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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 05.04.2022

PRONOUNCED ON : 27.04.2022

CORAM

THE HONOURABLE Mr.JUSTICE P.N.PRAKASH
AND

THE HONOURABLE Mr.JUSTICE A.A.NAKKIRAN

W.P.No.18204 of 2020

AND

W.M.P.No.22610 of 2020

N.Sarojini

.. Petitioner

Vs.

The State of Tamil Nadu
Rep. by Additional Chief Secretary to Government
Department of Home (Prison-IV)
Fort St. George
Chennai 600 009

.. Respondent

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 in connection with the impugned order passed by the respondent in G.O.(D).No.1291 Home (Prison-IV) Department, dated 29.10.2020 and quash the same and further direct the respondent to extend the benefit of G.O.(Ms) No.64 Home (Prison-IV) Department, dated 01.02.2018 and release the petitioner's son viz., Hariharan @ Hari, Life Convict No.14895, S/o.Natarajan, who is confined in the Central Prison, Cuddalore, prematurely.

For Petitioner : Mr.G.Ravikumar

For Respondent : Mr.Hasan Mohamed Jinnah
Public Prosecutor
Assisted by
Mr.R.Muniyapparaj
Additional Public
Prosecutor



O R D E R

P.N.PRAKASH, J.

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Challenging the order in G.O.(D).No.1291, Home (Prison-IV) Department dated 29.10.2020 (for brevity "the impugned order") passed by the respondent, refusing to grant premature release of Hariharan @ Hari (life convict No.14895) under 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 Hariharan prematurely, his mother Sarojini has filed the instant writ petition.

2. The facts in brief are as under :

2.1. The petitioner's son viz., Hariharan is a life convict prisoner (CT.No.14895). In connection with the kidnap and murder of one M.K.Balan, former AIADMK M.L.A., a case was registered in E-5 Pattinappakkam Police Station Crime No.986 of 2001 against 18 accused, including Hariharan, who faced trial in S.C.No.87 of 2003 in the Court of the Additional District and Sessions (FTC-I), Chennai, in which, Hariharan was convicted and sentenced on 19.02.2004 as under :

Provision under which convicted	Sentence
Section 120-B IPC	Imprisonment for life and fine of Rs.50,000/-
Section 302 read with Section 109 IPC	Imprisonment for life and fine of Rs.50,000/-, in default to undergo 1 year rigorous imprisonment
Section 365 read with Section 109 IPC	Rigorous imprisonment for 7 years and fine of Rs.5,000/-, in default to undergo 1 year rigorous imprisonment
Section 387 IPC	Rigorous imprisonment for 7 years and fine of Rs.5,000/-, in default to undergo 1 year rigorous imprisonment
Section 364 read with Section 109 IPC	Rigorous imprisonment for 10 years and fine of Rs.5,000/-, in default to undergo 2 years rigorous imprisonment
Section 347 read with Section 109 IPC	Rigorous imprisonment for 3 years and fine of Rs.5,000/-, in default to undergo 3 months rigorous imprisonment



The appeal preferred by Hariharan in CrI.A.No.716 of 2004 was dismissed by this Court on 06.10.2007.

2.2. That apart, in connection with the kidnap and murder of one Jayakumar, a case was registered in K-4 Anna Nagar Police Station Crime No.1440 of 2001, in which, 8 accused including Hariharan, faced trial in S.C.No.206 of 2003 and Hariharan was convicted and sentenced by the Additional District and Sessions Judge (FTC-I), Chennai on 19.04.2004 as under :

Provision under which convicted	Sentence
Section 302 IPC	Imprisonment for life and fine of Rs.50,000/-
Section 364 IPC	Rigorous imprisonment for 10 years and fine of Rs.10,000/-, in default to undergo 1 year rigorous imprisonment

The appeal preferred by Hariharan in CrI.A.No.715 of 2004 was dismissed by this Court on 21.11.2008.

