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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON 31.01.2022
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.16702 OF 2019

K.V. Komarasamy

...Petitioner

vs.

- 1 The Government of Tamil Nadu
represented by its
Additional Chief Secretary to Government
Home (Prison-IV) Department
Fort St. George
Madras 600 001
- 2 The Additional Director General of Police
Inspector General of Prisons
1, Gandhi Irwin Road
Egmore
Chennai 600 008
- 3 The Superintendent of Prisons
Cuddalore Central Prison
Cuddalore

... Respondents

Writ Petition filed under Article 226 of the Constitution of India seeking a writ of certiorarified mandamus to call for the records of the proceedings in G.O. (D) No.467, dated 10.05.2019 on the file of the first respondent and to quash the same as illegal and without jurisdiction and to consequently, direct the first respondent to re-examine the case of the petitioner's son Balu @ Dhanapal (life convict prisoner 13927), for premature release under G.O. (Ms.) No.64, Home (Prison-IV) Department dated 01.02.2018.

For petitioner
For respondents

Mr. Sharath Chandran
Mr. Hasan Mohamed Jinnah
assisted by
Mr. R. Muniyapparaj
Additional Public Prosecutor



ORDER

P.N. PRAKASH, J.

The short point that falls for consideration in this writ petition is whether the conviction of the petitioner's son, viz., Balu @ Dhanapal, for the offences under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (for brevity "the SC/ST Act") would be a bar for granting premature release to him under G.O. (Ms.) No.64, Home (Prison-IV) Department dated 01.02.2018 (for brevity "G.O.64").

2 The undisputed facts are as under:

2.1 The petitioner's son Balu @ Dhanapal faced a prosecution in S.C.No.142 of 2003 in the Court of Session, Erode and was convicted on 03.03.2004 and was sentenced to undergo the following imprisonments:

S.No .	Provisions under which convicted	Sentence
1	S.302 IPC read with Section 3(2)(v) of the SC/ST Act	Imprisonment for life and fine of Rs.2,000/-, in default to undergo two years rigorous imprisonment
2	S.307 IPC read with Section 3(2)(v) of the SC/ST Act	Imprisonment for life and fine of Rs.1,000/-, in default to undergo one year rigorous imprisonment
3	S.448 IPC	Rigorous imprisonment for one year
4	S.506 (II) IPC	Rigorous imprisonment for six months

2.2 The aforesaid sentences were ordered to run concurrently. The appeal preferred by the convict prisoner in CrI.A.No.449 of 2004 was dismissed on 19.08.2006.

2.3 While that being so, to commemorate the Birth Centenary of Dr.M.G.Ramachandran, former Chief Minister of Tamil Nadu, the State Government issued a remission G.O. in G.O. 64 (supra) for granting premature release to convict prisoners in the State. Pursuant thereto, the convict prisoner herein addressed a representation dated 24.10.2018 to the Superintendent, Central Prison, Cuddalore, seeking premature release. Since no orders were passed on the said representation, the convict prisoner preferred a writ petition in W.P.No.30791 of 2018, in which, this Court, by order dated 26.11.2018, directed the Government to consider the convict prisoner's representation and pass



orders on the same in accordance with law. Accordingly, the State Government considered the representation of the convict prisoner and by the impugned order, G.O. (D) No.467, Home (Prison-IV) Department dated 10.05.2019, rejected the same, assailing the correctness of which, the present writ petition has been filed by Komarasamy, father of the convict prisoner, besides seeking a direction to the first respondent to re-examine the case of the convict prisoner.

3 Heard Mr. Sharath Chandran, learned counsel for the petitioner and Mr. Hasan Mohamed Jinnah, learned Public Prosecutor assisted by Mr. R. Muniyapparaj, learned Additional Public Prosecutor appearing for the respondents/State.

4 Justifying the impugned Government Order, the Joint Secretary to the Government, has filed a counter affidavit dated 24.01.2022.

