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IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDER RESERVED ON : 28.04.2022
ORDER PRONOUNCED ON : 08.06.2022

CORAM

THE HONOURABLE MR. JUSTICE P.N.PRAKASH
and
THE HONOURABLE MR. JUSTICE A.A.NAKKIRAN

Writ Petition No.5858 of 2021
and
W.M.P.Nos.6450 and 6451 of 2021

Jasmine
W/o.Babu Oomai Babu

.. Petitioner/
Wife of the detenu

Vs.

1. The State of Tamil Nadu
represented by its Secretary,
Home Department,
Fort St.George,
Chennai - 600 009.
2. The Superintendent of Central Prison,
Coimbatore District,
Coimbatore.

.. Respondents

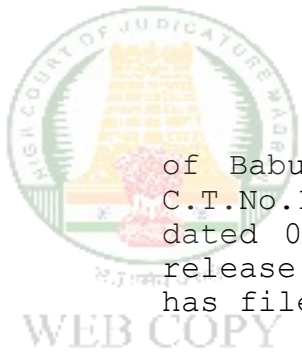
Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus calling for the records made in G.O.(D) No.749, Home (Prison IV) Department, Chennai - 600 009 dated 08.07.2019 and quash the same as illegal and direct the respondents to produce the detenu Babu @ Ommai Babu s/o.Yusuf, Life Convict, aged 53 years, C.T.No.17147, now confined at Central Prison, Coimbatore District, the second respondent herein, before this Court and set him at liberty.

For Petitioner : Mr.R.Sankarasubbu
For Respondent : Mr.R.Muniyapparaj
Additional Public Prosecutor

O R D E R

P.N.PRAKASH, J.

Challenging the order in G.O.(D) No.749, Home (Prison IV) Department, dated 08.07.2019 (for brevity "the impugned order") passed by the respondents, refusing to grant premature release



of Babu @ Ommai Babu s/o.Yusuf, Life Convict, aged 53 years, C.T.No.17147 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 Babu @ Ommai Babu prematurely, his wife Jasmine has filed the instant writ petition.

2. The facts that are required for deciding this writ petition are as follows:

2.1. The petitioner is seeking premature release of her husband Babu @ Ommai Babu, whose conviction and sentence details have been set out in paragraph Nos.3 and 4 of the counter affidavit dated 25.09.2021 that has been filed by the Joint Secretary to the Government and the same is extracted below:

"3. With regard to the averments made in Paragraphs (2) and (3) of the affidavit, it is submitted that, the petitioner's husband / life convict prisoner No.17147, Babu @ Ommai Babu, Son of Yusuf along with 8 others involved in the brutal murder of Veera siva @ Siva Kumar, a Hindhu Munnani activist of Coimbatore was concerned in B1 Bazaar Police Station Crime No.1026/1991 and was convicted and sentenced to undergo imprisonment for life and a fine of Rs.10,000/- in default to undergo Rigorous Imprisonment for 1 year under section 120(B)(1) of the Indian Penal Code, Imprisonment for life and a fine of Rs.25,000/- in default Rigorous Imprisonment for 1 year under section 302 of the Indian Penal Code, Rigorous Imprisonment for one year under section 148 of the Indian Penal Code. The sentences were ordered to run concurrently on the file of Fast Track Court No.3, Coimbatore in Session Case No.239/2000 on 29.07.2003. On appeal, the conviction was confirmed in Criminal Appeal No.1459/2003, dated 08.11.2006 by the Hon'ble High Court of Judicature at Madras.

4. It is submitted that, the above life convict prisoner was also concerned in Coimbatore Serial Bomb blast cases and was also convicted and sentenced to undergo life imprisonment under section 120-B(1) read with 109, 111, 114, 148, 149, 212, 302, 307, 353, 449, 465, 468, 471 of the Indian Penal Code, Sections 3, 4 (b), 5, 6 of the Explosive Substances Act 1908, Section 3 read with Section 25(1-B)(a) of the Arms Act, 1959 and Section 3(i), 4 of the Tamil Nadu Property (Prevention of Damage and Loss) Act, 1992, rigorous imprisonment for 3 years under section 153(a) (1) of the Indian Penal Code. Rigorous imprisonment for 7 years under section 109 read with section 307 of



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the Indian Penal Code. The sentences were ordered to run concurrently in Sessions Case No.2/2000 on the file of Sessions Judge for Bomb Blast Cases, Coimbatore (Coimbatore serial bomb blast case) on 24.10.2007. On appeal preferred by the prisoner, the above conviction and sentences were set aside by the Hon'ble High Court of Judicature at Madras in Criminal Appeal No.1111/07, dated 18.12.2009.'