2.3. The sentences imposed in S.C.No.206 of 2003 vide judgment and order dated 19.04.2004 were ordered to run concurrently with the sentences imposed in S.C.No.87 of 2003 vide judgment and order dated 19.02.2004.

2.4. While so, in order to commemorate the Birth Centenary of Dr.M.G.Ramachandran, the State issued G.O.64 dated 01.02.2018, which was amended in G.O.(Ms) No.302, Home (Prison-IV) Department dated 03.05.2018, fixing certain eligibility criteria for consideration of the cases of convict prisoners for premature release by the Governor under Article 161 of the Constitution of India. In the said Government Order, the cut-off date was fixed as 25.02.2018. In other words, the cases of convict prisoners, who satisfied the eligibility conditions prescribed by G.O.64 as on 25.02.2018, were collated and scrutinized by two Committees viz., District Level Committee and State Level Committee. The cases recommended by the State Level Committee were sent to the Governor via the Cabinet, for consideration under Article 161, *ibid.* It is reported that under G.O.64, the Governor, in exercise of powers under Article 161, *ibid.*, based on the aid and advice of the Cabinet, ordered release of 1,650 convict prisoners.

2.5. Since Hariharan was not prematurely released based on G.O.64, the petitioner viz., Sarojini gave a representation dated 18.02.2019 and finding no response, filed W.P.No.7963 of 2020 seeking issuance of a mandamus to the Government to consider the said representation in the light of G.O.64. A Division Bench of this Court, by order dated 11.06.2020 in



W.P.No.7963 of 2020, directed the Government to consider the said representation within a period of three months and pass appropriate orders on merits. Pursuant to the aforesaid directions, the Government considered the said representation and has passed the impugned order rejecting the same, aggrieved by which, the instant writ petition has been filed for the relief as stated in the opening paragraph.

3. Heard Mr.G.Ravikumar, 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 respondent State.

4. Mr.Ravikumar contended that a convict prisoner by name Samikannu who was similarly placed with Hariharan, was prematurely released under G.O.64 and therefore, the non-release of Hariharan violates Articles 14 and 21 of the Constitution of India. He also submitted that the Probation Officer in this case had given a very favourable report, based on which, the District Level Committee had even recommended the case of Hariharan, despite which, the Government had chosen not to release Hariharan, which is arbitrary.

5. Refuting the grounds raised in this writ petition, the Joint Secretary to the Government has filed a counter affidavit dated 30.11.2021 and Mr.Hasan Mohamed Jinnah reiterated the stand of the Government set out in the said counter affidavit.

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

7. Before advertng to the law relating to remission under Article 161 of the Constitution of India, it may be necessary to discuss the factual reasons stated in the impugned order.

8. The impugned order discusses the cases against Hariharan and in paragraph 5, the reasons for rejecting the case of Hariharan have been set out and the same read as under :

"5. In pursuance of the orders of the Hon'ble High Court, Madras orders third read above, the Government have examined the representation of the writ petitioner Tmt.N.Sarojini second read above seeking premature release of her son/life convict prisoner No.14895 Hariharan @ Hari S/o.Natarajan, confined in Central Prison, Cuddalore in consultation with the Director General of Police/Director General of Prisons and Correctional Services, Chennai-8 along with connected records and in terms of the guidelines



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framed in the G.O. first read above and decided to reject the same for the following reasons and order accordingly :-

- a) He, being a life convict prisoner cannot claim premature release as a matter of right as per para-5(viii) of the G.O.Ms.No.64, Home (Prison-IV) Department, dated 01.02.2018 since all these cases are examined on case to case basis as per para-5(v) of the Government order.
- b) He was convicted in multiple murders of heinous nature involving criminal conspiracy and was also involved in various forgery incidents. Therefore, the point of reformation and whether his conduct will be adorable to the society on his release was found questionable. Moreover his prison behaviour is not satisfactory as required under para 5(II) (B) (2) in G.O.Ms.No.64, Home (Prison-IV) Department, dated 01.02.2018 due to violations of prison rules by him prior to the crucial date for consideration of his premature release.

