



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON	18.04.2022
DELIVERED ON	22.04.2022

CORAM:

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

W.P. No.3018 of 2022

M. Jeyammal

...Petitioner

v.

- 1 State by:
State of Tamil Nadu
The Secretary to Government
Home, Prohibition and Excise Department
Secretariat
Chennai 600 009
- 2 The D.G.P. & Inspector General of Prison
Gandhi Irwin Road
Egmore
Chennai 600 008
- 3 The Superintendent of Prison
Central Prison
Salem - 7

...Respondents

Writ Petition filed under Article 226 of the Constitution of India seeking a writ of mandamus directing the respondents to grant 30 days ordinary leave by considering the petitioner's representation dated 22.01.2022 and release her father viz., Mathaiyan, S/o Munusamy, Life Convict, aged about 75 years, now confined in the Central Prison, Salem, on 30 days ordinary leave.

For petitioner : Ms. S. Nadhiya

For respondents: Mr. R. Muniyapparaj
Additional Public Prosecutor(Crl.Side)

ORDER

P.N. PRAKASH, J.

Seeking 30 days ordinary leave under the Tamil Nadu Suspension of Sentence Rules, 1982 (for brevity "the Sentence



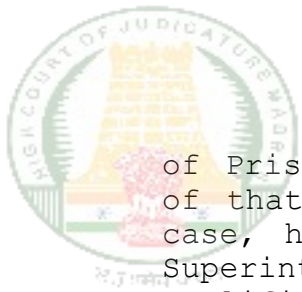
Suspension Rules") for Mathaiyan, aged about 75 years, who is a life convict and now confined in the Central Prison, Salem, his daughter Jeyammal, addressed a representation dated 22.01.2022 and finding no response therefor, she followed it up by filing the present writ petition, seeking a writ of mandamus directing the respondents to consider her representation dated 22.01.2022 and release her father on 30 days ordinary leave.

2. Heard Ms. S. Nadhiya, learned counsel for the petitioner and Mr. R. Muniyapparaj, learned Additional Public Prosecutor appearing for the respondents/State.

3. The learned Additional Public Prosecutor produced a copy of the order dated 25.01.2022 passed by the Superintendent, Central Prison, Salem, rejecting the petitioner's leave application dated 22.01.2022 on the ground that the convict prisoner Mathaian had been, inter alia, convicted for the offence under Section 396 IPC and sentenced to undergo life imprisonment therefor and hence, he would not be entitled to ordinary leave of 30 days as per Rule 21 of the Sentence Suspension Rules. A copy of the rejection order dated 25.01.2022 was furnished to the learned counsel for the petitioner.

4. However, the learned counsel for the petitioner assailed the order dated 25.01.2022 by submitting that the petitioner's representation dated 22.01.2022 seeking ordinary leave was addressed to the State Government and therefore, the Superintendent, Central Prison, Salem, did not have the authority to reject the same.

5. Though the aforesaid argument of the learned counsel for the petitioner appears attractive, yet, there is a fallacy in it. Under Section 11 of the Prisons Act, 1894, it is the Superintendent who shall manage the prison in all matters relating to discipline, labour, expenditure, punishment and control. However, Rule 19 of the Sentence Suspension Rules, which deals with leave, states that the Deputy Inspector General of Prisons is the competent authority to issue order of release of prisoners on ordinary leave, subject to the satisfaction of all conditions in the Rules (emphasis supplied). This means that a prisoner must have satisfied all the other conditions in the Sentence Suspension Rules for availing ordinary leave and only thereafter, the Deputy Inspector General of Prisons can order release of the prisoner on ordinary leave. Pertinent it is to point out that the Deputy Inspector General of Prisons is a Range Officer under whose jurisdiction, more than one prison will fall. Whether a particular prisoner satisfies the other conditions in the Rules is a question of fact that has to be decided only by the Superintendent of the Prison where the prisoner is lodged. It is only the office of the Superintendent



of Prison which will maintain all the records of the prisoners of that prison. That is why, perhaps, the petitioner in this case, has addressed the representation dated 22.01.2022 to the Superintendent of Prison, Salem, also. Whether a prisoner qualifies the threshold requirements for availing ordinary leave has, perforce, to be determined only by the Superintendent of the Prison where he is lodged. In the instant case, the Superintendent of Prison, Salem, has gone into the relevant records pertaining to the convict prisoner and has found that he would not be eligible for ordinary leave as he has been inter alia convicted for the offence under Section 396 IPC and sentenced to life imprisonment therefor which is a deterrent for availing ordinary leave in the light of Rule 21 (b) of the Sentence Suspension Rules which reads as under:

"21. Non-eligibility for ordinary leave: The following categories of prisoners shall not be eligible for ordinary leave:

(a)

(b) Prisoners sentenced under Sections 392 to 402 of the Indian Penal Code (Central Act 45 of 1860);

6.Thus, it is perspicuous that the convict prisoner does not qualify at all to avail ordinary leave of 30 days. Via the order dated 25.01.2022, the Superintendent of Prison, Salem, has merely conveyed to the petitioner that the convict prisoner is ineligible for ordinary leave of 30 days for the aforesaid reason. Therefore, it cannot be stated that the Superintendent of Prison, Salem, has denied ordinary leave to the convict prisoner by the order dated 25.01.2022 and rather, it is the law which has denied ordinary leave to him.