2.2. While so, in order to commemorate the Birth Centenary of Dr.M.G.Ramachandran, the State issued G.O.64 dated 01.02.2018, which was amended in G.O.(Ms) No.302, Home (Prison-IV) Department dated 03.05.2018, fixing certain eligibility criteria for consideration of the cases of convict prisoners for premature release by the Governor under Article 161 of the Constitution of India. In the said Government Order, the cut-off date was fixed as 25.02.2018. In other words, the cases of convict prisoners, who satisfied the eligibility conditions prescribed by G.O.64 as on 25.02.2018, were collated and scrutinized by two Committees viz., District Level Committee and State Level Committee. The cases recommended by the State Level Committee were sent to the Governor via the Cabinet, for consideration under Article 161, *ibid*. It is reported that under G.O.64, the Governor, in exercise of powers under Article 161, *ibid*., based on the aid and advice of the Cabinet, ordered the release of 1650 convict prisoners.

2.3. Since the case of Babu @ Oomai Babu was not considered for premature release, he filed H.C.P.No.174/2016, in which, a direction was given to the Government on 11.12.2018 to consider his case within a period of twelve weeks from the date of the order. Accordingly, the Government considered the case of Babu @ Oomai Babu and by the impugned order in G.O.(D) No.749, Home (Prison-IV) Department, dated 08.07.2019, has rejected the same, aggrieved by which, the present Writ Petition has been filed.

3. Heard Mr.R.Sankarasubbu, learned counsel appearing for petitioner and Mr.R.Muniyapparaj, learned Additional Public Prosecutor, appearing for the State.

4. The Joint Secretary to the Government has filed a detailed counter affidavit dated 25.09.2021 in justification of the impugned order.

5. At the outset, Mr.R.Sankarasubbu, learned counsel, submitted that since this Court has consistently been dismissing cases of the present nature, a representation has been given by the petitioner to the Chief Justice and therefore, the matter may be adjourned, so that it may come before another Bench, where he could try his chance. When we politely explained to him



by showing various dates on which, the matter was posted and that if we accede to his request, it would amount to we encouraging Bench shopping, Mr.R.Sankarasubbu, learned counsel, agreed with us and advanced his arguments.

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6. Mr.R.Sankarasubbu, learned counsel, submitted a communication dated 13.01.2015 sent by the Tahsildar, Coimbatore South, to the Revenue Divisional Officer, wherein, it is stated that release of Babu @ Oomai Babu would not cause any harm either to the family of the victims or any harm would befall him. Therefore, learned counsel pleaded for premature release of Babu @ Oomai Babu.

7. Learned counsel placed reliance on the judgment of a Division Bench of this Court in C.Amudha vs. Shankar, Tamil Nadu Jail Service and another¹, wherein, in contempt proceedings, the Bench has ordered premature release of the convict prisoner therein by observing that the accused in the infamous Dharmapuri bus burning case were released and so the convict prisoner, in this case, would also be entitled to premature release. Mr.R.Sankarasubbu, learned counsel, submitted that if we disagree with this order, we should refer the matter to a Larger Bench.

8. Per contra, Mr.R.Muniyapparaj, learned Additional Public Prosecutor, refuted the aforesaid contentions.

9. In order to answer the various contentions raised by Mr.R.Sankarasubbu, learned counsel, it may be necessary to extract the operative portion of the impugned order:

"The Director General of Police/Inspector General of Prisons has further informed that as per G.O.Ms.No.64, Home (Pri.IV) Department, dated 01.02.2018, the prisoner's case was not considered for premature release due to the fact that the report of the Probation Officer concerned reveals that the Commissioner of Police is objecting to his release on the ground that his release will endanger his life and will create communal problem in the area and therefore, the Probation Officer has not recommended for his premature release. The District Level Committee headed by the Superintendent, Central Prison, Coimbatore, has also not recommended for his premature release. Hence his case was not considered and not recommended to Government.

6. The Director General of Police / Inspector General of Prisons has also stated that the case of

¹ 2021 (3) CTC 721



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the above Life Convict Prisoner No.17147 Babu @ Oomai Babu son of Yusuf is not recommended for premature release for the following reasons:

- i) He along with 8 others were involved in a brutal murder with a communal motive.
- ii) A Police Constable, who was on duty was also stabbed by knife by them.
- iii) As per the Judgement of the trial court, one accused in the case is still at large.
- iv) The Commissioner of Police, Coimbatore City has informed that his release will create communal problem in the area.
- v) The Probation Officer has not recommended his premature release on the basis of the report of the Commissioner of Police, Coimbatore city.
- vi) These extremely violent murders have communal overtones in a communally sensitive area added to social tension, and 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.

