging the order in G.O.(D).No.720 Home (Prison-IV) Department, dated 03.07.2019, passed by the 1st respondent, refusing to grant premature release of Kannan (life convict No.20124) under G.O.Ms.No.64 Home (Prison-IV) Department, dated 01.02.2018 (for brevity "G.O.64") and for a direction to release the said Kannan prematurely, his wife Prema Devi has filed this writ petition.

2. The facts that are required to decide this writ petition are as under :

2.1. Kannan, along with three others, was involved in the murder of one Sardhar Ibrahim Basha, in connection with which, he was prosecuted along with others in S.C.No.149 of 2004 on the file of the Additional District and Sessions Court, FTC-II, Coimbatore, in which, he was convicted under Section 302 IPC and sentenced to undergo imprisonment for life and pay a fine of Rs.5,000/-, in default to undergo simple imprisonment for six months.

2.2. His appeal in CrI.A.No.1285 of 2004 was dismissed by this Court on 18.10.2006 and his further appeal in S.L.P.(CrI.) No.7357 of 2008 to the Supreme Court, also was dismissed on 19.09.2008.

2.3. While that being so, the State Government, in order to commemorate the Birth Centenary of Dr.M.G.Ramachandran, issued G.O.64 for premature release of convict prisoners, however, imposing certain conditions therefor.

2.4. The petitioner viz., Prema Devi gave a representation to the Government, seeking premature release of her husband Kannan, under the said G.O.64 and thereafter, filed H.C.P.(MD) No.359 of 2016, in which, this Court, by order dated 02.04.2018, directed the authorities to consider her representation within a period of four weeks.

2.5 Accordingly, the Principal Secretary to Government, Home (Prison-IV) Department, considered the representation and rejected the same, by the impugned order dated 03.07.2019, aggrieved by which, the present writ petition has been filed.

3. Heard Mr.S.Manoharan, learned counsel for the petitioner and Mr.R.Muniyapparaj, learned Additional Public Prosecutor appearing for the respondent/State.



4. The State has filed a counter affidavit dated 25.08.2021, justifying the reasons given in the impugned order.

5. Mr.Manoharan contended that in the last 11 years, the convict prisoner viz., Kannan was released on emergency leave and that, he had returned to the prison on the expiry of the leave and nothing untoward had happened, either to him or to anyone else, by him. He further contended that Kannan acquired several educational qualifications, including a B.A. degree in Political Science, from the Tamil Nadu Open University, during his period of incarceration and therefore, he has turned into a new leaf and hence, deserves to be released prematurely.

6. Mr.Manoharan further contended that persons involved in more heinous offences have been released by the Government prematurely and therefore, Kannan cannot be discriminated. In support of this contention, he placed strong reliance on the judgment of the Supreme Court in Home Secretary (Prison) and Others Vs. H.Nilofer Nisha [(2020) 14 SCC 161] in which many convict prisoners were ordered to be released prematurely. He finally submitted that even in the counter affidavit filed by the State, it is stated that the murder of Sardhar Ibrahim Basha, was on account of a wordy quarrel and therefore, it is not a case of communal murder. That apart, he submitted that Kannan was only a first time offender.

7. Per contra, Mr.R.Muniyapparaj, learned Additional Public Prosecutor refuted the aforesaid contentions of Mr.Manoharan.

8. In order to appreciate the rival submissions, it may be pertinent to extract the relevant portion from the impugned order :

"8. The Government have examined the request of Tmt.Prema Devi seeking premature release of her husband/life convict prisoner No.20124, Kannan son of Subramanian, confined in Central Prison, Trichy with relevant records. The life convict prisoner No.20124, Kannan son of Subramanian, confined in Central Prison, Trichy along with 3 others (all belonging to Viswa Hindu Parishad) were involved in the brutal murder of a person belonging to Islamic community. Since it is a communally sensitive case and if he come out there is danger to his life. The Commissioner of Police, Coimbatore City has informed that his release will create communal overtones in the area. The Probation Officer has not recommended on the basis of the report of the Commissioner of Police, Coimbatore City. The extremely violent murder had communal overtones in a communally sensitive area added to social tension, and



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the release of a person in communal violence would disturb peace and harmony prevailing in that area. There will be law and order problem if he is released. Hence, the State Level Committee has not recommended for premature release of the above convict prisoner. The Government, therefore, reject the request of Tmt.Prema Devi seeking premature release of her husband/life convict prisoner No.20124, Kannan son of Subramanain, confined in Central Prison, Trichy."

9. At the outset, it may be necessary to state here that in Nilofer Nisha (supra), the Supreme Court dealt with G.O.64 and held as follows :

"26. We would also like to point out that the grant of remission or parole is not a right vested with the prisoner. It is a privilege available to the prisoner on fulfilling certain conditions. This is a discretionary power which has to be exercised by the authorities conferred with such powers under the relevant rules/regulations. The court cannot exercise these powers though once the powers are exercised, the Court may hold that the exercise of powers is not in accordance with rules."