5 Before advertng to the rival submissions, it may be necessary to extract the relevant portion from the impugned Government Order which assigns the reasons for rejection:

"7.As per the guidelines issued in para 5(II) (3) in G.O.Ms.No.64, Home (Pri-IV) Department dated 01.02.2018, the cases of prisoners convicted under Section 435 of Code of Criminal Procedure are not eligible for consideration of premature release. The life convict prisoner No.13927, Balu @ Dhanapal, was convicted under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribal Act, which falls under Section 435 (2) of Criminal P.C. Accordingly, the Government, therefore, reject the request of Tr.K.V. Kumarasamy seeking premature release of his son Life Convict prisoner No.13927, Balu @ Dhanapal, confined in Central Prison, Cuddalore." (emphasis supplied)

6 Mr. Sharath Chandran, learned counsel for the petitioner submitted that Section 435 Cr.P.C. would not have any application to the facts of this case, because, the Central Government is not the appropriate Government and it is only the State Government which is the appropriate Government which can grant premature release under G.O. 64. He submitted that the source of power for enacting the SC/ST Act by the Parliament is not traceable to any Entry in List I of the Seventh Schedule to the Constitution of India, but, is traceable to Entry 1 in List III (concurrent list) of the Seventh Schedule to the Constitution of India. This submission of Mr. Sharath Chandran



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Constitution but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power."

10 The scope of this entry came up for consideration in *Kartar Singh vs. State of Punjab*¹, wherein, it was pointed out that Entry 1 in List III would have to be construed liberally, so as to take within its fold, any matter that was criminal in nature. As to what constitutes criminal law within the meaning of this entry, the Supreme Court, in *Kartar Singh (supra)* has observed thus:

"445. What is a criminal law? Any Act or rule dealing with crime, "(The) criminal justice system is a firmly societal defensive reaction to intolerable behaviour. From the beginning it was considered as a tool designed to protect an established order of values attuned to the political organisation of the community. Transgression of some important norms reflecting these values was seen as a crime and, as such, demanded punishment."

11 Be it noted, the SC/ST Act essentially aims to punish a person who perpetrates violence, both verbal and physical, on a Dalit. Thus, in our opinion, this enactment would squarely fall within the peg of criminal law in Entry I of List III.

12 Now, the next question is, just because the SC/ST Act has been enacted by the Parliament, would that, by itself, denude the State of its power to grant remission. To appreciate this issue, we should first understand the distinction between the legislative power and executive power.

13 Section 432(7)(a) Cr.P.C. defines the expression "appropriate Government" to suspend or remit sentences as "the Central Government" in cases where the sentence is for an offence under any law relating to a matter to which the "executive power of the Union extends". What constitutes executive power has been sapiently explained by B.K. Mukherjea, C.J. in *Rai Sahib Ram Jawaya Kapur & Others vs. State of Punjab*² as follows:

"14. It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily, the executive power connotes the residue of Governmental functions that

¹ (1994) 3 SCC 569

² AIR 1955 SC 549



remain after legislative and judicial functions are taken away....

15. The executive function comprises both the determination of the policy as well as carrying it into execution....."

14 The extent of the executive power of the Union is set out in Article 73 of the Constitution which reads thus:

"73 Extent of executive power of the Union:

(1) Subject to the provisions of this Constitution, the executive power of the Union shall extend --

(a) to the matters with respect to which Parliament has power to make laws; and

(b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement:

Provided that the executive power referred to in sub clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws."

15 The proviso to Article 73(1)(a) would dispel all doubts, in that, it clearly states that the executive power of the Union cannot extend in any State, to a matter with respect to which, the legislature of the State has also the power to make laws. It does not say that just because the Union has made a law on a subject in the concurrent list, that, by itself, would extend the executive power of the Union in the State. To be more perspicuous, we have returned a finding that the SC/ST Act is traceable to Entry 1 in List III (concurrent list) of the Seventh Schedule to the Constitution. This means that the State legislature would also have the power to pass a legislation on this subject. However, the Parliament took upon itself to pass a legislation to protect the interest of Dalits by enacting the SC/ST Act. Had the proviso to Article 73 not been there, then, there may be some force in the argument of the State.

16 Though the general principle is that the executive power of the Union is co-extensive with its legislative power, Article 73 is an exception to this principle, as was pointed out by Sikri, C.J., in the Constitution Bench judgment of the



Supreme Court in Ishwar Das Malhotra vs. Union of India and Others³:

"11. The learned Counsel contended that this principle conflicts with the general principle that executive power corresponds to legislative power and it could not have been intended that the extended law should operate when there was no corresponding legislative power. In this connection he referred to Article 73. The general principle is subject to exceptions. Article 73 itself opens with, the words "subject to the provisions of this Constitution." This is one of the exceptions envisaged by the Constitution. Other such exceptions are in Article 277 and Article 372. Although legislative power may not exist to legislate on the subject of existing laws executive power would be exercised under the laws saved by Article 277 and Article 372. No authority has been cited in support of the contention that executive power to execute a valid law ceases to exist if power to make that law has been transferred to another authority or ceases to exist."
(emphasis supplied)

17 Article 73(1)(a) of the Constitution states that the executive power of the Union shall extend to the matters with respect to which the Parliament has the power to make laws. Indisputably, the Parliament has the power to make laws in respect of subjects in the Union and concurrent list, i.e., List I and List III. However, the proviso to Article 73(1)(a) takes away the executive power of the Union in respect of matters in the concurrent list, except matters that are expressly provided in the Constitution or in any law made by the Parliament. The examples for the expression "expressly provided in the Constitution" are Articles 246(2), 249, 250, 277, 286 and 369 (See paragraph 42 of the Constitution Bench judgment of the Supreme Court in Union of India vs. Sriharan @ Murugan and Others⁴).