7. The Director General of Police/Inspector General of Prisons has, therefore, requested the Government to pass necessary orders.

8. The Government have examined the request of petitioner/life convict prisoner No.17147 Babu @ Oomai Babu, son of Yusuf, confined in Central Prison, Coimbatore seeking premature release with relevant records. The Life Convict Prisoner along with 8 others were involved in a brutal murder with a communal motive. A Police Constable, who was on duty was also stabbed by knife by them. As per the Judgement of the trial court, one accused in the case is still at large. The Commissioner of Police, Coimbatore City has informed that his release will create communal problem in the area. The Probation Officer has not recommended his premature release on the basis of the report of the Commissioner of Police, Coimbatore city. These extremely violent murders have communal overtones in a communally sensitive area added to social tension, and the release of a person in communal violence would disturb peace and harmony prevailing in that area.'

10. Following the various judgments of the Supreme Court including Home Secretary (Prison) and Others vs. H.Nilofer Nisha²



and Epuru Sudhakar vs. State of Andhra Pradesh³, this Court has, in Sikkander vs. State rep. by its Secretary to Government of Tamil Nadu and Others⁴, has laid down the law relating to application of G.O.64 and the consequent release of a convict prisoner under Article 161 of the Constitution of India.

11. At the outset, it is misnomer to state that the release of a convict prisoner is under G.O.64. For, the said Government Order only prescribes the eligibility conditions for consideration of the case of a convict prisoner by the Government under Article 161 of the Constitution of India. G.O.64 prescribes the cut-off date as 25.02.2018. In other words, as on 25.02.2018, a convict prisoner should have completed 10 years of actual imprisonment. Apart from the length of imprisonment condition, it also specifies certain other conditions, like, the behaviour of the convict prisoner and whether he has been convicted of certain offences enumerated therein. Ultimately, G.O.64 clearly states in paragraph 5(V) and (VIII) as under :

“(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.”

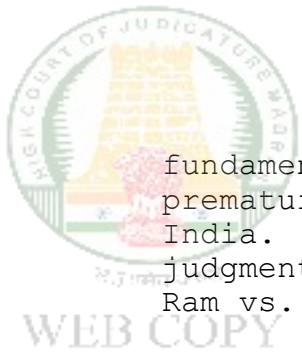
12. Thus, the cases of convict prisoners, who had completed the prescribed period of actual imprisonment were considered by the District Level Committee and the State Level Committee constituted under G.O.64 and thereafter, the cases recommended by the State Level Committee were forwarded to the Government (Cabinet) to consider those cases on a case to case basis for the purpose of advising the Governor under Article 161 of the Constitution of India. In the case of Babu @ Oomai Babu, as could be seen from the impugned order as well from the counter filed by the State, neither the District Level Committee nor the State Level Committee had recommended his case. However, on the directions of this Court in H.C.P.No.174 of 2016 dated 11.12.2018, his case was considered and the impugned order has been passed.

13. In Gopal Vinayak Godse vs. State of Maharashtra and Others⁵, the Constitution Bench has held that imprisonment for life means "imprisonment till the end of the natural life of the convict prisoner". It is settled beyond cavil by a catena of judgments of Supreme Court that no convict prisoner has a

3 (2006) 8 SCC 161

4 2021 SCC Online Mad 6586

5 AIR 1961 SC 600



fundamental right or a statutory right or a vested right to be prematurely released under Article 161 of the Constitution of India. It may be apposite to extract the following from the judgment of the Constitution Bench of the Supreme Court in *Maru Ram vs. Union of India*⁶:

"25. ... The nature of a life sentence is incarceration until death, judicial sentence of imprisonment for life cannot be in jeopardy merely because of long accumulation of remissions. Release would follow only upon an order under Section 401 of the Criminal Procedure Code, 1898 (corresponding to Section 432 of the 1973 Code) by the appropriate Government or on a clemency order in exercise of power under Articles 72 or 161 of the Constitution."

Again, in paragraph No.72 (8), the Supreme Court has stated as follows:

"72. (8) The power under Articles 72 and 161 of the Constitution can be exercised by the Central and State Governments, not by the President or Governor on their own. The advice of the appropriate Government binds the Head of the State. No separate order for each individual case is necessary but any general order made must be clear enough to identify the group of cases and indicate the application of mind to the whole group."

