

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 22.02.2022

PRONOUNCED ON : 25.03.2022

CORAM

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

W.P.NO.10803 OF 2020
AND
W.M.P.NO.13046 OF 2021

Mehaboobjan

.. Petitioner/
Mother of the Detenue

Vs.

1. The State rep. by its
The Chief Secretary to Government of Tamil Nadu
Home Department, Fort St. George
Chennai 600 009
2. The Additional Director General of Prison
CMDA Towers, Egmore
Chennai 600 008
3. The Superintendent
Central Prison
Coimbatore

.. Respondents

Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus, to call for the records pertaining to the impugned order G.O. (D).No.21 Home (Prison-IV) Department, dated 07.01.2019, passed by the 1st respondent and to quash the same and consecutively direct the respondents to release the detenu viz., Ashique, S/o.Sardar, life convict No.13112, detained at Central Prison, Kovai-18, prematurely as per the G.O.(Ms) No.1155 Home (Pri.IV) Department, dated 11.09.2008 and G.O.(Ms) No.64 Home (Prison-IV) Department, dated 01.02.2018.

For Petitioner Mr.S.Manoharan
 for Mrs.S.Lakshmi

For Respondents Mr.R.Muniyapparaj
 Additional Public
 Prosecutor

O R D E R

P.N.PRAKASH, J.

Challenging the order in G.O.(D).No.21 Home (Prison-IV) Department, dated 07.01.2019 (for brevity "G.O.21") passed by the 1st respondent, refusing to grant premature release of Ashique (life convict No.13112) under G.O.(Ms) No.1155 Home (Pri.IV) Department, dated 11.09.2008 (for brevity "G.O.1155") and 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 Ashique prematurely, his mother Mehaboobjan has filed the instant writ petition.

2. The facts in brief are as under :

2.1. One Jayaprakash was the Assistant Jailor in the Central Prison, Madurai. He is said to have conducted the search of a prisoner by name Shahul Hameed, who was a member of Al-Ummah, a banned terrorist outfit. Infuriated at that, the said Jayaprakash was murdered in front of the Madurai prison, in connection with which, a case in CB-CID Crime No.1861 of 1997 was registered and Ashique was prosecuted, along with two others, in S.C.No.456 of 2000 on the file of the Additional District and Sessions Court, FTC-II, Madurai and was convicted and sentenced on 02.05.2003 as under :

Provision under which convicted	Sentence
Section 120-B IPC	6 months rigorous imprisonment and fine of Rs.1,000/-, in default to undergo 2 months rigorous imprisonment
Section 148 IPC	3 years rigorous imprisonment and fine of Rs.1,000/-, in default to undergo 2 months rigorous imprisonment
Section 341 IPC	1 month simple imprisonment and fine of Rs.500/-, in default to undergo 1 month simple imprisonment

Provision under which convicted	Sentence
Section 302 read with Section 34 IPC	Imprisonment for life and fine of Rs.1,000/-, in default to undergo 6 months rigorous imprisonment

2.2. The appeal preferred by Ashique in Crl.A.No.953 of 2003 was dismissed by this Court on 10.07.2006 and the Supreme Court also confirmed the same in Crl.A.No.26 of 2007 on 08.05.2009.

2.3. Seeking premature release of Ashique, his mother Mehaboobjan addressed a representation dated 19.08.2017 to the respondents and followed it up, by filing a habeas corpus petition in H.C.P.No.1607 of 2017, in which, this Court, by order dated 30.07.2018, directed the State to dispose of the said representation within a period of four weeks. Accordingly, the State considered Mehaboobjan's representation and rejected the same vide G.O.21 (supra), aggrieved by which, this writ petition has been filed, not only for quashing the impugned order, but also for a direction to the State to release Ashique, in terms of G.O.1155 and G.O.64.

3. Heard Mr.S.Manoharan, learned counsel for Mehaboobjan and Mr.R.Muniyapparaj, learned Additional Public Prosecutor appearing for the respondent/State.