(BY ORDER OF THE GOVERNOR)

S.K.PRABAKAR
ADDITIONAL CHIEF SECRETARY TO GOVERNMENT"

9. Mr.Ravikumar took us through the interim order dated 21.06.2019 that was passed by a Division Bench of this Court, in the earlier proceedings in H.C.P.No.1227 of 2019, in which, the Division Bench had directed the Government to answer, inter alia, the following question :

"c. Why the similarly placed co-accused Mr.Samikannu @ Sami was granted permission and released prematurely on 12.06.2018 whereas the petitioner's son has not been granted so far ?"

In response to the above, the Deputy Secretary to the Government had filed a status report dated 30.07.2019, wherein, the following answer to the above question has been given :

"In the instant case, life convict Hariharan was the master mind behind the criminal conspiracy in connection with Additional District Sessions Judge Fast Track Court I, Chennai in S.C.No.87/2003, dated 19.04.2004 (sic 19.02.2004) and Additional District Sessions Judge Fast Track Court I, Chennai in S.C.No.206/2003, dated 19.04.2004 and awarded life imprisonment under Section 120-B of Indian Penal Code. Whereas, the life convict Sami @ Samikannu was not awarded life imprisonment under Section 120-B. In



view of that the case of life convict Samikannu @ Sami was considered for premature release and released prematurely."

However, H.C.P.No.1227 of 2019 was dismissed by a Division Bench of this Court vide order dated 27.02.2020, following the judgment of the Supreme Court in Home Secretary (Prison) and Others Vs. H.Nilofer Nisha [(2020) 14 SCC 161], wherein, it was held that a writ of habeas corpus cannot be maintained for seeking premature release and only a writ petition can be maintained. Therefore, the petitioner filed W.P.No.7963 of 2020, for a mandamus, which has already been adverted to in paragraph 2.5 (supra).

10. In its counter affidavit, the State Government has taken a specific stand that the case of Samikannu does not stand on the same footing as that of the petitioner's son Hariharan. At paragraph 13 of its counter affidavit, it has been averred as under :

"13. With regard to the averments made in paragraphs 14, 15 and 16 of the affidavit, it is submitted that, the life convict prisoner Sami @ Samikannu was not awarded with life imprisonment under Section 120-B and the petitioner's son cannot be equally placed with co-accused Samikannu. In view of that, the case of life convict Samikannu @ Sami was considered and released prematurely. ..."

In view of the aforesaid, the plea that the case of Hariharan was similar to that of Samikannu is clearly unfounded. Once it is found that Hariharan and Samikannu are not similarly placed, it would be asking the Court to scale the heights of perversity by treating unequals equally and ordering the release of Hariharan. Hence, the sheet anchor of Mr.Ravikumar's submission founded on the plea of discrimination and violation of Articles 14 and 21 of the Constitution of India is clearly without substance.

11. The scope of judicial review of an order rejecting the case of a convict prisoner under G.O.64 was elaborately considered by a Division Bench of this Court in Sikkander Vs. State [2021 SCC Online Mad 6586], in which, one of us (PNPJ), was a member. Under our Constitutional scheme of things, it is the judiciary which is vested with the power to adjudicate the culpability or otherwise of an accused person. The judicial function ends with the pronouncement of sentence. It is then the function of the executive to carry the sentence into effect. The exercise of Constitutional power to grant remission merely abridges the execution of the sentence and does not alter or wipe out the judgment of conviction and sentence by the Court. The classic exposition on the point is found in the decision of Sutherland, J. in U.S. Vs. Benz [75 L Ed 354], wherein, it is observed as under:



"The judicial power and the executive power over sentences are readily distinguishable. To render judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment, but does not alter it qua a judgment."