14. The communication dated 13.01.2015 that has been submitted by Mr.R.Sankarasubbu, learned counsel, across the bar relates to consideration of the case of Babu @ Oomai Babu under the Advisory Board's Scheme and not under Article 161 of the Constitution of India and therefore, this would have no relevance for deciding the validity of the impugned order, which has been passed under Article 161 of the Constitution of India by the Governor on the aid and advice of the Cabinet. Further, the submission of Mr.R.Sankarasubbu, learned counsel, that, since the accused in the infamous Dharmapuri bus burning case were released, all convict prisoners including Babu @ Oomai Babu deserve to be released, cannot be countenanced.

15. In *C.Amudha (supra)*, the State had not contended before the Division Bench of this Court that negative equality has no room in our constitutional scheme. In other words, just because the accused in the Dharmapuri bus burning case were released, it would not follow that all the convict prisoners should be automatically released on the ground of violation of Article 14 and 21 of the Constitution of India.

16. In this connection, the following from the judgment of

6 (1981) 1 SCC 107



the Supreme Court in R.Muthukumar and Others Vs. Chairman and Managing Director, TANGEDCO and Others⁷, is worth extracting :

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

17. Had the Government released the accused in the Dharmapuri bus burning case for extraneous reasons, that is open to challenge before the constitutional Court, but, that cannot be a ground to claim the release of others. We are bound by the law laid down by the Supreme Court on the question of negative equality and not on the order that has been passed in C.Amutha (supra) on facts in a contempt proceedings without adverting to the concept of negative equality. Hence, the submission of Mr.R.Sankarasubbu, learned counsel, in this regard, stands rejected.

18. In G.O.64, the important passages from the judgment of the Supreme Court in Epuru Sudhakar (supra), Maru Ram (supra), and Union of India vs. V.Sriharan @ Murugan and Others⁸, have been extracted. The passage that has been extracted from Epuru Sudhakar (supra) reads as under:

"Exercise of executive clemency is a matter of discretion and yet subject to certain standards. It is not a matter of privilege. It is a matter of performance of official duty. It is vested in the President or the Governor, as the case may be, not for the benefit of the convict only, but for the welfare of the people who may insist on the performance of the duty. This discretion, therefore, has to be exercised on public considerations alone. 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 limitations, if any, must be found in the Constitution itself. Therefore, the principle of exclusive cognizance would not apply when and if the decision impugned is in derogation of a constitutional provision. This is the basic working test to be applied while granting pardons, reprieves, remissions and commutations."

7 2022 SCC OnLine SC 151

8 (2016) 7 SCC 1



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"Therefore, the power of executive clemency is not only for the benefit of the convict, but while exercising such a power the President or the Governor, as the case may be, has to keep in mind the effect of his decision on the family of the victims, the society as a whole and the precedent it sets for the future."

(emphasis supplied)

19. A reading of the above shows that the Governor (on the advice of the Cabinet) is the Sole Judge with regard to sufficiency of facts and of the appropriateness of granting pardon. It also states that the Governor should keep in mind what effect his decision would have on the family of the victims, the society as a whole and the precedent it sets for the future. We find that the Governor has borne in mind all these aspects while refusing to release Babu @ Oomai Babu prematurely.

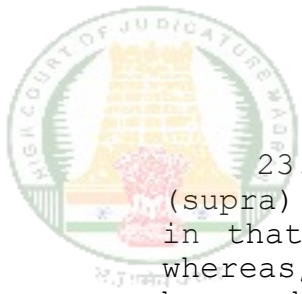
20. Mr.R.Sankarasubbu, learned counsel, contended that in the impugned order there is a reference to the accused attacking a police constable, which is not factually correct. For this, Mr.R.Sankarasubbu, learned counsel, took us through the deposition of Chinnathambi, the injured police constable.

21. Chinnathambi, the injured police constable, was examined as PW-1 in the trial. In his evidence, he has stated that six persons including Babu @ Oomai Babu (convict prisoner herein), chased Siva, an RSS activist, encircled him and stabbed him in broad daylight around 07.45 a.m. on 05.09.1991 in Sukiravarapettai junction in Coimbatore; while Babu @ Oomai Babu sat on Shiva and was stabbing him with a knife, he [PW-1], who was there on duty, shouted at him and tried to pull the knife from Jahir Hussain's hand and at that time, Jahir Hussain attacked him and caused injuries to his hand. Thus, the presence of Babu @ Oomai Babu and Jahir Hussain has been spoken to by Chinnathambi, who was injured in that incident and therefore, reference to attack of Chinnathambi in the impugned order cannot be said to be an extraneous one. The impugned order does not say that it was Babu @ Oomai Babu, who attacked the police constable [Chinnathambi], it only says "he along with eight others were involved in a brutal murder with a communal motive and a police constable, who was on duty was also stabbed by knife by them".

