



W.P.No.27756 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.09.2023

CORAM

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

W.P.No.27756 of 2023

K.Sivathy

.. Petitioner

Vs

The State Rep. By

1.The Secretary to Government of Tamilnadu,
Department of Home,
Fort St.George, Chennai – 9.

2.The Additional Director General of Prison,
CMDA Towers, Egmore,
Chennai – 08.

3.The Superintendent of Prison,
Central Prison, Puzhal I,
Chennai.

.. Respondents

Petition filed under Article 226 of the Constitution of India praying for issuance of a writ of mandamus directing the respondents to grant 2 months leave without escort to the detenu Kamalananda, S/o.Rasanayagam, aged about 75 years, Convict No.4220 detained at Central Prison I, Puzhal, Chennai.



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For Petitioner : Dr.S.Manoharan
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 19.09.2023 with a mandamus prayer.

2. Factual matrix in a nut shell is that writ petitioner's father one Thiru.Kamalananda, S/o.Thiru.Rasanayagam, aged 75 years is a prison inmate; that writ petitioner's father is a convict prisoner (CT No.4220) now lodged in Central Prison – I, Puzhal, Chennai; that writ petitioner's 75 years old father shall hereon and henceforth be referred to as 'said prison inmate' in this order for the sake of convenience and clarity; that writ petitioner made an application dated 28.08.2023 seeking two months leave for said prison inmate on the ground that said prison inmate is ailing, unable to walk and his eye sight is diminishing; that it is to be noted that two months leave has been sought primarily on the ground that said prison inmate is ill and it is necessary that leave is



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granted so that he can be given adequate treatment after putting him through requisite tests; that this 28.08.2023 leave application is pending, it is unattended is the basis on which captioned WP has been filed with a mandamus prayer.

3. Today, Dr.S.Manoharan, learned counsel for writ petitioner submitted that there is no disputation or contestation about the ailment of said prison inmate. Learned counsel also pointed out that the said prison inmate who is 75 years old has been sent out on leave multiple times in the past and nothing untoward has happened.

4. Issue notice.

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

6. Owing to the narrow scope of the captioned WP, with the consent of both sides main WP was taken up and heard out.



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7. Learned Prosecutor, on instructions submitted that Rule 21(j) of 'The Tamil Nadu Suspension of Sentence Rules, 1982' [hereinafter 'said Rules' for the sake of convenience and clarity] will be an impediment as said prison inmate is a Srilankan and therefore a Foreign National.

8. We carefully considered the submissions made on both sides and we are of the view that leave sought for by the writ petitioner for the said prison inmate has to be answered in the affirmative. The reasons are as follows:

8.1 As rightly pointed out by learned counsel for writ petitioner, there is no dispute or contestation that the 75 years old said prison inmate is ailing and suffering from multiple ailments. To be noted, his mobility is affected and his vision is afflicted/diminishing;

8.2 The said prison inmate has gone out on leave multiple times in the past and on all occasions he has come back and surrendered without anything untoward happening. To be noted, we are informed that 351 days leave (120 days ordinary leave and 231 days emergency



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leave) has been availed thus far, said leave has been granted either by the Court by way of judicial orders or by the Executive Arm;

8.3 As regards Rule 21(j) of said Rules, the same cannot be an impediment as regards this Court as we are exercising constitutional powers. In this regard, in Selvam's case reported vide Neutral Citation of Madras High Court {**2023:MHC:4258**}, being order dated 05.09.2023 in W.P.No.27137 of 2023 is relevant and a portion of paragraph 8(iii) of Selvam's case reads as follows:

*'In this regard, we remind ourselves that a prisoner and his fundamental rights do not part ways at the prison gates and Right to Education is indisputably a fundamental right. The said Rules is a piece of Subordinate Legislation made by Executive i.e., Government of Tamil Nadu 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]. A piece of Subordinate Legislation which has not gone through grind i.e., Legislative grind in the Legislature can hardly constrict or in any manner hamper Constitutional powers of this Court, more so, when such Constitutional powers pertain to Article 21 of Constitution of India. In this regard, we remind ourselves of recent judgement of Hon'ble Supreme Court in **Elgar Parishad** case i.e., **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***