4. The State has filed a counter affidavit dated 23.09.2021, in defence of the impugned order.

5. To appreciate the rival contentions, it may be necessary to state here that in order to commemorate the Birth Centenary of Peraringnar Anna, the State issued G.O.1155, ordering premature release of 1,405 convict prisoners, wherein the cut-off date was fixed as 15.09.2008, and the names of the convict prisoners who were so ordered to be released, found a place therein. The case of Ashique was not considered by the State in G.O.1155. Therefore, as stated above, Mehaboobjan addressed a representation dated 19.08.2017 to the respondents, seeking premature release of Ashique and thereafter, filed H.C.P.No.1607 of 2017, in which, a Division Bench of this Court, by order dated 30.07.2018, directed the authorities to consider her representation, in terms of G.O.1155.

6. However, during the pendency of the said Habeas Corpus Petition, to commemorate the Birth Centenary of Dr.M.G.Ramachandran, the State issued a fresh remission Government Order, viz., G.O.64, wherein, certain parameters for grant of remission to convict prisoners as on 25.02.2018 were fixed. This G.O.64 was not the subject matter of H.C.P.No.1607

of 2017, obviously because, the said Habeas Corpus Petition was filed in the year 2017 and G.O.64 was notified only in February 2018. Therefore, in the order dated 13.07.2018, in H.C.P.No.1607 of 2017, the authorities were directed to consider the case of Ashique, only in terms of G.O.1155.

7. The State considered the case of Ashique under G.O.1155 and has passed the impugned order viz., G.O.21, wherein, the reasons for not granting premature release to Ashique, have been stated in paragraph 6, which reads as follows :

"6. The Government have examined the request of Tmt.Mehaboobjan seeking premature release of her son life convict prisoner No.13112, Ashique, son of Sardar. The life convict prisoner No.13112, Ashique, son of Sardar was involved in the murder of Tr.Jayaprakash, Assistant Jailor, Central Prison, Madurai in front of the Central Prison, Madurai along with three other prisoners for the reason that the Assistant Jailor had searched one of the prisoners Sahul Hameed, during his admission in Central Prison, Madurai in the year 1997. The Probation Officer had reported that the life of the prisoner would not be safe, if he is released prematurely. Considering the gravity of the offence and the safety of the society as well as the prisoner and also considering that the Additional Director General of Police/Inspector General of Prisons has not recommended for the premature release of the life convict prisoner No.13112, Ashique, son of Sardar confined in Central Prison, Coimbatore, the Government reject the request of Tmt.Mahaboobjan seeking premature release of her son life convict prisoner No.13112, Ashique, son of Sardar confined in Central Prison, Coimbatore."

8. Thus, a reading of the above shows that for three reasons, the case of Ashique was not considered in terms of G.O.1155 viz.,

- i. The gravity of the offence i.e., the murder of the Assistant Jailor Jayaprakash in front of the Central Prison, Madurai, as he had searched a prisoner by name Shahul Hameed, who was an Al-Ummah leader;
- ii. The Probation Officer had given a report that the life of Ashique would not be safe, if he is released; and
- iii. Safety of the society.

9. Mr.Manoharan attacked the Probation Officer's report and submitted that the Probation Officer's stereo-typed reports without any basis, should not have been taken into consideration

by the State. He further contended that Ashique was granted leave without escort several times, but, he had returned safely to the prison and that, he had not indulged in any violence during the leave period.

10. Per contra, Mr.R.Muniyapparaj, learned Additional Public Prosecutor refuted the contentions of Mr.Manoharan.

11. We gave our anxious consideration to the rival submissions.

12. At the outset, it may be necessary to state that no convict prisoner has any fundamental or vested right for premature release. In fact, in Gopal Vinayak Godse Vs. State of Maharashtra and Others (AIR 1961 SC 600), a 5 Judge Bench of the Supreme Court has held that sentence of imprisonment for life is imprisonment till the end of the natural life. However, the State has the sovereign power under Article 161 of the Constitution of India to grant remission.

