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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 21.02.2022
PRONOUNCED ON : 14.03.2022

CORAM

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

W.P.No.648 of 2022

B.V.Jeevankumar

Vs.

.. Petitioner

1.The Home Secretary
Home Department (Prison)
Secretariat, Fort St. George
Chennai 600 009

2.The Director General of Prison and
Inspector General of Prison
Whannels Road
Egmore, Chennai 600 008

3.The Superintendent of Prison
Central Prison-I (Convicted Prison)
Puzhal, Chennai 600 066

4.The Deputy Inspector General
Department of Prisons and Corrections
Chennai Saragam, Chennai

.. Respondents

Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus, directing the 3rd respondent to call for the records pertaining to the proceedings of the 3rd respondent in No.7387/Tha.Ku.1/2021 dated 21.06.2021 and quash the same and to direct the 3rd respondent to grant the petitioner viz., B.V.Jeevakumar, S/o.Late B.Venkateswarlu, (Convict No.7387), 15 days leave without escort, who is confined in the 3rd respondent's prison.



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For Petitioner Mr.G.Murugendran
For Respondents Mr.Hasan Mohamed Jinnah
Public Prosecutor
Assisted by
Mr.R.Muniyapparaj
Additional Public
Prosecutor

O R D E R

P.N.PRAKASH, J.

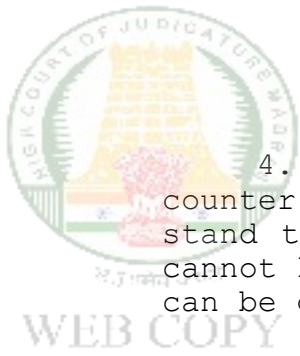
This petition has been filed to quash the impugned order in No.7387/Tha.Ku.1/2021 dated 21.06.2021 and to direct the 3rd respondent to grant 15 days leave without escort to the petitioner viz., B.V.Jeevakumar, S/o.Late B.Venkateswarlu, (Convict No.7387), who is at present confined in the Central Prison-I, Puzhal.

2. The facts that are germane for deciding this writ petition are as under :

2.1. The petitioner and three others, faced a prosecution that was initiated by the Narcotics Control Bureau (NCB), Chennai, an executive arm of the Central Government, in C.C.No.28 of 2016, on the file of the I Additional Special Court for NDPS Act Cases, Chennai, for trafficking in Methamphetamine, a psychotropic substance. The petitioner was convicted on 06.12.2018 of the offences under Sections 8(c) read with 29(1) and 28 of the NDPS Act and sentenced to undergo 10 years rigorous imprisonment with fine. Challenging the said conviction and sentence, the petitioner preferred an appeal in Crl.A.No.245 of 2019, before this Court and the same is pending.

2.2. While that being so, the petitioner gave a representation dated 16.06.2021, seeking 30 days ordinary leave under the Tamil Nadu Suspension of Sentence Rules, 1982 (for brevity "the Sentence Suspension Rules"), which has been rejected by the Superintendent of Central Prison, Puzhal, by the impugned order dated 21.06.2021, challenging which, the petitioner is before this Court.

3. Heard Mr.Murugendran, learned counsel for the petitioner and Mr.Hasan Mohamed Jinnah, learned Public Prosecutor, assisted by Mr.R.Muniyapparaj, learned Additional Public Prosecutor appearing for the respondents/State.



4. The Superintendent, Central Prison, Puzhal, has filed a counter affidavit dated 02.02.2022, wherein, he has taken a stand that, when the appeal of the petitioner is pending, leave cannot be granted and that, only suspension of sentence and bail can be granted under Section 389(1) Cr.P.C.

5. In the impugned order, the petitioner's request for leave for 30 days has been rejected on the ground that since he has been convicted for the offence under the NDPS Act, which is a Central Act, only 15 days ordinary leave can be granted per year.

6. Mr. Murugendran took this Court through paragraph 30 of the judgment of the Supreme Court in *Dadu @ Tulsidas Vs. State of Maharashtra* [(2000) 8 SCC 437] and submitted that parole cannot be denied to the petitioner by the authorities. It may be profitable to extract paragraphs 29 and 30 of *Dadu (supra)*, as under :

"29. Under the circumstances the writ petitions are disposed of by holding that:

(1) Section 32-A does not in any way affect the powers of the authorities to grant parole.

