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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON 27.01.2022
DELIVERED ON 18.02.2022

CORAM:

THE HON'BLE MR. JUSTICE P.N. PRAKASH
and
THE HON'BLE MRS. JUSTICE R. HEMALATHA

W.P. No.10265 of 2021

L. Wasib Khan

...Petitioner

vs.

1.The State represented by its
Deputy Inspector General of Prisons (Chennai Range)
Gandhi Irwin Road
CMDA Building
Egmore, Chennai 600 008

2.The Superintendent of Prison
Central Prison at Puzhal - I
Tiruvallur 600 066

3.The Superintendent of Prison
Central Prison at Puzhal - II
Tiruvallur 600 066

...Respondents

Writ Petition filed under Article 226 of the Constitution of India seeking a writ of certiorarified mandamus to call for the records in No.6332/t.k.2/2021 dated 23.03.2021 passed by the second respondent and quash the same and direct the second respondent to grant 30 days leave without escort to the convict, viz., Wasib Khan, S/o Liaquat Ali, confined at the Central Prison, Puzhal-I.

For petitioner : Mr. Mohamed Saifullah

For respondents : Mr. R. Muniyapparaj
Additional Public Prosecutor

ORDER

P.N. PRAKASH, J.

A short, but, very interesting legal conundrum has been raised by Mr.Mohamed Saifullah in this case, to appreciate which, we need to state the minimum facts.

2 Wasib Khan, the petitioner herein, was convicted on 21.11.2019 by the I Additional Special Court for NDPS Act Cases, Chennai, of the offences under Sections 8(c) read with



Sections 22(c) and 8(c) read with Section 29 and 8(c) read with Sections 27-A and 8(c) read with Section 23(c) read with Section 28 of the NDPS Act for possession of commercial quantity of Alprazolam tablets and was sentenced to undergo 10 years rigorous imprisonment for each of the offences, but, the sentences were ordered to run concurrently, together with the benefit of set off under Section 428 Cr.P.C. Challenging the aforesaid conviction and sentences, Wasib Khan has filed CrI.A.125 of 2020 and the same is under consideration by this Court.

3 While so, a representation dated 10.01.2021 was given by Wasib Khan's mother Ramzan Beevi Yakut Ali seeking one month ordinary leave for the former. Since no order was passed on the said representation by the Prison authorities, a writ petition being W.P. No.4574 of 2021 was filed by Wasib Khan which was disposed of on 10.03.2021 directing the Prison authorities to dispose of the representation dated 10.01.2021 within a period of ten days, in accordance with the Tamil Nadu Suspension of Sentence Rules, 1982 (for brevity "the Sentence Suspension Rules"), pursuant to which, the said representation was considered and rejected by the Superintendent, Central Prison-I, Puzhal, vide the impugned order dated 23.03.2021, aggrieved by which, the present writ petition has been filed by Wasib Khan, besides seeking a direction to the second respondent to grant 30 days leave to him without escort.

4 Justifying the impugned order of rejection, the Superintendent, Central Prison, Puzhal, has filed a counter affidavit dated 04.06.2021.

5 Heard Mr. Mohamed Saifullah, learned counsel for Wasib Khan and Mr.R. Muniapparaj, learned Additional Public Prosecutor appearing for the respondents/State.

6 Mr. Mohamed Saifullah cited several rulings of the Supreme Court to assail the impugned order, which we are not deliberately advertent to, as we agree with him on most of the aspects covered under those rulings. To appreciate his arguments, it may be necessary to state the grounds on which Wasib Khan's leave application has been turned down by the impugned order. The impugned order cites two reasons for rejection of leave for Wasib Khan.

(a) Wasib Khan has not completed three years of imprisonment, as required under Rule 22 of the Sentence Suspension Rules; and

(b) Wasib Khan's appeal challenging his conviction and sentence is pending in the appellate Court, viz., High Court.



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7 With regard to reason (a) above, Mr. Mohamed Saifullah submitted that Wasib Khan was in detention since his arrest on 13.02.2016 and he continued to remain in the prison as an undertrial without bail and therefore, under Section 428 Cr.P.C., if the period of custody is calculated from the date of commencement of his incarceration, he would fulfil the requirement of Rule 22 of the Sentence Suspension Rules.

8 It is seen that in the impugned order, the period of detention has been calculated from the date of conviction and sentence, viz., 21.11.2019 and the period of Wasib Khan's detention as an undertrial was not reckoned at all. In the counter affidavit, it is stated that Wasib Khan has completed 5 years, 3 months and 16 days as on 25.05.2021 by including the period of detention as an undertrial. This procedure, in our opinion, is a correct one. Under Section 428 Cr.P.C., a prisoner is entitled to set off and the benefit of such a set off cannot be denied to him while calculating the actual period of incarceration, for fulfilling the eligibility condition in Rule 22 of the Sentence Suspension Rules. Ergo, the reason (a) assigned in the impugned order for rejecting Wasib Khan's leave application cannot be sustained.

9 Now, coming to reason (b) for rejection of leave to Wasib Khan, viz., pendency of appeal before the High Court, this issue is no longer res integra in the light of the authoritative pronouncement of the Constitution Bench of the Supreme Court in K.M.Nanavati vs. State of Bombay [AIR 1961 SC 112] and in view of the definition of the word "sentence" in Rule 2 of the Sentence Suspension Rules.

10 Now, let us examine as to what the Supreme Court has held in Nanavati (supra). The paragraph relevant for our discussion is 21 and the same reads thus:

"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 seisin 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 Executive, because the judiciary has no



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such "mercy jurisdiction". But the suspension of the sentence for the period when this court is in seisin 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)

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.

11 Sections 426 and 401 of Cr.P.C. 1898, are in pari materia with Sections 389 and 432 respectively of Cr.P.C. 1973. The legal principle that has been set out in Nanavati (supra) is that when the appellate Court has the power to grant suspension of sentence and bail, pending appeal, the executive power of the State cannot extend to grant parole or leave or suspension of sentence. Pertinent it is to state that the Sentence Suspension Rules has been framed under Section 432(5) Cr.P.C. Further, in consonance with the law laid down by the Supreme Court in Nanavati (supra), the definition of the word "sentence" in Rule 2(4) of the Sentence Suspension Rules has been designed as under:

"(4) "sentence" means a sentence as finally



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." (emphasis supplied)

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12 Superadded, during the hearing of the case in Manokaran vs. State of Tamil Nadu [Crl.A. No.866 of 2020] on 01.10.2002, 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 the said order dated 01.10.2002:

"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."

13 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 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



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endtno.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"

14 In view of the above, Wasib Khan cannot be granted leave under the Sentence Suspension Rules and therefore, the second reason given in the impugned order stands upheld.

In the result, this writ petition stands dismissed, however, sans costs.

Sd/-
Assistant Registrar (CS-IX)

//True Copy//

Sub Assistant Registrar

Cad

To

- 1.The Deputy Inspector General of Prisons (Chennai Range),
Gandhi Irwin Road, CMDA Building,
Egmore, Chennai 600 008.
- 2.The Superintendent of Prison,
Central Prison at Puzhal - I, Tiruvallur 600 066.
- 3.The Superintendent of Prison,
Central Prison at Puzhal - II,
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MT (CO)