(emphasis supplied)

10. Superadded, in Nilofer Nisha (supra), the Supreme Court, while dealing with cases in which, the Madras High Court had granted relief under G.O.64 on various grounds, held in paragraph 47 as follows :

"47. In view of the above discussion, we set aside the judgment(s) of the High Court. As far as Criminal Appeal No. 144 of 2020 arising out of SLP (Crl.) No. 626 of 2020 arising out of SLP (Crl.) D. No. 18046 of 2019, Criminal Appeal No. 145 of 2020 arising out of SLP (Crl.) No. 627 of 2020 arising out of SLP (Crl.) D. No. 18016 of 2019, Criminal Appeal No. 146 of 2020 arising out of SLP (Crl.) No. 7697 of 2019 and Criminal Appeal No. 148 of 2020 arising out of SLP (Crl.) No. 11494 of 2019, are concerned the detenus are ordered to be released forthwith unless wanted in any other case. As far as detenu in Criminal Appeal No. 147 of 2020 arising out of SLP (Crl.) No. 6159 of 2019 is concerned the State is directed to consider and decide the representation of the detenu within 6 weeks from today."

(emphasis supplied)

However, after holding so, the Supreme Court examined the case



of each convict prisoner under Article 142 of the Constitution of India and granted premature release. We do not have similar powers for ordering premature release of Kannan. Our power is to the limited extent of examining whether there is any illegality in the impugned order, within the parameters set out by the Supreme Court in *Epuru Sudhakar and Another Vs. Government of Andhra Pradesh and Others* [(2006) 8 SCC 161]. At this juncture, it may be profitable to extract the relevant passage from *Epuru Sudhakar* (supra):

"34. 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."

11. The impugned order states that Kannan and the other accused were members of Vishva Hindu Parishad and they had attacked the deceased Sardhar Ibrahim Basha, a Muslim in Coimbatore City, which is a communally sensitive area. One cannot deny the fact that Coimbatore is a communally sensitive area, after the serial blast that occurred there during the relevant period. We are unable to agree with Mr. Manoharan's submission that the murder of Sardhar Ibrahim Basha was on account of a private dispute between the accused and the deceased.

12. It is true that Kannan had completed the threshold conditions specified in G.O.64, by serving 14 years and 6 days of actual imprisonment as on the cut-off date viz., 25.02.2018, but, that, by itself, would not entitle him to be released prematurely. Similarly, the fact that he was given leave on various occasions and that nothing had happened either to him or to others by him, cannot be a reason, to hold that if he is permanently released prematurely, nothing untoward will happen, either to him or to others by him.

13. G.O.64 clearly states that the cases of prisoners, who have completed the minimum prescribed term of imprisonment, will be considered by two Committees viz., State Level Committee and District Level Committee and recommendations would be made to



the Government accordingly. The actual release is by the Government under Article 161 of the Constitution of India, based on the advice of the Cabinet. In this case, the State Level Committee has not recommended the case of Kannan, as could be seen from paragraph 6 of the impugned order. In paragraph 8 of the impugned order, which has been extracted above, the Governor has given the reasons, for not granting premature release to the convict prisoner.

14. In G.O.64, the law laid down by the Supreme Court in Epuru Sudhakar (supra) has been referred to as follows :

"... ... 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 limitation, if any, must be found in the Constitution itself. Therefore, the principle of exclusive impugned is in derogation of a constitutional provision. This is the basic working test to be applied while granting pardons, reprieves, remissions and commutations."

(emphasis supplied)

We are afraid that we cannot sit in judgment over the sufficiency of facts and of the appropriateness in not granting pardon alluded to in the impugned order. It is clearly held in Epuru Sudhakar (supra) that the President or the Governor must keep in mind the families of victims and what impact the order of release of a convict prisoner, would have on them as well on the society. G.O.64 further clearly states thus :

"(V) The above cases shall be examined with reference to the above guidelines on a case to case basis.

... ..

(VIII) The life imprisonment prisoners cannot claim premature release as a matter of right."

15. Negative equality under Article 14 of the Constitution of India, cannot be claimed at all. In other words, just because, the State Government had committed wrong by ordering release of the accused in other heinous cases, say Dharmapuri bus burning case, Melavalavu case, etc., that wrong, by itself, cannot be a ground, for the release of others. The following passage from a very recent judgment of the Supreme Court in R.Muthukumar and Others Vs. Chairman and Managing Director, TANGEDCO and Others [2022 SCC OnLine SC 151], provides a complete answer to the claim of negative equality :

"28. A principle, axiomatic in this country's



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constitutional lore is that there is no negative equality. In other words, if there has been a benefit or advantage conferred on one or a set of people, without legal basis or justification, that benefit cannot multiply, or be relied upon as a principle of parity or equality."

(emphasis supplied)

If anyone were to challenge those orders as arbitrary, then, this Court, has the powers to examine them and quash them even, as illegal.

16. That apart, in Sikkander Vs. State rep. by its Secretary to Government of Tamil Nadu and Others (2021 SCC Online Mad 6586), this Court has discussed all the aspects relating to premature release under G.O.64 and the law laid down therein is a binding precedent.

17. In fine, the impugned order does not fall foul of the parameters laid down in paragraph 34 of Epuru Sudhakar (supra), which has been extracted above and accordingly, the case of Kannan does not pass muster the conditions stipulated in G.O.64 for grant of premature release

In the result, this Writ Petition is dismissed as being devoid of merits. No costs. It is made clear that the dismissal of this writ petition will not be a bar for consideration of Kannan's case for premature release in the future schemes.

Sd/-

Assistant Registrar(CS V)

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Sub Assistant Registrar

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To

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

2.The Superintendent
Central Prison, Trichy

3.The Public Prosecutor, High Court, Madras

+1 cc to Dr.S.Manoharan, Advocate Sr.NO. 20426

W.P.No.796 of 2021

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A.SK(01/04/2022)