



WEB COPY



W.P. No. 24601 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 11.11.2022

PRONOUNCED ON : 14.12.2022

CORAM:

THE HONOURABLE Mr.JUSTICE P.N.PRAKASH

AND

THE HONOURABLE Mr.JUSTICE RMT.TEEKAA RAMAN

W.P.No.24601 of 2022 & W.M.P. No.23575 of 2022

A.Faseela

Petitioner

v

1 The State represented by its
The Deputy Inspector General of Prison
Coimbatore Range
Coimbatore Central Prison
Coimbatore 641 018

2 The Superintendent
Central Prison
Coimbatore 641 018

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 bearing No.8934/Tha.Ku.3/2022, dated 11.05.2022, passed by the 2nd respondent and quash the same and consequently, direct the respondents to grant ordinary leave for 40 days without escort to the detenu, Mohamed Azam, S/o.John Basha, aged about 44 years, convict No.10709, confined in the Central Prison, Coimbatore.



W.P. No. 24601 of 2022

For petitioner	Dr.S.Manoharan
For respondents	Mr.R.Muniyapparaj Additional Public Prosecutor

ORDER

P.N.PRAKASH, J.

The petitioner is the wife of one Mohamed Azam, S/o John Basha (Convict Prisoner No.10709), who is presently lodged in the Central Prison, Coimbatore.

2 The petitioner addressed a representation dated 05.05.2022 seeking a month's ordinary leave for her husband under the Tamil Nadu Suspension of Sentence Rules, 1982 (for short “the Sentence Suspension Rules”) on the ground that she suffers from an eye ailment and requires the presence of her husband to mobilise funds for her eye treatment as well for eking out their family's livelihood, in terms of Rule 20(i) and (iv), *ibid*. The said representation has been rejected by the Superintendent of Prison, Central Prison, Coimbatore, the second respondent, by order dated 11.05.2022, challenging which, the present writ petition has been filed, besides seeking a direction to the respondents to grant 40 days ordinary



W.P. No. 24601 of 2022

leave to Mohamed Azam.

WEB COPY 3

Heard Dr. S. Manoharan, learned counsel for the petitioner and Mr. R. Muniyapparaj, learned Additional Public Prosecutor appearing for the State.

4 The learned counsel for the petitioner submitted that all the earlier Benches, both Single Benches and Division Benches, except this Division Bench, have been granting leave munificently. In support of the said submission, he placed reliance on the following orders:

- i. M. Uma Manickam v State (Single Bench)¹
- ii. A. Fathima v The State (Single Bench)²
- iii. Pooranam v The Superintendent, Central Prison, Madurai (Division Bench)³
- iv. Mohammed Ghouse v The State (Division Bench)⁴
- v. Zubaida Begum v The State (Division Bench)⁵
- vi. R. Chellammal v The State (Division Bench)⁶

5 He placed further reliance on the order of the Supreme Court in **Mohammed Shamsuddin v The State of Rajasthan**⁷, wherein, the following passage from the judgment of the Supreme Court in **Asfaq v**

1 W.P. No.25184 of 2014 decided on 15.10.2014

2 W.P. No.980 of 2015 decided on 29.01.2015

3 W.P. (MD) No.8089 of 2013 decided on 20.08.2013

4 H.C.P. No.1673 of 2018 decided on 27.08.2018

5 H.C.P. No.1937 of 2020 decided on 20.11.2020

6 W.P. No.11939 of 2022 decided on 29.08.2022

7 W.P. (Crl.) No.235 of 2018 decided on 17.01.2019



W.P. No. 24601 of 2022

State of Rajasthan⁸, has been quoted:

WEB COPY

“17.The theory of criminology, which is largely accepted, underlines that the main objectives which a State intends to achieve by punishing the culprit are : deterrence, prevention, retribution and reformation. When we recognise reformation as one of the objectives, it provides justification for letting of even the life convicts for short periods, on parole, in order to afford opportunities to such convicts not only to solve their personal and family problems but also to maintain their links with the society. Another objective which this theory underlines is that even such convicts have right to breathe fresh air, *albeit* for (*sic* short) periods. These gestures on the part of the State, along with other measures, go a long way for redemption and rehabilitation of such prisoners.....”

6 It is true that several Single and Division Benches have been granting parole straightaway, the correctness or otherwise of which, we do not want to comment on the ground of judicial propriety and discipline. We closed our eyes and pondered over the aforesaid submission of Dr.Manoharan. The question that arises for consideration is, can the Constitutional Court, in the purported exercise of the power under Article 226 of the Constitution of India, take over the administration of the prison and arrogate to itself, the powers vested on the various prison functionaries like Superintendent of Prison, Deputy Inspector General of Prison, Inspector General of Prison and Government under the Sentence Suspension Rules?

⁸ (2017) 15 SCC 55



W.P. No. 24601 of 2022

The answer to the above question is an emphatic “No”. The power under Article 226 of the Constitution of India can be exercised in an area which is not governed by any law. A Full Bench of this Court, in **State v Yesu**⁹, has held that in the State of Tamil Nadu, the Minister cannot grant parole and any temporary release of a convict prisoner can be granted only under the Sentence Suspension Rules. After the said decision, the Ministers concerned stopped granting parole. What applies to the Ministers would equally apply to this Court as well. We are bound by the Full Bench judgment in **Yesu** (*supra*), the attention of which, seemingly, was unfortunately not drawn to the other Benches which were granting parole in habeas corpus petitions.

