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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON 24.01.2022
DELIVERED ON 03.02.2022

CORAM:

THE HON'BLE MR. JUSTICE P.N.PRAKASH

and

THE HON'BLE MRS. JUSTICE R.HEMALATHA

W.P. No.11352 of 2020

K. Rajasekar

...Petitioner

vs.

- 1 The State represented by
the Additional Chief Secretary to Government
Home Department
Secretariat
Fort St. George
Chennai 600 009
- 2 The Deputy Secretary to Government
Home (Prison-IV) Department
Secretariat
Fort St. George
Chennai 600 009
- 3 The Additional Director General of Police/
Inspector General of Prisons
Tamil Nadu Prison Department
Chennai 600 008

...Respondents

Writ Petition filed under Article 226 of the Constitution of India seeking a writ of certiorarified mandamus calling for the records relating to the impugned G.O. (Ms.) No.992, Home (Prison-IV) Department dated 30.08.2019, issued by the first respondent and to quash the same as non-est in the eye of law and consequently, direct the first respondent to produce the petitioner's wife Shanthi (Detenue), Life Convict Prisoner No.3784, confined in the Special Prison for Women, Tiruchirappalli, before this Court and order to release her forthwith and set her at liberty.



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For petitioner

Mr. K.S. Govinda Prasad

For respondents

Mr. Hasan Mohamed Jinnah
Public Prosecutor
assisted by
Mr. R. Muniyapparaj
Addl. Public Prosecutor

ORDER

P.N. PRAKASH, J.

This writ petition has been preferred calling into question, the legality and validity of G.O. (Ms) No.992, Home (Prison-IV) Department dated 30.08.2019 (for short "G.O. 992") issued by the first respondent, in and by which, the recommendation of the State Level Committee for the premature release of Shanthi, the petitioner's wife (Life Convict Prisoner No.3784), was rejected, and for a direction to the first respondent to release her forthwith from the Special Prison for Women, Tiruchirappalli.

2 A short but very interesting conundrum has been raised in this writ petition, wherein, the petitioner, Rajasekar, seeks premature release of his wife Shanthi (Life Convict Prisoner No.3784) under G.O.(Ms.) No.64, Home (Prison-IV) Department dated 01.02.2018 (for short "G.O.64"), on the ground of parity.

3 The minimum facts that are required for deciding this legal conundrum are as under:

3.1 Rajasekar, the petitioner, was a widower and had a daughter through his first wife. He got married to Shanthi (detenue) and through the wedlock, Shanthi begot a girl child. Everything was fine until a third girl child was born to Rajasekar, which placed the Rajasekar-Shanthi duo in an emotional distress, as they feared that they may not be able to bring up all the three children (one child born through Rajasekar's first wife and two children born through Shanthi) with their meagre income.

3.2 Ten days after the birth of the third girl child, Rajasekar and Shanthi decided to snuff out its life and therefore, on 16.12.1992, they smothered the child, caused its death and buried it in their garden. The Village Administrative Officer somehow smelt a rat and when he started an enquiry, Rajasekar spilled the beans and confessed to the murder of the child. This extrajudicial confession was recorded by the Village Administrative Officer in which Shanthi also signed as an attesting witness.



3.3 Rajasekar and Shanthy were prosecuted in S.C. No. 235 of 1994 in the Court of the First Additional District and Sessions Judge, Salem, under Section 302 read with Section 34 IPC and Section 201 IPC for the murder of the child. The trial Court, vide judgment and order dated 19.07.1995, convicted Rajasekar and Shanthy for the aforesaid offences and sentenced them as under:

Accused Name	Provisions under which convicted	Sentence
Rajasekar	S.302 r/w S.34 IPC S.201 IPC	Life imprisonment and fine of Rs.1,000/-, in default to undergo six months simple imprisonment. Five years rigorous imprisonment and fine of Rs.500/-, in default to undergo four months simple imprisonment.
Shanthy	S.302 r/w S.34 IPC	Life imprisonment and fine of Rs.1,000/-, in default to undergo six months simple imprisonment.

The aforesaid two sentences imposed on Rajasekar were ordered to run concurrently.

3.4 Their appeal in Crl.A. No.636 of 1995 was dismissed by a Division Bench of this Court on 05.09.2003, thereby confirming the conviction and sentences imposed by the trial Court.