(emphasis supplied)

22. Mr.R.Sankarasubbu, learned counsel, placed strong reliance on the judgment of the Supreme Court in Laxman Naskar vs. Union of India and others⁹ and submitted that the police report ought not to have been relied upon by the Government.

⁹ (2000) 2 SCC 595

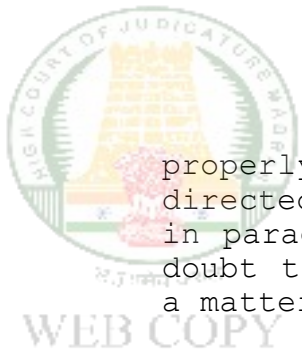


23. A careful reading of the judgment in Laxman Naskar (supra) shows that the prayer for premature release was rejected in that case mainly on the ground of objection by the police, whereas, in the present case, the objection by the police has been adverted to in the impugned order, but, the Government had taken into consideration the brutal manner, in which, a person was murdered for communal motive and also the attack on the police constable, who was on duty at that time. That apart, the Government has viewed this "as an extremely violent act of murder having communal overtones in a communally sensitive area and that it would add to social tension and the release of a person in communal violence would disturb peace and harmony prevailing in that area."

24. Mr.R.Sankarasubbu, learned counsel, contended that the impugned order is beyond the scope of G.O.64. As stated by us earlier, relief is not under G.O.64. G.O.64 prescribes only the threshold conditions for consideration of the case of a convict prisoner by the Government for release under Article 161 of the Constitution of India. Learned counsel placed strong reliance on the judgment in H.Nilofer Nisha (supra), wherein the Supreme Court, in exercise of powers under Article 142 of the Constitution of India, released certain convict prisoners. Learned counsel contended that the power of this Court under Article 226 of the Constitution of India is far more wider than that of the power under Article 142, ibid. This submission, requires to be stated, only to be rejected.

25. Some life convict prisoners were released in G.O.64, aggrieved by which, the State of Tamil Nadu took the matter on appeal to the Supreme Court in H.Nilofer Nisha (supra). The Supreme Court went into the entire scope of G.O.64 and set aside the orders passed by this Court by allowing the appeals filed by the State Government. However, in exercise of powers under Article 142 of the Constitution of India, the Supreme Court went into the case of each convict prisoner and directed their release not under Article 161 of the Constitution of India, but, under its power under Article 142 of the Constitution of India to do complete justice. We know our limitations and we have no authority to emulate the Supreme Court.

26. Learned counsel placed reliance on the judgment of the Supreme Court in Satish @ Sabbe vs. The State of Uttar Pradesh¹⁰. We are afraid that this judgment may not be of avail as the Supreme Court was dealing with Section 2 of UP Prisoners Release on Probation Act, 1938 and not with an order passed by the Governor on the advice of the Cabinet under Article 161 of the Constitution of India. In Satish @ Sabbe (supra), the Government failed to follow the provisions of Section 2 of the said Act



properly and therefore, the Supreme Court intervened and directed the release of the convict prisoner therein. In fact, in paragraph No.16, the Supreme Court has stated that it is "no doubt trite law that no convict prisoner can claim remission as a matter of right."

27. We are not saying that the order of the Governor is not open to judicial review at all. As held by the Supreme Court in *Epuru Sudhakar (supra)*, the order of the Governor can be challenged on the grounds set out in paragraph No.34 of the said judgment and the same reads as follows:

"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."

28. We find that the impugned order in this case does not suffer any of the vices enumerated above.

In the result, this writ petition is dismissed as being devoid of merits. No costs. Connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

gm

To
1. The Secretary,
Home Department,
Fort St.George, Chennai - 600 009.



2. The Superintendent of Central Prison,
Coimbatore District,
Coimbatore.

3. The Public Prosecutor,
High Court, Madras.

+1cc to Mr.R.Sankarasubbu, Advocate, S.R.No.33534

Writ Petition No.5858 of 2021

SR(CO)
CT/23/06/2022