7 Coming to the order dated 11.05.2022 which is assailed in this writ petition, the second respondent has assigned the following two reasons for rejecting the petitioner's application for leave for her husband:

- The appeal that has been filed by the convict prisoner in S.L.P. (Crl.) No.24293 - 24297 of 2010 has been pending;
- He was found in possession of a cell phone on 21.01.2022 in violation of Prison Rules, on account of which, he was awarded a penalty of loss of all privileges for three months, which disentitles him to ordinary leave

⁹ 2011 (5) CTC 353



W.P. No. 24601 of 2022

under Rule 21(k) of the Sentence Suspension Rules, 1982.

WEB COPY

8 Dr. Manohar contended that Rule 35 of the Sentence Suspension Rules would apply only to cases which are pending trial and it would not apply to appeal. In support of this contention, he placed reliance on **Uma Manickam** (*supra*), wherein, the judgment of the Supreme Court in **Nanavati v State of Mumbai**¹⁰ was considered and distinguished. In order to appreciate the aforesaid contention, it may be relevant to extract paragraphs 5 and 6 of **Uma Manickam** (*supra*).

“5. But I do not think that the decision of the Supreme Court in *Nanavati v. State of Maharashtra*, AIR 1961 SC 112 would apply. The appeal is pending as against the conviction, at the instance of the accused. The appeal is not against acquittal. It was not done by the State.

6. If an appeal is pending against acquittal or if an appeal is pending for enhancement of penalty, then, the convict cannot be granted leave. In any appeal filed by the accused arising out of conviction, there are only three things that could happen, namely, (i) the dismissal of the appeal outright (ii) allowing of the appeal in total or (iii) allowing of the appeal in part and the reduction of the sentence. Therefore, the grant of leave would have no nexus to any of the three alternatives.”

9 A reading of the above shows that the learned single judge has held that leave can be granted only in an appeal against acquittal and not in

10 AIR 1961 SC 112



W.P. No. 24601 of 2022

an appeal against conviction. With due respect, we are unable to persuade to subscribe ourselves to the aforesaid view, because, in an appeal against acquittal, the prisoner will be outside the prison and not inside the prison for seeking leave under the Sentence Suspension Rules. On the contrary, in **Navavati** (*supra*), the Supreme Court has very clearly held that as follows:

“22. 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 head of the Executive, because the judiciary has no 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



W.P. No. 24601 of 2022

WEB COPY

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)

10 Further, Rule 2(4) of the Sentence Suspension Rules reads as under:

“(4) “sentence” means a sentence as finally fixed on appeal or revision or otherwise and 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)

11 Thus, from a conjoint reading of the law laid down in **Nanavati** (*supra*) and the definition of the word “sentence”, it is clear that the executive authorities cannot release a prisoner on leave, if the judiciary is in seizin of the case.

12 In fact, in **Manokaran vs. State of Tamil Nadu**¹¹, 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

¹¹ (2010) 15 SCC 562



W.P. No. 24601 of 2022

observations of the Supreme Court in the said order dated 01.10.2002:

WEB COPY

“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.866/2000, 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 endt.No.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



WEB COPY



W.P. No. 24601 of 2022

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 When this is the legal position, the executive authorities cannot grant leave when the appeal of the convict prisoner is pending before the Supreme Court. It is always open to the convict prisoner to approach the Supreme Court seeking suspension of sentence and bail. In our view, Rule 35 of the Sentence Suspension Rules would not apply to the present case, inasmuch as, it is not the case of the Prison authorities that the convict prisoner is required to be taken to a Court for a trial. It is the specific case of the Prison authorities that when the convict prisoner's appeal is pending before the Supreme Court, they cannot grant him ordinary leave.

15 As regards the eligibility for leave, the counter affidavit dated 28.09.2022 reads as follows:

“9. I further submit that the averments contained in para 13 &



WEB COPY



W.P. No. 24601 of 2022

14, I submit that the amendment made in Tamil Nadu Suspension of Sentence Rules, 1982 Rule No.21(k) (G.O. (Ms) No.205 Home (Pri-5) Department dated 25.04.2022), it states that “Prisoners, whose work and conduct have not been good during the preceding twelve month shall not be granted leave”. Accordingly Convict No.10709 Mohammed Azam S/o John Basha is not eligible as his conduct in this prison is not good as he committed Prison Offence on 21.01.2022 as follows:

<i>S.No.</i>	<i>Date</i>	<i>Nature of offence committed</i>	<i>Punishment awarded</i>
1	21.01.2022	He was in possession of mobile phone with him in 10 th block, which was seized during searching	Prison Privileges for three months was curtailed.

16 Further, Rule 3 of the Sentence Suspension Rules states that leave is a concession and not a right. Superadded, in **State v H. Nilofer Nisha**¹², the Supreme Court has held in unequivocal terms that parole is not a right, but is only a privilege. When the convict prisoner has been found in possession of a cell phone in violation of the Prison rules and has been awarded the punishment of loss of all privileges for three months for such violation, he cannot ask for leave as a matter of right. Thus, looking at from any angle, this writ petition is devoid of merits.

¹² (2020) 14 SCC 161



WEB COPY



W.P. No. 24601 of 2022

P.N.PRAKASH, J.
and
RMT.TEEKAA RAMAN, J.

cad

In view of the foregoing discussion, this writ petition fails and is accordingly dismissed. Costs made easy. Connected W.M.P. stands closed.

[P.N.P., J.] [T K R, J.]

14.12.2022

cad

To

1. The Deputy Inspector General of Prison
Coimbatore Range
Coimbatore Central Prison
Coimbatore 641 018
2. The Superintendent
Central Prison
Coimbatore 641 018
3. The Public Prosecutor
Madras High Court
Chennai 600 104

W.P.No.24601 of 2022