(2) It is unconstitutional to the extent it takes away the right of the court to suspend the sentence of a convict under the Act.

(3) Nevertheless, a sentence awarded under the Act can be suspended by the appellate court only and strictly subject to the conditions spelt out in Section 37 of the Act, as dealt with in this judgment.

30. The petitioner in Writ Petition No.169 of 1999 shall be at liberty to apply for parole and his prayer be considered and disposed of in accordance with the statutory provisions, if any, jail manual or Government instructions without implying Section 32-A of the Act as a bar for consideration of the prayer. Similarly the petitioner in Writ Petition No.243 of 1999 is at liberty to move the High Court for suspension of sentence awarded to him under the Act. As and when any such application is filed, the same shall be disposed of in accordance with law and keeping in view the limitations prescribed under Section 37 of the Act and the law laid down by this Court."

7. A reading of the above shows that the petitioner therein in W.P.No.169 of 1999, was given an opportunity, who applied for parole, with a further direction that his prayer for parole



should be considered and disposed of in accordance with the statutory provisions, if any, jail manual or Government instructions, without implying Section 32-A of the NDPS Act as a bar for consideration of the prayer. In other words, the petitioner before the Supreme Court in W.P.No.169 of 1999, was denied parole by the prison authorities, by relying upon Section 32-A, *ibid.* Therefore, while interpreting Section 32-A, *ibid.*, the Supreme Court held that the said Section does not take away the power of the prison authorities to grant parole. One can have no quarrel with the above proposition of law.

8. In the State of Tamil Nadu, as held by the Full Bench of this Court in State rep. by the Home Secretary, Government of Tamil Nadu and Others Vs. Yesu @ Velaiyan [(2011) 5 CTC 353 : 2011 SCC OnLine Mad 1463], only leave can be granted and that too, under the Sentence Suspension Rules. Therefore, Section 32-A, *ibid.* will not be a bar for grant of leave to a convict prisoner under the Sentence Suspension Rules, provided he satisfies the other eligibility conditions. In this case, the pendency of Crl.A.No.245 of 2019, is a bar for grant of leave under the Sentence Suspension Rules.

9. The word "sentence" has been defined in Section 2 of the Sentence Suspension Rules, as under :

"4. Sentence means a sentence as finally fixed on appeal or revision or otherwise and includes an aggregate of more sentence than one. Sentences in default of fine shall not be taken into consideration while fixing eligibility for being released on leave."

Mr.Murugendran gave a convoluted interpretation by reading the second portion of the aforesaid definition. We are unable to persuade ourselves to agree with him because, the first portion of the definition is quite unambiguous, in that, it clearly states that sentence means, a sentence finally fixed on appeal or revision.

10. In the case of the petitioner, the sentence has been imposed only by the trial Court and it has not been finally fixed by the Appellate Court, as the appeal in Crl.A.No.245 of 2019 is under consideration. Therefore, during the pendency of the said appeal, it is only this Court, which can grant suspension of sentence and bail under Section 389(1) Cr.P.C. and the prison authorities cannot arrogate to themselves, the power of this Court and cannot grant leave or parole.

11. This issue is no more *res integra*, in the light of the authoritative pronouncement of the Supreme Court in K.M.Nanavati Vs. State of Bombay (AIR 1961 SC 112), wherein, the Supreme Court has held as follows :



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"21. In the present case, the question is limited to the exercise by the Governor of his powers under Article 161 of the Constitution suspending the sentence during the pendency of the special leave petition and the appeal to this court; and the controversy has narrowed down to whether for the period when this court is in seizin of the case the Governor could pass the impugned order, having the effect of suspending the sentence during that period. There can be no doubt that it is open to the Governor to grant a full pardon at any time even during the pendency of the case in this court in exercise of what is ordinarily called "mercy jurisdiction". Such a pardon after the accused person has been convicted by the court has the effect of completely absolving him from all punishment or disqualification attaching to a conviction for a criminal offence. That power is essentially vested in the head of the Executive, because the judiciary has no such "mercy jurisdiction". But the suspension of the sentence for the period when this court is in seizin of the case could have been granted by this court itself. If in respect of the same period the Governor also has power to suspend the sentence, it would mean that both the judiciary and the executive would be functioning in the same field at the same time leading to the possibility of conflict of jurisdiction. Such a conflict was not and could not have been intended by the makers of the Constitution. But it was contended by Mr.Seervai that the words of the Constitution, namely, Article 161 do not warrant the conclusion that the power was in any way limited or fettered. In our opinion there is a fallacy in the argument insofar as it postulates what has to be established, namely, that the Governor's power was absolute and not fettered in any way. So long as the judiciary has the power to pass a particular order in a pending case to that extent the power of the Executive is limited in view of the words either of Sections 401 and 426 of the Code of Criminal Procedure and Articles 142 and 161 of the Constitution. If that is the correct interpretation to be put on these provisions in order to harmonise them it would follow that what is covered in Article 142 is not covered by Article 161 and similarly what is covered by Section 426 is not covered by Section 401. On that interpretation Mr.Seervai would be right in his contention that there is no conflict between the prerogative power of the sovereign state to grant pardon and the power of the courts to deal with a pending case judicially."