18 Having held that the SC/ST Act is traceable to Entry 1 of the concurrent list, the question as to whether the executive power of the Union extends to matters therein, has been answered by the Supreme Court in Sriharan (supra) in paragraphs 213 and 214 which are extracted for ready reference:

³ (1972) 1 SCC 646

⁴ (2016) 7 SCC 1



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"213. There is one more provision, namely, Section 435(2) Cr.P.C. which needs to be considered at this stage. It is possible that in a given case the accused may be convicted and sentenced for different offences, in respect of some of which the Executive Power of the Union may extend and to the rest the Executive Power of the State may extend. Since the Executive Power either of the Union or the State is offence specific, both shall be appropriate Governments in respect of respective offence or offences to which the Executive Power of the respective Government extends. For instance, an offender may be sentenced for an offence punishable under an enactment relatable to subject under List I of the Constitution and additionally under the Penal Code, 1860. Such eventuality is taken care of by sub-section (2) of Section 435 and it is stipulated that even if the State Government in its capacity as an appropriate Government in relation to an offence to which the Executive Power of the State Government extends, were to order suspension, remission or commutation of sentence in respect of such offence, the order of the State Government shall not have effect unless an appropriate order of suspension, remission or commutation is also passed by the Central Government in relation to the offence(s) with respect to which Executive Power of the Union extends. Relevant to note that it is not with respect to a specific offence that both the Central Government and State Government have concurrent power but if the offender is sentenced on two different counts, both could be the appropriate Governments in respect of that offence to which the respective Executive Power extends.

214. It was submitted on behalf of the petitioner that if the Executive Power is coextensive with the Legislative Power and the law-making power of the State must yield to the Legislative Power of the Union in respect of a subject in the Concurrent List, reading of these two principles would inevitably lead to the conclusion that the Executive Power of the Union takes primacy over that of the State thereby making it i.e. the Central Government the appropriate Government under Section 432(7) Cr.P.C. It was further submitted that it was Parliament which made law contained in Cr.P.C. in exercise of power relatable to Entries 1 and 2 of List III and that the provisions in the Penal Code, 1860 (existing law under Article 13) and under Cr.P.C., both



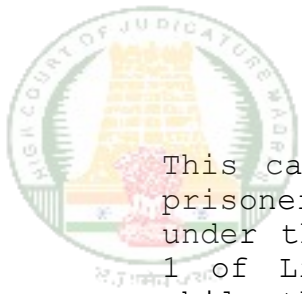
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relatable to the powers of Parliament, which provide for "appropriate Government" as prescribed in Section 55-A IPC and Section 432(7) Cr.P.C. without any validly enacted conflicting or amending law by the State, would clearly show that it is the Union which has the primacy. In our considered view, that is not the correct way to approach the issue. For the purposes of Article 73(1) it is not material whether there is Union law holding the field but what is crucial is that such law made by Parliament must make an express provision or there must be such express provision in the Constitution itself as regards Executive Power of the Union, in the absence of which the general principle as stated above must apply. If the submission that since IPC and Cr.P.C. are relatable to the powers of Parliament, it is the Executive Power of the Union which must extend to aspects covered by these legislations is to be accepted, the logical sequitur would be that for every offence under IPC the appropriate Government shall be the Central Government. This is not only against the express language of Article 73(1) but would completely overburden the Central Government." (emphasis supplied)

19 If the argument of the State is to be accepted, then, the State Government cannot grant remission to a convict prisoner who has been convicted of the offence under Section 302 IPC, because, IPC also is a Central enactment, by virtue of Article 372 of the Constitution of India, albeit the fact that it was enacted in the year 1861.

20 Therefore, the objection of the State that though the SC/ST Act is traceable to Entry 1 of the concurrent list, yet, it is only the Union which can consider granting remission to a person convicted of the offences under the SC/ST Act is clearly misconceived. We hold that the appropriate Government for grant of remission in cases of conviction under the SC/ST Act is the State Government and not the Central Government.