3.5 While that being so, in connection with the Birth Centenary of Perarignar Anna, the State Government issued G.O. (Ms.) No.1155, Home (Prison-IV) Department dated 11.09.2008 (for short "G.O.1155") for the premature release of 1,339 life convicts, who had completed 7 years of actual imprisonment as on 15.09.2008. Rajasekar was lucky enough to be one of the 1,339 life convicts to be released under G.O.1155, whereas, Shanthy was not, inasmuch as, she had completed only 5 years, 6 months and 24 days of actual imprisonment as on 15.09.2008. That was because Shanthy appears to have been on bail during trial as well during the pendency of her appeal before this Court.



3.6 While so, to commemorate the birth centenary of Dr.M.G.Ramachandran, former Chief Minister of Tamil Nadu, the State Government issued G.O. 64 (supra), fixing certain requirements to be satisfied by a convict prisoner as on 25.02.2018 for being eligible for consideration for premature release. The said Government Order states that remission would be granted on a case-to-case basis, on the basis of recommendation of a State Level Committee headed by the Inspector General of Prisons, which would predicate its decision on the recommendations of a District Level Committee headed by the Superintendent of the Prison concerned, where, the convict prisoner is lodged.

3.7 Since Shanthi satisfied the eligibility conditions fixed by G.O.64, her case was considered and recommended by the State Level Committee to the State Government for her premature release. However, the State Government, vide the impugned G.O.992, (supra), as stated in paragraph 2 (supra), rejected the recommendation of the State Level Committee for premature release of Shanthi. In effect, by the impugned G.O.992 (supra), Shanthi was declined the relief of premature release under G.O. 64 (supra), for the following reasons:

"3. The Additional Director General of Police/Inspector General of Prisons, in his letter third read above, has stated that as per G.O.(Ms.) No.64, Home (Pri.IV) Department dated 01.02.2018, the State Level Committee recommended for premature release of the life convict prisoner No.3784, Shanthi, wife of Rajasekaran, confined in Special Prison for Women, Trichy.

4. The Government have examined the recommendation of the State Level Committee for the premature release of the life convict prisoner No.3784, Shanthi, Wife of Rajasekaran, with relevant records. In this case, the life convict prisoner No.3784, Shanthi, Wife of Rajasekaran, confined in Special Prison for Women, Trichy, was convicted by the I Additional District Judge, Salem, on 19.07.1995 in Sessions Case No.235 of 1994 under Section 302 read with 34 of the Indian Penal Code for murdering her newly born female child (age three days). Considering the cruel and brutal nature of the offence committed by her, the Government have decided to reject the recommendation of the State Level Committee for the premature release of the life convict prisoner No.3784 Shanthi, Wife of Rajasekaran, confined in Special Prison for Women, Trichy and order accordingly.



(By Order of the Governor)

Niranjan Mardi
Additional Chief Secretary to Government"
(emphasis supplied)

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3.8 Assailing G.O. 992 (supra) and for a consequential direction to the first respondent to release Shanthi forthwith, as stated in the opening paragraph, Rajasekar has preferred this writ petition.

4 Heard Mr. K.S. Govinda Prasad, learned counsel for Rajasekar and Mr. Hasan Mohamed Jinnah, learned Public Prosecutor, assisted by Mr.R.Muniyapparaj, learned Additional Public Prosecutor appearing for the respondents/State.

5 A counter affidavit dated 09.08.2021 has been filed by the Joint Secretary to Government, Home Department, justifying the impugned G.O.992 (supra), by extensively quoting from the judgments of the Supreme Court in Epuru Sudhakar and another vs. Government of Andhra Pradesh and others¹ and Sanaboina Satyanarayana vs. Government of Andhra Pradesh and others². The sum and substance of the Government's objection for ordering premature release of Shanthi can be found in paragraph 10 of the counter affidavit, which reads as under:

"10 With regard to the averments made in ground (vi) of the affidavit, it is submitted that, the concession of remission/premature release itself is a boon and to which no one has vested right. It is submitted that, the classes of prisoners or category of offender to whom the remission has to be extended is a matter of policy, particularly when it is also a constituent power conferred upon the constitutional functionary and the Head of the State Government, larger area of latitude is to be conceded in favour of such authority to decide upon the frame and limits of its exercise under Article 161 of the Constitution of India."

6 The learned counsel for Rajasekar contended that on the same set of facts, when the Government had granted premature release to Rajasekar, denial of the relief to Shanthi is violative of Article 14 of the Constitution of India.

7 Per contra, the learned Public Prosecutor made his submissions based on the stand taken by the State in the counter affidavit.