(emphasis supplied)

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12. The aforesaid passage was relied on by a Division Bench of this Court in K.Rajamanickam and Others Vs. State [2015 (3) MWN (Cr.) 379 (DB)], which was rendered way back on 03.01.1991.

13. Superadded, during the hearing of the case in Manokaran Vs. State of Tamil Nadu [(2010) 15 SCC 562], it came to the notice of the Supreme Court that in the State of Tamil Nadu, the convict prisoners were being granted parole/leave during the pendency of their appeal. This was frowned upon by the Supreme Court and the Joint Secretary to the Government was summoned. Apposite it is to extract the observations of the Supreme Court in Manokaran (supra) :

"Mr.J.A. Syed Abdul Khader, Joint Secretary to Government of Tamil Nadu, Home Department, Chennai, is present in terms of the earlier orders of this Court. Mr. Khader regrets that unfortunately a practice has grown in the State of Tamil Nadu to act in the fashion as it has been effected in the matter under consideration. Mr. Khader, however, assures this Court that in future, the State Government would act strictly according to the requirements of the statute and not de hors. The question of continuity of there being any practice being followed henceforth would not arise and the same has been discarded by the State Government."

14. Following this, the office of the Additional Director General of Prisons, issued an Office Memo No.43880/PS4/2002 dated 21.10.2002 which reads as under:

"The Superintendent is informed that the Supreme Court of India in C.A. No.866/2002, has observed that the practice being following in this State for granting leave to prisoners even for short duration during the pendency of their appeal is not in accordance with Tamil Nadu Suspension of Sentence Rules, 1982 and it is also contrary to the Constitution Bench judgment of Supreme Court in K.M. Nanavati vs. State of Bombay AIR 1961 SC 112. The Supreme Court of India has therefore ordered that in



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future no such short term release should be made by the competent authority without informing the Court in which the prisoner's appeal is pending and that this order of the Court should be scrupulously followed in future.

2. In this connection, the attention of the Superintendent is invited to Government letter no.66517/Prison.V/2000-15, Home Department dated 20.06.2002 communicated in this office endt.No.38245/PS4/2000 dated 04.08.2002 wherein the Government have clarified that for suspension of sentence of a convicted person whose appeal is pending, he has to approach only the Appellate Court or High Court."

3. The Superintendent/Deputy Inspector General of Prisons should therefore act in accordance with the above orders of the Supreme Court of India and should desist from releasing any prisoner on emergency or ordinary leave when his appeal is pending before the appropriate Court without prior permission of the Court. If any violation is noticed in this regard, the Superintendent concerned will be liable for disciplinary action.

4. The receipt of this memo should be acknowledged.

BHOLA NATH
Additional Director General of Prisons"

15. There is yet another bottleneck, for grant of leave by the Tamil Nadu prison authorities for the petitioner, in that, the Sentence Suspension Rules has been framed under Section 432 (5) Cr.P.C. Section 432(5), *ibid.* begins with the expression "appropriate Government", which expression has been set out in Section 432(7), *ibid.* which reads as follows :

"In this Section and in Section 433, the expression "appropriate Government" means,

(a) in cases where the sentence is for an offence against, or the order referred to in sub-section (6) is passed under, any law relating to a matter to which the executive power of the Union extends, the Central Government;

(b) in other cases, the Government of the State within which the offender is sentenced or the said order is passed." (emphasis supplied)