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India Vs. K.A.Najeeb reported in **2021 3 SCC 713**] was reiterated to say that a bail restricting clause in a Statute cannot denude jurisdiction of Constitutional Court and that this is a fundamental proposition. Though **K.A.Najeeb** principle and **Elgar Parishad** case were rendered in the light of Section 43D of Unlawful Activities (Prevention) Act, 1967, principle applies in all fours i.e., principle that a restriction clause in a Statute cannot denude jurisdiction of a Constitutional Court applies in all force. We draw inspiration from Hon'ble Supreme Court, having declared that this is a fundamental proposition. Reverting to the case on hand, said Rules is not even a Statute, it is a Subordinate Legislation made under Rule making powers vested with the Executive under Section 432(5) of Cr.PC and this Subordinate Legislation has not gone through legislative grind of law making in the Legislature. Therefore, this piece of Subordinate Legislation is only a codified guideline for the Executive to deal with requests for leave from prisoners and it cannot abridge Constitutional powers which this Court is exercising. At the risk of repetition, we reiterate that a prisoner and his fundamental rights do not part ways at the prison gates. To put it in a nutshell, Subordinate Legislation cannot denude nay not even abridge Constitutional powers.'

8.4 We reiterate the above position and we have no hesitation in saying that constitutional powers cannot be abridged much less denuded by a piece of subordinate legislation.

9. In the light of the narrative, discussion and dispositive reasoning set out supra, we make the following order:



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9.1 The said prison inmate Thiru.Kamalananda, S/o.Thiru.Rasanayagam, aged 75 years (Convict No.4220), now lodged in Central Prison -I, Puzhal, Chennai, is granted forty days leave from 01.10.2023 to 09.11.2023 (both days inclusive). To be noted, it is forty days ordinary leave without escort;

9.2 The said prison inmate while on leave shall sign on every Monday before jurisdictional police station (we are informed that Edamalaipatti Puthur Police Station is the jurisdictional police station). If for any reason, Monday turns out to be a public holiday, the said prison inmate shall sign on the next working day;

9.3 The forty days leave is inclusive of 01.10.2023 and 09.11.2023. Therefore, the said prison inmate shall surrender before the third respondent on 10.11.2023 (Friday) by dusk i.e., by 05.30 p.m.;

9.4 The said prison inmate shall not utilise the leave for any purpose other than the reasons/grounds on which leave has been granted and therefore the said prison inmate shall not partake in any other activities;

9.5 The said prison inmate during the period of forty days leave shall reside in his daughter's



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residence being the address given in the short cause title viz., No.120, Fathima Nagar, Edamalaipatti Pudhur, Trichy – 620 012.

10. Captioned WP is disposed of in the aforesaid manner. There shall be no order as to costs.

(M.S.,J.) (R.S.V.,J.)
27.09.2023

Index : Yes

Neutral Citation : Yes

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P.S: (i) Registry to forthwith communicate this order to Jail authorities in Central Prison, Puzhal, Chennai – 600 066.

(ii) Though the captioned WP has been disposed of, Registry is directed to list the matter under the cause list caption 'FOR REPORTING COMPLIANCE' on 15.11.2023.

To

- 1.The Secretary to Government of Tamilnadu,
Department of Home,
Fort St.George, Chennai – 9.
- 2.The Additional Director General of Prison,
CMDA Towers, Egmore,
Chennai – 08.
- 3.The Superintendent of Prison,
Central Prison, Puzhal I, Chennai.
- 4.The Inspector of Police,
Edamalaipatti Puthur Police Station, Trichy.
- 5.The Public Prosecutor, High Court, Madras.

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and
R.SAKTHIVEL, J.,**

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