Nevertheless, it is well settled that the exercise of Constitutional power to grant remission by the President under Article 72, or, by the Governor under Article 161, is not beyond judicial scrutiny. In *Epuru Sudhakar Vs. State of Andhra Pradesh* [(2006) 8 SCC 161], the Supreme Court held that judicial review of an order under Article 72/161 of the Constitution was permissible on 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."

12. It is also well settled that a convict prisoner has no fundamental or statutory right to be released prematurely. Indisputably, the case of the petitioner's son Hariharan falls under paragraph 5 (II) of G.O.64. A close examination of the said paragraph reveals that it prescribes certain objective criteria of eligibility, coupled with certain subjective standards of suitability. For instance, prisoners who are convicted and sentenced to the offences set out in paragraphs 5 II (A) and (B) or whose cases fall under Section 435(2) Cr.P.C. are straightaway out of the purview of G.O.64 as they do not meet the objective criteria of eligibility. The only rider is where the convict prisoner has served out his sentence for the offences set out in paragraph 5 II(2) (A) and (B) before the cut-off date i.e., 25.02.2018.

13. Once the convict prisoner has crossed the objective criteria of eligibility, his case must then be tested with reference to the criteria of suitability prescribed under paragraph 5(II)(1), (2), (4), (5) and (6). To facilitate an assessment of the suitability of release of a convict prisoner, the Government have created a second level/District Committee headed by the Superintendent of Prisons of the Central Prison concerned. The recommendations of the second level committee are



scrutinized by the Range Inspector General of Prisons and the Regional Probation Officer before being forwarded to the State level committee headed by the Inspector General of Prisons. These recommendations form the material based on which the executive tenders its advice to the Governor for release of eligible prisoners under G.O.64.

14. The District and State Level Committees serve as fact-finding bodies to collect data and provide intelligence inputs in order to enable the Cabinet to take an informed decision to advise the Governor on releasing or refusing to release a convict under G.O.64. As was pointed out in Sikkander (supra), the recommendations of these Committees do not constitute binding edicts on the Cabinet or on the Governor, while exercising power under Article 161 of the Constitution. Therefore, the contention of Mr.Ravikumar that the Probation Officer has given a report in favour of Hariharan is clearly of no consequence, especially in view of the fact that the State level committee had not recommended his case, as could be seen from the proceedings enclosed in page 84 of the typed set of papers.

15. Having examined the impugned order, and the material placed on record, we also find that Hariharan was involved in certain prison offences and his behaviour in prison was also not found satisfactory. The details are set out in paragraph 13 of the counter affidavit which run thus :

"Further, it is submitted that, the following prison offences are committed by the petitioner's son during his incarceration :

Date	Nature of offence	Punishment awarded
24.01.2008	Not allowed to search his cell and quarrelled with searching team	Prohibited for one month interview
07.03.2013	A cell phone with broken battery was seized from the prisoner. And he denied to accept the complaint against him	Forfeiture of all prison privileges for four months and prohibited from interview for two months

14. It is further submitted that, the report of Probation Officer mainly consists of crime history and its consequences, convict behaviour outside prison



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while on leave, field verification report etc. The behaviour of the life convict is collected from the records given by the concerned Superintendent of the Central Prison. While pursuing the records submitted by the Superintendent, Central Prison, Cuddalore it is found that, the petitioner's son/life convict prisoner No.14895, Hariharan @ Hari, Son of Natarajan has involved in the above prison offences. Hence, the contention of the petitioner that, her son was not involved in any prison offences and maintaining good conduct in the prison is not true as devoid of merits."

The aforesaid observations cannot be wished away as irrelevant, especially since satisfactory behaviour of the prisoner is a relevant criterion explicitly prescribed in paragraph 5(II)(1) of G.O.64.