13. In order to find out if the life of Ashique would be safe in the event of his premature release, the prison authorities had requisitioned the services of the Probation Officer, who, in his report, has stated that the life of Ashique would not be safe, if he is granted premature release. Just because, nothing had happened to Ashique, or to others by Ashique when he was sent on leave, cannot lead to the inference that nothing would happen to him, if he is released prematurely. To be noted, the adverse report of the Probation Officer was not the sole reason assigned in the impugned order, for refusing premature release of Ashique under G.O.1155. The gravity of the offence and what impact his premature release would have on the society, have weighed in the mind of the Governor, while declining the premature release of Ashique. G.O.1155 clearly stipulates those conditions and two of them, which may be relevant for this case, read as under :

"(iii) That the life of the convict would be safe if released,

(iv) That they would be accepted by the members of their family or any other social organization which can give guarantee for the safety of their lives."

14. In support of his contention, Mr.Manoharan placed strong reliance on the judgments of the Supreme Court in Satish @ Sabbe Vs. The State of Uttar Pradesh [2020 SCC OnLine SC 811] and Home Secretary (Prison) and Others Vs. H.Nilofer Nisha [(2020) 14 SCC 161].

15. In Satish (supra), the Supreme Court was dealing with Section 2 of the Uttar Pradesh Prisoners Release on Probation Act, 1938, which provided for the premature release of convict prisoners on certain grounds. Since the Uttar Pradesh Government had not properly applied the said provision, the Supreme Court had to intervene and direct release of the convict prisoners therein. In Tamil Nadu, we do not have any enactment akin to Uttar Pradesh Prisoners Release on Probation Act, 1938. Hence, the release of Aashique is demanded under Article 161 of the Constitution of India.

16. In Tamil Nadu, the State would normally announce schemes, from time to time, for the premature release of convict prisoners and only if a person becomes eligible for consideration under such a scheme, will the Government examine his case and decide, either to grant or not to grant premature release to him under Article 161, *ibid.* The Governor would pass orders based on the advice of the Cabinet. It is true that a Division Bench of this Court, by order dated 14.12.2017, in H.C.P.No.1606 of 2017, had directed the premature release of Jabroo @ Sayed Jafer Ahmed, one of the co-accused in Jayaprakash's murder case. However, aggrieved by the said order of this Court, the State took the matter on appeal to the Supreme Court and the Supreme Court passed the following order on 12.10.2018 :

"Having regard to the long period of custody suffered by the respondent (i.e., about 20 years) and also having regard to the peculiar facts of the case we decline to entertain the present Special Leave Petition. However, our refusal to entertain the present petition may not be understood to be an approval of the view taken by the High Court which is kept open for examination in an appropriate case."

Hence, the reasons given by the High Court in Jabroo's case have not received the seal of approval of the Supreme Court. In Jabroo's case, the State had not passed any orders refusing premature release. Based on the averments in the counter affidavit that was filed by the State in H.C.P.No.1606 of 2017, the Division Bench had directed release of Jabroo prematurely. In the case at hand, the Governor, on the advice of the Cabinet, has passed the impugned order under Article 161, *ibid.*, which is under challenge before us and therefore, we have to examine its validity on the anvil of the law relating to judicial review of an order passed under Article 161, *ibid.*,

17. As regards Nilofer Nisha (supra) which arose from this Court, this Court had ordered premature release to several convict prisoners under G.O.64, which was challenged by the

State before the Supreme Court. The Supreme Court allowed the appeals filed by the State, however, by exercising its power under Article 142 *ibid.*, on a case-to-case basis, ordered premature release of some convict prisoners in that case. We cannot arrogate to ourselves the power of the Supreme Court under Article 142, *ibid.*, and order premature release of Ashique.

