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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON	23.03.2022
DELIVERED ON	01.04.2022

CORAM:

THE HON'BLE MR.JUSTICE P.N.PRAKASH
AND
THE HON'BLE MR.JUSTICE A.A.NAKKIRAN

W.P.NO.1975 OF 2022

Kalaivani

... Petitioner

vs.

1. State represented by its
Secretary to the Government of Tamil Nadu
Home (Prison-IV) Department
Fort St. George
Chennai 600 009
2. The Additional Director General of Police/Prisons
The Inspector General of Police
CMDA Tower (II)
No.1, Gandhi Irwin Road
Egmore
Chennai 600 008
3. The Superintendent of Police (sic Prison)
Central Prison,
Puzhal I
Chennai 66

... Respondents

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 proceedings of the third respondent in No.6380/R1/2021 dated 15.12.2021 and quash the same and direct the second and third respondents to grant one month leave without escort to the petitioner's husband T. Suresh, male aged 34 years, S/o Thirunavukkarasu (Convict No.6380), who is confined in the third respondent prison, in accordance with law.



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For Petitioner : Mr.S.Senthilvel
For Respondents : Mr.R.Muniyapparaj
Additional Public Prosecutor
(Crl. Side)

ORDER

P.N. PRAKASH, J.

Seeking 30 days ordinary leave under Rule 20 of the Tamil Nadu Suspension of Sentence Rules, 1982 (for brevity "the Sentence Suspension Rules") for the convict prisoner, viz., Suresh (Ct. No.6380), the petitioner, Kalaivani, who is his wife, addressed a representation dated 19.08.2021 to the respondents, which has been rejected by the Superintendent of Prisons, Central Prison - I, Puzhal, Chennai, by order dated 15.12.2021, aggrieved by which, the present writ petition has been filed.

2. The Superintendent of Prisons, Central Prison - I, Puzhal, Chennai, has filed a counter affidavit dated 28.02.2022 justifying the impugned order.

3. Mr. Senthilvel, learned counsel for the petitioner, contended that the convict prisoner was earlier granted ordinary leave on the orders of this Court in H.C.P. No.2110 of 2019 and H.C.P. No.2016 of 2020 dated 24.10.2019 and 04.11.2020, respectively, pursuant to which, he availed leave and returned to the prison promptly; that apart, under Rule 40 of the Sentence Suspension Rules, the Government has got the power to grant exemption which the Government should have exercised.

4. Per contra, Mr. R. Muniyapparaj, learned Additional Public Prosecutor appearing for the respondents/State refuted the aforesaid contentions.

5. Heard the learned counsel for the petitioner and the learned Additional Public Prosecutor appearing for the respondents/State.

6. The reason for denying ordinary leave to the convict prisoner has been stated in the impugned order as under:

"the Inspector of Police, H1, Washermanpet Police Station raised strong objection stating that there will be law and order problems if her husband/said convict prisoner is released on leave and (ii) her husband/said convict prisoner has a case pending trial



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before the XV Metropolitan Magistrate Court, registered as C.C. No.571 of 2017 concerning R.K. Nagar Police Station Cr.No.913/2014, and hence, he is not eligible for ordinary leave as per Rule No.35 of the Tamil Nadu Suspension of Sentence Rules, 1982."

7. 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."

8. Under Rule 832 of the Tamil Nadu Prison Rules, an undertrial prisoner is required to be produced before the trial Court by the Prison authorities on all hearing dates. Therefore, ordinary leave cannot be granted to a convict prisoner against whom there is a criminal case pending trial.

9. As regards the applicability of Rule 40 of the Sentence Suspension Rules, this is an exemption power of the Government to exercise which, we are afraid, a mandamus cannot be issued. The scope of Rule 35 and Rule 40, *ibid.*, has been discussed in detail by a Division Bench of this Court in *S. Santhosam vs.State and others* [2021-2-LW (Crl.) 519], in which, one of us (PNPJ) was a member, wherein, it has been held as under:

"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 trial, and shall make suitable arrangements with the Police for the provision of the necessary escort. When



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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



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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. Yesu* 2011 (5) CTC 353, 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



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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 the light of the above legal position, we find no infirmity in the impugned order warranting interference and as a sequitur, this writ petition stands dismissed as being devoid of merits. Costs made easy.

Sd/-
Assistant Registrar(CS-VII)

//True Copy//

Sub Assistant Registrar

cad

To

1. The Secretary to Government of Tamil Nadu
Home (Prison-IV) Department
Fort St. George
Chennai 600 009.
2. The Additional Director General of Police/Prisons
The Inspector General of Police
CMDA Tower (II)
No.1, Gandhi Irwin Road
Egmore, Chennai 600 008.
3. The Superintendent of Prison
Central Prison, Puzhal I, Chennai 600 066.
4. The Public Prosecutor
Madras High Court, Chennai 600 104.

+1cc to M/s.S.Senthil Vel, Advocate, S.R.No.22429

W.P.No.1975 of 2022

MG(CO)
RLP(11/04/2022)