16. It is a misnomer on the part of the petitioner to say that the release is under G.O.64 because, G.O.64 only prescribes the parameters for consideration and recommending the cases of convict prisoners, on a case-by-case basis to the Government for premature release and thereafter, it is for the Cabinet to recommend or not to recommend the case of a convict prisoner to the Governor for release under Article 161, *ibid*. Even assuming for a moment that Samikannu was wrongly released, that does not mean that Hariharan should also be so released because, negative equality is alien to Constitutional law. In this context, it may be profitable to refer to the following passage from the judgment of the Supreme Court in *R.Muthukumar and Others Vs. Chairman and Managing Director, TANGEDCO and Others* [2022 SCC OnLine SC 151]:

"28. A principle, axiomatic in this country's Constitutional lore is that there is no negative equality. In other words, if there has been a benefit or advantage conferred on one or a set of people, without legal basis or justification, that benefit cannot multiply, or be relied upon as a principle of parity or equality."

(emphasis supplied)

17. That apart, the trial court and this Court, in appellate stage, have found that Hariharan was the mastermind behind the entire plot to kidnap and murder M.K.Balan in a gruesome manner. Hariharan has another life sentence also to his credit in S.C.No.206 of 2003 on the file of the Additional District and Sessions Court (FTC-I), Chennai, for murder and abduction. This Court has also affirmed the conviction and sentence vide its judgment dated 21.11.2008 in CrI.A.No.715 of 2004.



18. By no stretch of imagination could these aspects be termed as irrelevant or extraneous while declining to exercise power under Article 161, *ibid.* keeping in mind the interests of the society at large and the family of the victims. At this juncture, it is worth referring to a perceptible passage from the concurring view of Fazal Ali, J. in the Constitution Bench judgment in *Maru Ram Vs. Union of India* [(1981) 1 SCC 107], which reads as under:

"79. The question, therefore, is -- should the country take the risk of innocent lives being lost at the hands of criminals committing heinous crimes in the holy hope or wishful thinking that one day or the other, a criminal, however dangerous or callous he may be, will reform himself. Valmiki's are not born everyday and to expect that our present generation, with the prevailing social and economic environment, would produce Valmiki's day after day is to hope for the impossible."

19. Once material is shown to exist, it is settled law that the Governor is the sole judge of the sufficiency of facts before him. Sufficiency of facts is beyond the ken of judicial review under Article 226, *ibid.* [vide *Epuru Sudhakar (supra)*]. We must also bear in mind that we are testing the order of a high Constitutional functionary which must enjoy a degree of deference, unless the order is shown to be vitiated by any of the infirmities pointed out by the Supreme Court in *Epuru Sudhakar (supra)*.

20. We have already noted in paragraph 10 (*supra*) that Mr. Ravikumar's principal contentions founded on the plea of discrimination and arbitrariness are without any substance. Having independently examined the impugned order on the touchstone of the law laid down in *Epuru Sudhakar (supra)*, we are of the considered view that no ground whatsoever has been made out for interference under Article 226, *ibid.*

Ex consequenti, the writ petition fails and is accordingly dismissed. Costs made easy. Connected Miscellaneous Petition stands closed.

P.N.PRAKASH, J.
AND
A.A.NAKKRIAN, J.

(Order of the Court was made by P.N.PRAKASH, J.)

After the orders were pronounced, Mr. G. Ravikumar, learned counsel for the petitioner submitted that an observation may be made by this Court to the effect that this order will not be an impediment for the Government to consider the case of the



convict prisoner for premature release under subsequent Government Orders, if any.

Accepting the above submission of Mr.G.Ravikumar, we make it clear that, not only in this case, but also in all other cases, where similar orders have been passed, such orders shall not be an impediment for the Government to consider the cases of the convict prisoners for premature release under subsequent Government Orders, if any.

Sd/-
Assistant Registrar (CS-VII)

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Sub Assistant Registrar

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To

1. The Additional Chief Secretary to Government
Department of Home (Prison IV)
Fort St. George
Chennai 600 009
2. The Superintendent
Central Prison
Cuddalore
3. The Public Prosecutor
High Court, Madras.

+2ccs to M/s.G.Ravikumar, Advocate, S.R.No.28839

W.P.No.18204 of 2020

KJ(CO)
SU(16/05/2022)