



W.P.No.27515 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.09.2023

CORAM

THE HONOURABLE MR.JUSTICE M.SUNDAR
and

THE HONOURABLE MR.JUSTICE R.SAKTHIVEL

W.P.No.27515 of 2023

Baskar
S/o.Balasundaram

.. Petitioner

Vs.

1. The State rep. by its
The Home Secretary to Government
Prison Department, Secretariat,
Chennai-600 009.
2. The Deputy General of Prisons
Chennai Range, Gandhi Irwin Road
CMDA Building, Egmore - 600 008.
3. The Superintendent of Prison
Central Prison at Puzhal-I
Thiruvallur District - 600 066.

..Respondents

Petition filed under Article 226 of the Constitution of India praying writ of Certiorarified Mandamus to call for the records in relating to the impugned order in No.7614/tha.ku.2/2023 dated 18.08.2023 passed by the 3rd respondent, quash the same and consequently, direct the 3rd respondent

Page Nos.1/12



W.P.No.27515 of 2023

to grant 40 days leave without escort to the convict / petitioner namely,
Mr.Baskar, son of Balasundaram (CT No.297).

For Petitioner : Mr.M.Mohamed Saifulla
For Respondents : Mr.E.Raj Thilak
Additional Public Prosecutor

ORDER

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

Captioned 'Writ Petition' [hereinafter 'WP' for the sake of brevity, convenience and clarity] has been presented in this Court on 12.09.2023.

2. Factual matrix in a nutshell is that writ petitioner one Thiru.Baskar, son of Thiru.Balasundaram is a Prison Inmate (CT No.297) now in Central Prison No.I, Puzhal, Chennai-600 066; that writ petitioner shall hereinafter be referred to as 'said prison inmate' for the sake of convenience and clarity; that sister of said prison inmate sent a 'representation dated 19.07.2023' [hereinafter 'said representation' for the sake of convenience and clarity] to the respondents in the captioned WP seeking 40 days ordinary leave for said prison inmate *inter alia* on the ground of failing health of her mother (said prison inmate's mother too); that according to said representation, it is an



W.P.No.27515 of 2023

extraordinary reason as it is imperative that said prison inmate is available for making arrangements to take care of his ailing mother in failing health; that said representation came to be rejected by an 'order dated 18.08.2023 bearing reference No.7614/tha.ku.2/2023 made by third respondent' [hereinafter 'impugned order' for the sake of convenience and clarity]; that impugned order has been made citing Rule 22(3) of 'the Tamil Nadu Suspension of Sentence Rules 1982' [hereinafter 'said Rules' for the sake of convenience and clarity] (wrongly mentioned as Rule 22(2) of said Rules in the impugned order) which says that one year of imprisonment should have elapsed between two spells of leave; that impugned order says that last spell of leave availed by said prison inmate is from 21.09.2022 to 01.11.2022; that assailing the impugned order [Certiorari limb] and seeking 40 days ordinary leave without escort [Mandamus limb], captioned WP with Certiorarified Mandamus prayer has been presented in this Court on 12.09.2023.

3. Mr.M.Mohamed Saifulla, learned counsel on record for writ petitioner, advertng to said representation and impugned order submits that



W.P.No.27515 of 2023

the reason i.e., ground on which ordinary leave has been sought has not been subjected to any disputation or contestation and therefore, Rule 22(3) of said Rules alone is the impediment, this is a case where Rule 4D exemption route should have been taken owing to the compelling ground but that has not been done.

4. Issue notice.

5. Mr.E.Raj Thilak, learned State Additional Public Prosecutor accepts notice for all three respondents.

6. Owing to the narrow compass on which captioned WP turns, main WP was taken up with the consent of both sides though captioned WP is listed in the Admission Board.

7. Learned Prosecutor, on instructions, submitted that Rule 22(3) of said Rules is an impediment as one year after completion of last spell of leave will elapse only one month from now and therefore the impugned



W.P.No.27515 of 2023

order has been correctly made considering the last spell. To be noted, as already alluded to supra, last spell of leave was from 21.09.2022 to 01.11.2022.

8. This Court carefully considered the submissions made on both sides and examined the case file, more particularly, said representation as well as impugned order. This Court is of the considered view that the prayer of writ petitioner (prison inmate) deserves to be acceded to i.e., answered in the affirmative and reasons are as follows:

(i) Impugned order has been made by third respondent but third respondent is not the authority, who can grant ordinary leave. To be noted, under the said Rules, third respondent vide Rule 10 of said Rules is the authority to grant emergency leave. It is further to be noted, emergency leave is vide Rule 6 of said Rules and two kinds of leave namely, ordinary leave and emergency leave have been set out in Rule 5 of said Rules. As regards ordinary leave, vide Rule 19 of said Rules vide Deputy Inspector General of Prisons i.e., jurisdictional Deputy



W.P.No.27515 of 2023

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Inspector General of Prisons is the authority to grant leave. To be noted, though not correctly described, for all practical purposes, it is the second respondent in the captioned WP. The impugned order has not been made by the officer who has been vested with the authority in this regard and therefore impugned order deserves to be interfered with and dislodged on this one ground;