16. Methamphetamine is a psychotropic substance, the trafficking of which has been made punishable by the NDPS Act, which is a Parliamentary enactment. The power to make a law relating to a drug is traceable to Entry 9 in the Concurrent List. The NCB is a Central Government agency that has been constituted vide Notification No.S.O.96(E) dated 17.03.1986, Ministry of Finance (Department of Revenue), Government of India under Section 4(3) of the NDPS Act. In State through NCB Vs. Kulwant Singh [(2003)9 SCC 193], the Supreme Court has held as under :

"Sub-section (2) of Section 4 enumerates only some of the measures which the Central Government may take. Sub-section (3) empowers and enables the Central Government in its discretion to constitute an authority or a hierarchy of authorities for taking measures with respect to such of the matters referred to in sub-section (2), as may be mentioned in the order. The order constituting the authority is required to be published in the Official Gazette. It is therefore apparent on a mere perusal of Section 4 that the Act does not itself create an authority, but empowers the Central Government to do so in its discretion. The authority envisaged by the section is constituted by the exercise of executive power by the Central Government which notifies its order constituting the authority by publishing the same in the Official Gazette enumerating the powers and functions to be exercised by it, subject to the supervision and control of the Central Government. Thus, the authority is not constituted by the Act, but is constituted by the Central Government by exercise of executive discretion vested in it by the Act. NCB is therefore not an authority created or constituted by the Act, but an authority created under the Act."

(emphasis

supplied)

17. In this case, it is the NCB that has prosecuted the petitioner and therefore, the State Government cannot grant leave de hors the consultation with the Central Government vide Section 435(1)(a) Cr.P.C. That is why, in the impugned order dated 21.06.2021, it has been stated that since the petitioner has been convicted under the NDPS Act, only 15 days ordinary leave can be granted, under the extant rules. What they mean by the extant rules, is set out in paragraph 4 of the counter affidavit, which reads as follows :

"4. With regard to the averments made in para 4 of



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the affidavit, it is submitted that the petitioner/said prisoner had submitted a representation, received to this office on 16.06.2021, requesting to grant 30 days leave in order to settle his family properties. It is submitted that the said prisoner is convicted under NDPS Act, which is a Central Act. It is submitted that as per the communication received from the Union Central Government vide Government of India, Ministry of Home Affairs order F.No.V-17013/02/2016-PR dt. 06.12.2017 and letter No.V-17013/02/2016-PR dt.13.07.2018, only the State Government has the power to grant ordinary leave to those prisoners who are convicted and sentenced under any law relating to matter to which the executive power of the Union extends, for a period not exceeding 15 days in a year, and the same was communicated to the said prisoner vide this office letter No.7387/R1/2021 dt.21.06.2021. It is submitted further that earlier ruling in Saleema Vs. The State rep. by the Superintendent of Prisons, this Hon'ble Court has observed in para 18 that 'when the Courts are in seizin of a case, the judicial power to suspend a sentence of imprisonment pending an appeal or revision can be traced to Section 389 Cr.P.C.' "

18. The operative portion of Standing Order in S.O.3860(E) dated 06.12.2017, issued by the Ministry of Home Affairs, Government of India under Section 432(5) Cr.P.C., reads as follows :

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

A reading of the above shows that the Central Government has empowered the State Authorities to grant a maximum of 15 days parole, "by reason of any illness, constituting a grave threat



to the life of such person or of a parent, wife, husband or child of such person." We are afraid that this power conferred by the Central Government on the State Government, cannot be exercised by the State Government authorities, when the appeal of the convict prisoner is pending in the Appellate Court, in the light of the law laid down by the Supreme Court in Nanavati (supra).

19. Thus, viewed from any angle, we find no infirmity in the impugned order, warranting interference. It is always open to the petitioner to seek suspension of sentence and bail under Section 389(1) Cr.P.C.

In view of the foregoing discussion, this writ petition is dismissed as being devoid of merits. No costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

gya

To

1.The Home Secretary
Home Department (Prison)
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4.The Deputy Inspector General
Department of Prisons and Corrections
Chennai Saragam, Chennai

5.The Public Prosecutor
High Court, Madras

+1 cc to MrG.Murugendran, Advocate Sr.NO. 16861

W.P.No.648 of 2022

MG(CO)
A.SK(25/03/2022)