7.Notwithstanding the position, from a perusal of the counter affidavit, it is seen that the convict prisoner has been granted emergency leave on 43 occasions and ordinary leave by this Court on two occasions, viz., in H.C.P. No.2040 of 2019 on 03.10.2019 and H.C.P. No.822 of 2020 on 25.08.2020.

8.Ms. Nadhiya's second contention is that under Rule 40, *ibid.*, the State has the power to grant exemption which they ought to have exercised, especially taking into consideration the fact that the convict prisoner is a septuagenarian and he had completed more than two decades of actual imprisonment.

9.To appreciate the aforesaid contention, it is worth extracting Rule 40, *ibid.*:

"40. Power to exempt.-- The Government may exempt any person from all or any of the provisions of these rules."



10. Be it noted, Rule 40, *ibid.*, is a negative power to grant exemption in a given case that is vested with the Government and it does not confer any right to a prisoner for the purpose of issuance of a writ of mandamus. Trite it is that in the absence of any legal right, a writ of mandamus cannot lie. At this juncture, apropos it is to allude to the following observation of the Supreme Court in *Mani Subrat Jain and Others v. State of Haryana and Others* [(1977) 1 SCC 486]:

"It is elementary though it is to be restated that no one can ask for a mandamus without a legal right. There must be a judicially enforceable right as well as a legally protected right before one suffering a legal grievance can ask for a mandamus. A person can be said to be aggrieved only when a person is denied a legal right by someone who has a legal duty to do something or to abstain from doing something. (See Halsbury's Laws of England, 4th Edn., Vol. I, para 122; *State of Haryana Vs. Subash Chander Marwaha* [(1974) 3 SCC 220 : 1973 SCC (L&S) 488 : (1974) 1 SCR 165] ; *Jasbhai Motibhai Desai Vs. Roshan Kumar Haji Bashir Ahmed* [(1976) 1 SCC 671 : (1976) 3 SCR 58] and *Ferris : Extraordinary Legal Remedies*, para 198.)"

11. Further, the power to exempt is a discretionary one vested with the State Government. The exercise of such discretion cannot be arbitrary or uncanalised, but, must be based on objective and intelligible material. It goes without saying that the exercise of such power is always subject to judicial review.

12. That apart, it is trite equally that a writ of mandamus would not lie to compel the exercise of discretion by an authority. The position is put beyond the ken of any controversy by a Constitution Bench of the Supreme Court in *State of Karnataka v. State of A.P.* [(2000) 9 SCC 572], wherein, it was observed thus:

"The law as regards the issuance of a mandatory order or writ depends upon the authority exercising the power as well as the nature of the function and obligations arising therefrom. It is settled law that such a direction cannot possibly be granted so as to compel an authority to exercise a power which has a substantial element of discretion."

(emphasis supplied)

13. Ergo, no mandamus can be issued to the Government to pass an order under Rule 40, *ibid.* Of course, if the Government passes an order under Rule 40, *ibid.* in a given case, the legality of it, can be subjected to judicial review by the Constitutional Court.



14. Superadded, as per Rule 3, *ibid.*, leave is not a matter of right, but, it is a concession granted to the prisoner. In fact, in *Home Secretary (Prison) and Others, State of Tamil Nadu v. H.Nilofer Nisha* [(2020)14 SCC 161], the Supreme Court has categorically held that, parole is a privilege and not a right vested with the prisoner.

In view of the above discussion, this writ petition fails and is accordingly dismissed as being devoid of merits. Costs made easy.

Sd/-

Assistant Registrar(CS-V)

//True Copy//

Sub Assistant Registrar

cad

To

1. The Secretary to Government
Home, Prohibition and Excise Department
Secretariat
Chennai 600 009
2. The D.G.P. & Inspector General of Prison
Gandhi Irwin Road, Egmore
Chennai 600 008
3. The Superintendent of Prison
Central Prison, Salem - 7
4. The Public Prosecutor
Madras High Court
Chennai 600 104.

W.P.No.3018 of 2022

NR(CO)

RGA(05/05/2022)