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W.P.No.24926 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.09.2023

Coram

THE HONOURABLE MR.JUSTICE **M.SUNDAR**
and
THE HONOURABLE MR.JUSTICE **R.SAKTHIVEL**

W.P.No.24926 of 2023

V.Chithra

.. Petitioner

VS

- 1.The State rep. By its
The Home Secretary to Government,
Prison Department,
Secretariat, Chennai – 9.
- 2.The Director General of Prisons,
No.2, Whannels Road, Egmore, Chennai – 8.
- 3.The Superintendent of Prison,
Coimbatore Central Prison, Gandhipuram,
Coimbatore – 641 018.

.. Respondents

Petition filed under Article 226 of the Constitution of India praying for issuance of a writ of certiorarified mandamus to call for the records relating to the impugned order in No.14826/Tha.Ku.3/2023 dated 20.07.2023 passed by the third respondent, quash the same and consequently direct the third respondent to grant 40 days leave to the convict Mr.Viswanathan @ Vijayan , S/o.Rajagopal (CT No.2807).

For Petitioner : Mr.M.Mohamed Saifulla

For Respondents : Mr.E.Raj Thilak,
Additional Public Prosecutor



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ORDER

[Order of the Court was made by M.SUNDAR, J.]

This order will now dispose of the captioned writ petition.

2. This order has to be read in conjunction with and in continuation of earlier proceedings made in the previous listing on 23.08.2023 which reads as follows:

'Captioned writ petition has been filed assailing an order dated 20.07.2023 bearing reference No.14826/jF3/2023 made by the third respondent rejecting 40 days ordinary leave sought for writ petitioner's spouse one Thiru.Viswanathan @ Vijayan, Son of Rajagopal [Convict No.2807] now lodged in Central Prison, Coimbatore.

2. Leave has been sought on the ground that convict prisoner has undergone renal transplant as regards one kidney and is now under dialysis with regarding to the other. Mr.M.Mohamed Saifulla, learned counsel for petitioner adverting to the writ petitioner's representation dated 13.07.2023 (page 19 of the typed-set) reiterated the contents thereat.



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3. *Issue notice.*

4. *Mr.E.Raj Thilak, learned State Additional Public Prosecutor accepts notice for all the three respondents and requests for some time to produce the medical records of the convict prisoner.*

List on 01.09.2023.'

3. The aforementioned earlier proceedings captures all essentials that are imperative for appreciating this order and therefore we are not setting out the same again and burdening this order with the details.

4. Suffice to say that the aforementioned earlier proceedings dated 23.08.2023 shall now be read as an integral part and parcel of this order.

5. Adverting to earlier proceedings, Mr.E.Raj Thilak, learned State Additional Public Prosecutor placed before us a communication dated 31.08.2023 from the Senior Assistant Surgeon, Central Prison Dispensary, Coimbatore and a scanned reproduction of the same is as follows:



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7. 'The order dated 20.07.2023 bearing reference No.14826/Tha.Ku.3/2023 made by the third respondent' rejecting 40 days ordinary leave for the writ petitioner's spouse Thiru.Viswanathan @ Vijayan, S/o.Rajagopal (CT No.2807) shall hereinafter be referred to as the 'impugned order' for the sake of convenience and clarity.

8. A careful perusal of the impugned order brings to light that leave sought for writ petitioner's spouse has been rejected on the ground that the cooling period which has been set out in sub-rule (3) of Rule 22 of 'The Tamil Nadu Suspension of Sentence Rules, 1982' [hereinafter 'said Rules' for the sake of convenience and clarity] , which reads as follows:

'Rule 22. Eligibility for ordinary leave:

(1)
(a) to (c).....

(2).....
(a) to (c).....

.....
(3) *The prisoner shall be granted the second or subsequent spell of ordinary leave not exceeding the period mentioned in sub rule (2) above, after the completion of one year of imprisonment from the date on which he returns from the last ordinary leave.'*



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9. The convict prisoner was granted 40 days ordinary leave in two spells of 06.04.2023 to 27.04.2023 and 29.04.2023 to 20.05.2023 and the one year cooling period set out in sub-rule (3) of Rule 22 of said Rules has not elapsed. A careful perusal of said Rules makes it clear that there are two kinds of leave viz., emergency leave and ordinary leave (Rule 5 of said Rules). Grant of emergency leave and eligibility for the same are set out in Rules 6 and 7 of said Rules. Rule 10 makes it clear that the Superintendent of Prison (third respondent in the case on hand) is the authority who is vested with the power to grant emergency leave. As regards ordinary leave, Rule 20 of said Rules is an adumbration of the grounds on which ordinary leave can be granted and Rule 22 (amended on 25.04.2022) sets out the ground for eligibility for ordinary leave. To be noted, sub-rule (3) of Rule 22 of said Rules has already been extracted and reproduced supra. Be that as it may, vide Rule 19 of said Rules, the Deputy Inspector General of Prisons is the competent authority with regard to grant of ordinary leave.