¹ (2006) 8 SCC 161

² (2003) 10 SCC 78



8 This Court gave its anxious consideration to the rival submissions.

9 At the outset, it is worth pointing out that this very Division Bench, in Sikkander vs. The State represented by its Secretary to Government of Tamil Nadu, Department of Home, Chennai and others³, has considered, in extenso, the entire contours of the law relating to premature release under G.O.64 (supra) and has held that the sufficiency of the material before the Governor is not a matter of enquiry by the Court, as it lies squarely within the province of the Governor and that this Court cannot sit in judgment over the same. Further, in Epuru Sudhakar (supra), in paragraphs 34 and 66, the grounds under which there could be a judicial review of such order, has been succinctly catalogued as under:

"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.

66. Granting of pardon is in no sense an overturning of a judgment of conviction, but rather it is an Executive action that mitigates or set aside the punishment for a crime. It eliminates the effect of conviction without addressing the defendants guilt or innocence. The controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter. It can no longer be said that prerogative power is ipso facto immune from judicial review. An undue exercise of this power is to be deplored. Considerations of religion, caste or political loyalty are irrelevant

³ 2021 SCC Online Mad 6586



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and fraught with discrimination. These are prohibited grounds. Rule of Law is the basis for evaluation of all decisions. The supreme quality of the Rule of Law is fairness and legal certainty. The principle of legality occupies a central place in the Rule of Law. Every prerogative has to be the subject to the Rule of Law. That rule cannot be compromised on the grounds of political expediency. To go by such considerations would be subversive of the fundamental principles of the Rule of Law and it would amount to setting a dangerous precedent. The Rule of Law principle comprises a requirement of "Government according to law". The ethos of "Government according to law" requires the prerogative to be exercised in a manner which is consistent with the basic principle of fairness and certainty. 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."

10 A reading of the above paragraphs makes it clear that the impugned G.O. 992 (supra) can be tested on the anvil of arbitrariness. To reiterate, both Rajasekar and Shanthi were convicted and sentenced of the offence under Section 302 read with Section 34 IPC for infanticide. In fact, Rajasekar was convicted and sentenced of the offence under Section 201 IPC, whereas, Shanthi was not even charged under Section 201 IPC. After gleaning through the judgments of the trial Court and the appellate Court, we find no materials to infer that the act of Shanthi was more gruesome and cruel than that of Rajasekar. Pertinent it is to state here that both of them had smothered the infant and Rajasekar had buried it in their garden and that is why, they were convicted and sentenced of the offence under Section 302 read with Section 34 IPC. Shanthi became ineligible for being considered under G.O. 1155 (supra) because, the period of incarceration undergone by her as on 15.09.2008 fell short of the 7-year period that was prescribed in the said G.O. In all other aspects, Shanthi was eligible under G.O.1155 (supra) for premature release. Since Rajasekar qualified the threshold requirements of G.O. 1155 (supra), he was prematurely released by the Government.

11 Now, coming to the case of Shanthi, since she satisfied the threshold requirements of G.O. 64 (supra), the State Level Committee recommended her case to the Government for premature release. We are conscious of the fact that the Government is



not bound by the recommendations of the State Level Committee and in a given case, as in this case, it can reject the recommendations of the State Level Committee and refuse to grant premature release. However, needless to say, such refusal must not be arbitrary.

12 In this case, when the Government did not find the act of Rajasekar to be cruel and brutal, on the same set of materials, if the Government were to say that the act of Shanthi is cruel and brutal and therefore, she would not be entitled to premature release, with no element of incertitude, we are afraid that this stand of the Government is nothing but arbitrary and fails the test of fairness and legal certainty propounded by the Supreme Court in Epuru Sudhakar (supra). What is sauce for the goose cannot be soup for the gander. Thus, decided on the touchstone of Article 14 of the Constitution of India, the impugned G.O.992 (supra) is liable to be quashed and it is accordingly quashed. As a sequitur, the first respondent is directed to recommend the case of Shanthi for premature release under G.O. 64 (supra) within a period of one month from the date of receipt of a copy of this order.

This writ petition stands allowed on the above terms. Costs made easy.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

cad

To

- 1 The Additional Chief Secretary to Government
Home Department
Secretariat
Fort St. George
Chennai 600 009
- 2 The Deputy Secretary to Government
Home (Prison-IV) Department
Secretariat
Fort St. George
Chennai 600 009



3 The Additional Director General of Police/
Inspector General of Prisons
Tamil Nadu Prison Department
Chennai 600 008

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4 The Superintendent
Special Prison for Women
Tiruchirappalli

5 The Joint Secretary to Govt of Tamil Nadu
Public Law and Order Dept,
Secretariat, Chennai - 9.

6 The I Additional district and Sessions Judge,
Salem.

7 The Public Prosecutor,
High Court, Madras - 104.

+1 cc to M/s.P.Daniel,Advocate Sr.No.7173

W.P. No.11352 of 2020

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NSK 14/02/2022