18. Besides the present writ petition, Mr.Manoharan argued a batch of premature release writ petitions and submitted that his legal arguments advanced in this case would be not only for this case, but, common for all such cases too. Therefore, the answer given by us below, to his legal submissions, would hold good for the other petitions argued by him and hence, may appear repetitive.

19. Though the impugned order viz., G.O.21 in this case relates to G.O.1155 and the main prayer is for quashing that, yet, in the prayer portion, Mehaboobjan has sought the release of Ashique under G.O.64 also. As stated above, in Nilofer Nisha (*supra*), the Supreme Court had gone into all the aspects of G.O.64 which contemplates the constitution of two Committees, viz., State Level Committee and District Level Committee, for examining the cases of convict prisoners and send their recommendations to the Government. We are told that 1,650 convict prisoners were released by the State Government under G.O.64 and the cut-off date was fixed as 25.02.2018 and as on that date, undoubtedly, Ashique was eligible for being considered, as he had completed 19 years, 8 months and 6 days of sentence as could be seen from paragraph 6 of the counter affidavit of the State Government. However, in paragraph 6 of the counter affidavit, reasons for not releasing Ashique under G.O.64 have been stated, which are as under :

" But considering the gravity of offence and the safety of the society as well as the life of the prisoner would not be safe, as reported by the Probation Officer, his case was not considered for premature release as per the above Government Order in the year 2018. "

We cannot say that the aforesaid reasons are totally perverse.

20. In support of his further contentions, Mr.Manoharan placed reliance on the following judgments :

i. Zahid Hussein and Others Vs. State of West Bengal and Another [(2001)3 SCC 750]

ii.State of Haryana and Others Vs. Rajkumar @ Bittu [(2021)9 SCC 292]

iii.State of Haryana Vs. Jagdish [(2010)4 SCC 216]

iv.Sharafat Ali Vs. State of Uttar Pradesh and Another
[2022 SCC OnLine SC 193]

21. As regards Zahid Hussein (supra), the Supreme Court was dealing with the order passed by the Review Board under Rule 591 of the West Bengal Rules for Superintendence and Managements of Jails, wherein, certain guidelines were framed by the Government for the consideration of the case of convict prisoners for premature release. From paragraph 14 of the said judgment, it is seen that the prison authority had recommended the premature release of the petitioner therein, but, the Review Board rejected the request. The Supreme Court went into the reasons given by them and found that the Review Board had not considered the guideline, viz., "whether there is any fruitful purpose of confining of these convicts any more."

22. Coming to the case of Jagdish (supra), the Haryana Government had put in place a remission policy dated 04.02.1993. The convict prisoner therein was convicted on 20.05.1999. Subsequently, the said Government put in place a short sentencing policy on 13.08.2008. When the convict prisoner therein claimed remission under the remission policy dated 04.02.1993, it was denied by holding that his case could be considered only under the remission policy dated 13.08.2008 and since he did not satisfy the conditions of the 13.08.2008 remission policy, he would not be entitled to premature release. In that context, the Supreme Court, in paragraphs 53 and 54, held that the State should have considered the case of the convict prisoner, in terms of the remission policy dated 04.02.1993, as that was the policy that was in force at the time of the conviction of the prisoner and that, the subsequent policy dated 13.08.2008, should not have been applied at all. Coming to the case in hand, in the State of Tamil Nadu, there is no general remission policy as such. However, under Rule 341 of the Tamil Nadu Prison Rules, 1983, individual case of convict prisoners for release can be considered by an Advisory Board and not under G.O.1155 or G.O.64.

23. In Rajkumar (supra) also, the issue was similar to the one in Jagdish (supra), with regard to the applicability of the remission policy that was in vogue, at the time of the conviction of the prisoner therein. A reading of paragraph 4 of Rajkumar (supra) shows that the petitioner therein was convicted on 25.03.2010 and that his case would have to be considered under the policy dated 13.08.2008.