21 As pointed out by the Supreme Court in paragraph 213 in Sriharan (supra) extracted above, the executive power of either the Union or the State is offence-specific. We have already alluded to the fact that the executive power of the Union does not extend to matters in the concurrent list, except in the cases falling under the proviso to Article 73(1)(a) of the Constitution. Section 435(2) Cr.P.C. which is the ground on which the impugned order rests, would apply only if the conviction and sentence are for different offences, in respect of some of which, the executive power of the Union may extend.



This can be explained by way of an illustration. If a convict prisoner has been convicted and sentenced under the IPC as well under the Arms Act, the former being a subject covered by Entry 1 of List III, the executive power would be with the State, while the latter being a subject covered by Entries 5 and 93 of List I, the executive power would be with the Union Government. In such circumstances, Section 435(2) Cr.P.C. would operate requiring an appropriate order of remission from the Central Government. However, as we have returned a finding that the SC/ST Act is traceable to Entry 1 of List III, and not to any Entry in the Union List, we are of the considered opinion that Section 435(2) Cr.P.C. will have no application to the case at hand. In this context, it would be useful to refer to Section 435 (2) Cr.P.C.

"435. State Government to act after consultation with Central Government in certain cases:

(2) No order of suspension, remission or commutation of sentences passed by the State Government in relation to a person, who has been convicted of offences, some of which relate to matters to which the executive power of the Union extends, and who has been sentenced to separate terms of imprisonment which are to run concurrently, shall have effect unless an order for the suspension, remission or commutation, as the case may be, of such sentences has also been made by the Central Government in relation to the offences committed by such person with regard to matters to which the executive power of the Union extends.

22 Section 435(2) Cr.P.C. extracted above speaks of the executive power of the Union and not about its legislative power. Therefore, just because, the SC/ST Act was enacted by the Parliament, that would not, by itself, bring it within the ambit of Section 435 (2) Cr.P.C.

23 It may be pertinent to state here that though G.O. 64 (supra) excludes from consideration, for premature release, of persons convicted under several penal statutes like the Prevention of Corruption Act, 1988, Immoral Traffic (Prevention) Act, 1956, Drugs and Cosmetics Act, 1940, etc., the SC/ST Act does not find a place therein.

24 In the counter affidavit, a stand has been taken in paragraph 11 saying "as a matter of policy, prisoners convicted and sentenced under the said Central Act, was not all considered by the first respondent for premature release and in the States till date, no life convict prisoner who was also convicted and



sentenced under the above said Central Act was released prematurely in any of the premature release scheme framed by the first respondent." This stand requires to be stated only to be rejected, for, G.O.64 (supra) clearly spells out the remission policy of the State Government and hence, we are afraid that there cannot be a policy exclusion outside the four corners of G.O.64. (supra). Where an authority disables itself from applying its mind to matters before it by self-created rules of policy, the exercise of power would be vitiated. In this regard, felicitous it is to refer to the judgment of the Supreme Court in Khudiram Das vs. State of West Bengal and others⁵.

"9. The satisfaction, moreover, must be a satisfaction of the authority itself, and therefore, if, in exercising the power, the authority has acted under the dictation of another body as the Commissioner of Police did in Commissioner of Police v. Gordhandas Bhanji [AIR 1952 SC 16 : 1952 SCR 135] and the officer of the Ministry of Labour and National Service did in Simms Motor Units Ltd. v. Minister of Labour and National Service [(1946) 2 All ER 201] the exercise of the power would be bad and so also would the exercise of the power be vitiated where the authority has disabled itself from applying its mind to the facts of each individual case by self-created rules of policy or in any other manner....."

(emphasis supplied)

25 Thus, looking at from any angle, the impugned Government Order is unsustainable and hence, is liable to be quashed and is accordingly quashed. The matter is remanded to the State Government for fresh consideration in accordance with G.O.64 (supra) within a period of 8 weeks from the date of receipt of a copy of this order.

In the result, this writ petition stands allowed. Costs made easy.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

cad

⁵ (1975) 2 SCC 81



To

1 The Additional Chief Secretary to Government
Home (Prison-IV) Department
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2 The Additional Director General of Police
Inspector General of Prisons
1, Gandhi Irwin Road
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3 The Superintendent of Prisons
Cuddalore Central Prison
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+1cc to Mr.Govind Chandrasekhar, Advocate, S.R.No.11480

W.P. No.16702 of 2019

MT (CO)
PM/09/03/2022