(ii) This takes this Court to the mandamus limb of the prayer. As regards mandamus limb, as rightly pointed out by learned counsel for writ petitioner, reason i.e., ground on which leave has been sought has not been subjected to any dispute or contestation. This means that the only impediment is Rule 22(3) of said Rules;

(iii) This Court in *Bhuvaneswari* case [*Bhuvaneswari Vs. The Secretary and three others*] reported in **2023:MHC:3983** (Neutral Citation of this Court) *Pushpalatha* case [*Pushpalatha Vs. The State and two others*] reported in **2023:MHC:4244** (Neutral Citation of this Court) and in a



W.P.No.27515 of 2023

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catena of cases has repeatedly held that said Rules is a piece of Subordinate Legislation made by Executive in exercise of Rule making powers *inter alia* under Section 432(5) of 'The Code of Criminal Procedure, 1973 (2 of 1974)' [hereinafter 'Cr.PC' for the sake of brevity and clarity] and therefore, such Subordinate Legislation which has not even gone through Legislative grind in the Legislature cannot in any manner abridge much less denude Constitutional powers of this Court. In this regard, though rendered in the context of Section 43D(5) proviso of Unlawful Activities (Prevention) Act, 1967, we draw inspiration from *Vernon* case [*Vernon Vs. State of Maharashtra and another* reported in **2023 SCC OnLine SC 885 : 2023 LiveLaw (SC) 575**], wherein *K.A.Najeeb* principle [*Union of India Vs. K.A.Najeeb* reported in **2021 3 SCC 713**] that a statutory provision cannot constrict constitutional powers when it comes to liberty as laid down / reiterated by Hon'ble Supreme Court. To be noted UAPA is a Statute which has gone through the law making drill whereas in the case on hand we



W.P.No.27515 of 2023

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are dealing with a piece of Subordinate Legislation made by the Executive arm. In this view of the matter, we find that even the Executive has been vested with powers vide Rule 40 of said Rules to exempt any person from all or any of the provisions of said Rules. This only means that even this Subordinate Legislation i.e., said Rules is not non-negotiable. This is evident from the window provided vide Rule 40 of said Rules but it is not necessary for us to take Rule 40 route as we are exercising Constitutional powers cannot be abridged, much less denuded by a piece of Subordinate Legislation;

(iv) As regards the ground on which leave has been sought, the same undoubtedly gets neatly slotted under sub-clause (vii) of Rule 20 of said Rules. As already alluded to supra, the ground has not been subjected to any disputation or contestation. Therefore, it follows as a sequitur i.e., an inevitable sequitur that 40 days ordinary leave sought by said prison inmate is deserved to be granted;

(v) We find that said prison inmate has been granted



W.P.No.27515 of 2023

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leave on earlier occasions and on all occasions, leave period has passed without any untoward incident and said prison inmate has returned on the leave period elapsing. The details are as follows:

'427 days

Ordinary leave - 160 days

Government leave - 60 days

Emergency leave - 207 days'

To be noted, on earlier occasion, said prison inmate has availed leave without escort;

(vi) It is also noticed that said prison inmate has served 17 long years i.e., 17 years, four months and one day including the remand set off period as on 19.09.2023. This is also weighed in favour of, we acceding to mandamus limb of prayer on the teeth of Rule 22(3) of said Rules;

(vii) The aforementioned one year cooling period qua Rule 22(3) of said Rules will also elapse by end of next calendar month which barely 6 weeks away (to be noted, earlier leave was from 21.09.2022 to 01.11.2022).



W.P.No.27515 of 2023

9. In the light of the narrative, discussion and dispositive reasoning

supra, we make the following order:

(i) Impugned order dated 18.08.2023 bearing reference No.7614/tha.ku.2/2023 made by third respondent is set aside;

(ii) Said prison inmate Thiru.Baskar, son of Thiru.Balasundaram (CT No.297), now lodged in Central Prison, Puzhal-I, Chennai-600 066 (writ petitioner) is granted 40 days ordinary leave without escort from 10.30 a.m. on 25.09.2023 to 04.11.2023;

(iii) Said prison inmate shall surrender on 05.11.2023 by 5.30 p.m. i.e., by dusk in the office of third respondent;

(iv) Said prison inmate shall utilize the leave only for the reason for which it has been granted and shall not partake in any other activities;

(v) Said prison inmate shall sign before jurisdictional Judicial Magistrate, namely, Judicial Magistrate, Sriperumbudur, every Monday and Friday by 10.30 a.m. On instructions, learned counsel for writ petitioner submits that



W.P.No.27515 of 2023

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said prison inmate during the period of leave will be staying with his sister, who has given representation dated 19.07.2023 in the address given in the said representation and jurisdictional Magistrate is qua jurisdictional Magistrate this address.

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.)

20.09.2023

Index : Yes/No
Speaking/Non-speaking
Neutral Citation : Yes/No
mk

Note: Upload forthwith

To

1. The State rep. by its
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Prison Department, Secretariat,
Chennai-600 009.
2. The Deputy General of Prisons
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Page Nos.11/12



WEB COPY



W.P.No.27515 of 2023

M.SUNDAR, J.,
and
R.SAKTHIVEL, J.,

mk

W.P.No.27515 of 2023

20.09.2023
(1/2)

Page Nos.12/12