24. In Sharafat Ali (supra), the Supreme Court was dealing with a petition under Article 32 of the Constitution of India. In paragraph 6, the Supreme Court held that the application for premature release has to be considered, on the basis of the policy as it stood on the date when the petitioner was convicted of the offence. After holding so, in paragraph 7, the Supreme Court held that the order of the State Government contains general observations to the effect that the release may result in resentment on the side of the victim.

25. In all the above cases, the Supreme Court was dealing with the power of the State Government to release a prisoner prematurely, based on the extant rules and policies. As alluded to above, in the State of Tamil Nadu, there is no fixed policy for the release of convict prisoners. In the instant case, premature release of Ashique is sought under G.O.1155, which is an one time scheme announced by the State Government to commemorate the Birth Centenary of Perararnar Anna and the cut-off date was fixed as 15.09.2008. The case of convict prisoners who qualified the threshold conditions as on 15.09.2008, were considered by the State Cabinet and on the aid and advice of the State Cabinet, the Governor ordered premature release under Article 161, *ibid.*, in respect of 1,405 convict prisoners. On the directions of this Court in H.C.P.No.1607 of 2017 dated 30.07.2018, the case of Ashique was considered by the State Cabinet and the State Cabinet did not recommend for his premature release and accordingly, the Governor, by the impugned order, has not exercised his powers under Article 161, *ibid.*, for the reasons given in the impugned order.

26. Under our Constitutional Scheme, the judiciary is vested with the power to decide the culpability or otherwise of an accused objectively based on the evidence on record. After the judiciary convicts and sentences an accused, the convicted accused is handed over to the executive for implementing the sentence imposed by the Court. The executive cannot sit in judgment over the correctness of the findings of the judiciary. Life imprisonment means imprisonment until the end of the natural life of the convicted accused. The Governor has the sovereign power under Article 161, *ibid.*, to remit the sentence. The Governor acts under the aid and advice of the Council of Ministers (Cabinet). The Chief Minister and his Council of Ministers should enjoy the confidence of the majority of the elected members in the assembly. The task of governance of the State is on the Chief Minister and his Council of Ministers. Therefore, when they advise the Governor not to grant premature release to a prisoner, the Court should be slow in interfering with that order. In *Epuru Sudhakar and Another Vs. Government of Andhra Pradesh and Others* [(2006) 8 SCC 161], the grounds on which judicial review of the order of the Governor passed under

Article 161, *ibid.*, can be done have been enumerated. The Court cannot also issue a mandamus to the Governor directing him to exercise his power under Article 161, *ibid.*

27. Further, in *Epuru Sudhakar (supra)*, the Supreme Court has held in paragraph 66 as under :

"66. 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."

Similarly, in paragraph 65, the Supreme Court has held that the President and the Governor are the sole judges of the sufficiency of facts and of the appropriateness of granting the pardons and reprieves. As regards the power of the Court to judicially review the order of the President/Governor under Article 72/161, *ibid.*, the Supreme Court has held 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. As held in *Epuru Sudhakar (supra)*, this Court cannot go into the sufficiency of facts and the appropriateness of not granting pardon to Ashique, but, can only test the validity of the impugned order on grounds (a) to (e) enumerated thereon. Tested on this anvil, we find that the impugned order does not pass muster the parameters laid down in *Epuru Sudhakar (supra)* for judicially reviewing the order of the Governor passed under Article 161, *ibid.*

In the result, this writ petition is dismissed. No costs.
Connected Miscellaneous Petition stands closed.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

gya

To

1. The Chief Secretary to Government of Tamil Nadu
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Chennai 600 009
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4. The Public Prosecutor
High Court, Madras.

+1cc to Mr.S.Manoharan, Advocate, S.R.No.20424

W.P.No.10803 of 2020

GPL(CO)
PM/01/04/2022