10. The first point legally grinds the impugned order as the same has been made by the third respondent (Superintendent of Prison) who has the authority to grant only emergency leave. As



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what has been dealt with is ordinary leave as per the said Rules, it should have been sent to the Deputy Inspector General of Prisons.

11. Be that as it may, as the prayer is not just for certiorari as it is for certiorarified mandamus, we need to also consider whether the convict prisoner is entitled to leave in the hands of this Court. In other words, merely interfering with the impugned order and setting aside the same by issuing a writ of certiorari will not suffice as the prayer is for certiorarified mandamus.

12. We now move on to the mandamus limb of the prayer after saying that the impugned order deserves to be set aside in certiorari legal drill. The ground on which leave has been sought is renal transplant. The earlier proceedings dated 23.08.2023 and a medical report in the form of communication make it clear that it is now a life saving measure for the convict prisoner and he is living on one transplanted kidney, donor being his wife (writ petitioner before us). This means that leave is sought on the ground of serious illness for the convict prisoner. We find that it is Rule 6 of said Rules which deals with serious illness. It deals with serious illness of relatives of convict prisoner viz., father, mother, wife, husband, son, daughter, full brother etc., we are of the view that as emergency leave can be granted on the ground of serious illness that should be



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made available for serious illness of the convict prisoner also. In this regard, we deem it appropriate to advert to the submission of learned Prosecutor that as regards convict prisoners, it is the responsibility of the prison authorities to take care of their good health and proper medical attention as and when it becomes necessary and that is the reason why serious illness of convict prisoner has not been included in the adumbration in Rule 6. Though we find this argument and statement to be fairly tenable, we leave it open for being considered in another case where it becomes imperative for arriving at a conclusion as in the case on hand, it is a super speciality medical requirement i.e., renal transplant and now the convict prisoner has to be under the management of a Nephrologist. This requires super speciality care and equipment and the prison hospital will not be able to readily deal with this kind of super speciality medial requirement. In this regard, we also remind ourselves that a person and his fundamental rights do not part ways at the prison gates. To put it differently, a prisoner is also entitled to take medical treatment in a hospital of his choice as long as he is able to afford the same.

13. Therefore, we treat the mandamus limb of the prayer as a prayer for emergency leave. We find that for the reasons alluded to /delineated supra, the convict prisoner is entitled to 40 days leave,



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in this case, it would be emergency leave.

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14. Before we write the operative portion of the order, we make it clear that this order will not serve as precedent in all and every case of illness of convict prisoner. In other words, this order is made in the peculiar facts and circumstances of the case and the nature of the illness and the nature of the medical treatment which the convict prisoner requires.

15. In the light of the narrative, discussion and dispositive reasoning thus far, we make the following order:

15.1 The impugned order dated 20.07.2023 bearing No.14826/Tha.Ku.3/2023 made by the third respondent is set aside;

15.2 The convict prisoner is granted 40 days leave without escort from 07.09.2023 10.30 a.m. to 16.10.2023 05.30 p.m.;

15.3 The convict prisoner shall report before the jurisdictional police station (we are informed that the jurisdictional police station is Perur Police Station, Coimbatore District) every Monday at 10.30 a.m.;

15.4 We direct the jurisdictional police to ensure



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that the convict prisoner spends minimum time in the police station as he has undergone renal transplant. In saying this, we have taken into account the requisite hygiene levels and possible infection in cases of this nature;

15.5 Convict prisoner shall utilise the leave only for the purpose for which it has been granted or in other words the convict prisoner shall not involve himself in any other activities which is outside the perimeter of the ground on which leave has been granted.

16. Captioned writ petition is disposed of in the aforesaid manner with the aforesaid directives. There shall be no order as to costs.

(M.S.,J.) (R.S.V.,J.)
01.09.2023

Index : Yes/No
Neutral Citation : Yes/No
mmi

P.S: Registry to forthwith communicate this order to Jail authorities in Central Prison, Coimbatore.

To

1.The Home Secretary to Government,



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Prison Department,
Secretariat, Chennai – 9.

2.The Director General of Prisons,
No.2, Whannels Road, Egmore, Chennai – 8.

3.The Superintendent of Prison,
Coimbatore Central Prison, Gandhipuram,
Coimbatore – 641 018.

4.The Inspector of Police,
Perur Police Station,
Coimbatore.

5.The Public Prosecutor,
High Court, Madras.

**M.SUNDAR, J.,
and**



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R.SAKTHIVEL , J.,

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