



WP(MD)No.24205 of 2022

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 26.10.2022

CORAM

THE HON'BLE MRS JUSTICE J. NISHA BANU

AND

THE HON'BLE MR JUSTICE N. ANAND VENKATESH

W.P.(MD)No.24205 of 2022

Shanmugavalli

... Petitioner

Vs.

1.The Superintendent of Prison,
Madurai Central Prison,
Madurai - 16.

2.The Inspector of Police,
Avanaiyapuram Police Station,
Madurai,
Madurai District.

...Respondents

PRAYER: Petition - filed under Article 226 of the Constitution of India to
issue a Writ of Certiorarified Mandamus, to call for the records relating to



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the impugned order passed by the first respondent by his proceedings No. 16623/Taku 2/ 2022, dated 29.09.2022 and to quash the same as illegal and consequently, direct the first respondent to grant one month ordinary leave under the provisions of the Tamil Nadu Suspension of Sentence Rules 1982, to the petitioner husband namely, Chinna Mani, C.P.No.5991, presently logged in Prison, Madurai.

For Petitioner : Mr.K.Mahendran

For Respondents : Mr.A.Thiruvadi Kumar

Additional Public Prosecutor

ORDER

J. NISHA BANU,J.

and

N. ANAND VENKATESH,J.

This Writ Petition has been filed challenging the impugned proceedings of the first respondent, dated 29.09.2022, wherein the ordinary leave sought for by the petitioner, who is the wife of the detenu, was



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rejected by the first respondent on the ground that the appeal is pending before the Apex Court in Criminal Appeal No.488 of 2020 and therefore, there is a bar under the Tamil Nadu Suspension of Sentence Rules, 1982.

2. The learned counsel for the petitioner submitted that the first respondent went wrong in rejecting the ordinary leave sought for, mainly on the ground that the appeal is pending before the Apex Court. According to the learned counsel for the petitioner, such pendency of appeal by itself is not a ground to reject the leave. To substantiate his submissions, the learned counsel relied upon the judgment passed by this Court in **W.P.(MD) No.8089 of 2013 in Pooranam Vs. The Superintendent, Central Prison, Madurai, dated 20.08.2013**. The learned counsel also relied upon the judgment passed in **W.P.(MD) No.8300 of 2015 in Murugeswari and another Vs. The State of Tamil Nadu and others, dated 18.08.2015**, wherein, the earlier judgment was followed by this Court.



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3. The learned counsel for the petitioner by placing reliance on the above two judgments submitted that the facts in the above case is very similar to the facts of the case on hand. That apart, this Court had directed the Additional Director General of Prisons and the Superintendent of All Central Prisons and Special Prisons for Women, to grant such leave in accordance with the Rules, even in cases where appeal is pending before the Apex Court.

4. Per contra, the learned Additional Public Prosecutor appearing on behalf of the respondents submitted that the contention raised by the learned counsel for the petitioner is directly covered by the latest judgment of this Court in **L.Wasib Khan Vs. The State rep. by its Deputy Inspector General of Prisons (Chennai Range) Gandhi Irwin Road, Egmore, Chennai and others** reported in **2022-1-L.W. (Crl.) - 416**. The learned Additional Public Prosecutor also submitted that once an appeal has been filed before the Apex Court and the same is pending, the respondents do not have the right or jurisdiction to grant leave to the detenu and if at all



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the detenu requires any leave / parole, the detenu has to only approach the Apex Court and the detenu cannot be permitted to knock the door of this Court.

5. We have carefully considered the submissions made on either side and the judgment cited by them.

6. The judgments that were brought to the notice of this Court by the learned counsel for the petitioner did not deal with the earlier observations made by the Apex Court in **Manoharan Vs. State of Tamil Nadu**, wherein the Apex Court came down heavily on the Government for granting leave during pendency of appeal before the Apex Court. This was noted in the judgment that was cited by the learned Additional Public Prosecutor and for proper appreciation, the relevant portions in the judgment are extracted hereunder :-

"9 Now, coming to reason (b) for rejection of leave to Wasib Khan, viz., pendency of appeal before the High Court, this issue is no longer res



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integra in the light of the authoritative pronouncement of the Constitution Bench of the Supreme Court in K.M.Nanavati vs. State of Bombay [AIR 1961 SC 112] and in view of the definition of the word 'sentence' in Rule 2 of the Sentence Suspension Rules.

10 Now, let us examine as to what the Supreme Court has held in Nanavati (supra). The paragraph relevant for our discussion is 21 and the same reads thus:

21. 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



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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 seizin 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



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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 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)

The aforesaid passage was relied on by a Division Bench of this Court in K.Rajamanickam and Others vs. State [2015 (3) MWN (Cr.) 379 (DB)] which was rendered way back on 03.01.1991.

11. Sections 426 and 401 of Cr.P.C. 1898, are in pari materia with Sections 389 and 432 respectively of Cr.P.C. 1973. The legal principle that has been set out in Nanavati (supra) is that when the appellate Court has the power to grant suspension of sentence and bail, pending appeal, the executive



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power of the State cannot extend to grant parole or leave or suspension of sentence. Pertinent it is to state that the Sentence Suspension Rules has been framed under Section 432(5) Cr.P.C. Further, in consonance with the law laid down by the Supreme Court in Nanavati (supra), the definition of the word sentence in Rule 2(4) of the Sentence Suspension Rules has been designed 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)

12. Superadded, during the hearing of the case in Manokaran vs. State of Tamil Nadu [Crl.A. No. 866 of 2002] on 01.10.2002, 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 observations of the Supreme Court in the said order



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dated 01.10.2002:

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.866/2002, 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



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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 prisoners 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 should therefore act in accordance with the above orders of the Supreme Court of India and should desist from releasing any



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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. In view of the above, Wasib Khan cannot be granted leave under the Sentence Suspension Rules and therefore, the second reason given in the impugned order stands upheld."

7. It is clear from the above that there was an earlier practice whereby grant of parole/leave was considered by the Jail Superintendents, even during the pendency of the appeal before the Apex Court. However, when this practice was brought to the notice of the Apex Court, the Apex



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Court got an undertaking from the Government that they will henceforth stop the practice. Accordingly, an office memo was also issued by the Assistant Director General of Prisons, on 21.10.2022. In view of the same, this Court exercising its jurisdiction under Article 226 of the Constitution of India, cannot issue a direction to the respondents which will go as against the undertaking given by them before the Apex Court. Issuing such directions, will not augur well for judicial discipline. Hence, we are inclined to follow the Division Bench judgment of this Court in **L.Wasib Khan's case**, stated supra.

8. In the light of the above discussion, we do not find any ground to interfere with the impugned proceedings of the first respondent and accordingly, this Writ Petition stands dismissed. No costs.

(J.N.B.,J.) (N.A.V.,J.)
26.10.2022

Index : Yes/No
Internet : Yes
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- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
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