



W.P.No.28162 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.28162 of 2023

S.Ishwariya

... Petitioner

Vs.

The State represented by its

1. The Secretary to Government of Tamilnadu
Department of Home
Fort St.George
Chennai – 600 009

2. The Deputy Inspector General of Police
Vellore Range
Vellore – 632 002

3. The Superintendent
Cuddalore Central Prison
Cuddalore – 607 004

..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

Page Nos.1/13



W.P.No.28162 of 2023

pertaining to the Impugned Order bearing No.14704/Tha.Ku.2/2023 dated 24.08.2023 passed by the third respondent and quash the same and consequently direct the respondents to grant ordinary leave for 30 days without escort to the detenu Sankar, son of Sanjeevirayar, aged about 44 years, Convict No.16501 confined at Central Prison, Cuddalore.

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' ('WP' for the sake of brevity) has been filed in this Court on 20.09.2023 with a certiorarified mandamus prayer assailing an 'order dated 24.08.2023 bearing reference No.14704/த.கு.2/2023 made by the third respondent' [hereinafter 'impugned order' for the sake of convenience and clarity] rejecting an application dated 21.08.2023 made by the writ petitioner seeking one month ordinary leave and six days emergency leave for her spouse who is a prison inmate.

2. Factual matrix in a nutshell is that writ petitioner's spouse one



W.P.No.28162 of 2023

Thiru.Sankar, son of Thiru.Sanjeevirayar is a prison inmate i.e., a convict prisoner having been convicted and sentenced to undergo 20 years of rigorous imprisonment with a default fine clause of 5 years simple imprisonment (fine of Rs.2 lakhs) vide conviction and sentence dated 11.12.2018 in Special S.C.No.27 of 2018 on the file of learned Mahila Court, Cuddalore; that this conviction and sentence was assailed in this Court vide Crl.A.No.10 of 2019 and the same came to be dismissed on 22.02.2021 but it is to be noted that it has been clearly recorded that the victim is now the spouse of the prison inmate and a mother of two children born out of the wedlock; that this criminal appeal was carried to Hon'ble Supreme Court unsuccessfully but a curative petition against the same has been filed and the same is pending; that leave was sought on two grounds namely a) for making arrangements for admission of children in the school and b) for repairing the homestead; that the leave application was rejected vide the impugned order primarily citing Rule 2(4) which defines 'sentence' and Rule 35 which talks about not granting leave when trial is pending qua a prisoner; that it has to be noted that Rules 2(4) and 35 are Rules qua 'Tamil Nadu Suspension of Sentence Rules, 1982' [hereinafter 'said Rules']



W.P.No.28162 of 2023

for the sake of convenience and clarity].

WEB COPY

3. Dr.S.Manoharan, learned counsel for writ petitioner in his campaign against the impugned order submitted that the reasons i.e., grounds on which leave has been sought has not been subjected to disputation or contestation but leave application has been rejected on technical grounds.

4. Issue notice.

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

6. Owing to the narrow scope on which the captioned writ petition turns, with the consent of both sides, captioned writ petition was taken up and heard out.

7. Learned Prosecutor on instructions submits that pendency of the aforementioned curative petition in Hon'ble Supreme Court has attracted Rule 35 read with Rule 2(4) of said Rules. To be noted, Curative Petition is Curative Pet(R) No.000003 of 2023 and the same is pending. Learned Prosecutor pointed out that this has been captured in the impugned order.

8. We carefully considered the rival submissions. We perused the



W.P.No.28162 of 2023

case records and we come to the conclusion that the impugned order deserves to be interfered with (certiorari limb) and the prison inmate deserves to be given leave (mandamus limb) and the reasons are as follows:

i) As rightly pointed out by learned counsel for the writ petitioner, the grounds on which leave has been sought, namely making arrangements for admission of children in school and repairing the homestead have not been subjected to any disputation or contestation;

ii) The aforementioned two grounds snugly fit into sub-clauses (ii) and (iii) of Rule 20 of said Rules, which is an adumbration of the grounds for grant of ordinary leave;

iii) The prison inmate has already served two years and has not come to adverse notice of the prison authorities;

iv) Grounds on which leave has been sought are grounds for ordinary leave and are not grounds for emergency leave (to be noted, grounds for ordinary leave have been adumbrated in Rule 20 of said Rules and grounds for emergency leave have been adumbrated in Rule 6 of said Rules).



W.P.No.28162 of 2023

v) Be that as it may, as regards ordinary leave, the Authority

WEB COPY

vested with the power under said Rules to deal with the same is Deputy Inspector General of Prisons [second respondent] but in the case on hand, impugned order has been made by the third respondent who vide Rule 10 is vested with the authority to deal with only emergency leave. Therefore, impugned order deserves to be interfered with on this technical ground also;

vi) On a demurrer, Rule 35 of said Rules talks about pendency of trial qua a prison inmate. In our considered view, pendency of a curative petition will not become pendency of a trial as it is Apex jurisdiction of the highest Court. To be noted, Curative Petition is post SLP and it is subjected to certain rigorous procedural requirements and that has prompted us to describe a curative petition as 'Apex jurisdiction'. Therefore, a curative petition cannot be construed as pendency of a trial. This view is being taken as the objective behind Rule 35 of said Rules is to ensure that a prison inmate if he is facing trial does not make himself scarce in the trial Court so that the trial gets derailed.



W.P.No.28162 of 2023

WEB COPY

This situation is not going to emerge as regards curative petition in the Hon'ble Supreme Court;

vii) Two grounds on which leave has been sought namely, making arrangements for education of children in school and repairing of homestead not being subjected to any disputation or contestation are appealing nay very compelling and therefore we are inclined to accede to the mandamus limb of the prayer also albeit restricting the leave period to 28 days in the light of Section 22 (2)(b) of said Rules;

viii) In **Selvam's** case reported in **2023:MHC:4258** [Neutral Citation of Madras High Court] this Bench dealt with the principle as to how said Rules which is a piece of Subordinate Legislation cannot abridge much less denude constitutional powers of this Court. The most relevant portion in **Selvam's** case which was also a case pertaining to grant of leave is contained in sub-paragraph (iii) of paragraph 8 and the relevant portion reads as follows:

'(iii)....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



WEB COPY



W.P.No.28162 of 2023

*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 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*



W.P.No.28162 of 2023

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.'

The above said principle applies in all force to the case on hand and therefore, we have no hesitation in saying that a piece of Subordinate Legislation which has not undergone the Legislative drill cannot abridge or curtail much less denude Constitutional powers of this Court.

9. This Court having set out the narrative, discussion and dispositive reasoning makes the following order:

i) the impugned order dated 24.08.2023 bearing reference



W.P.No.28162 of 2023

No.14704/த.சூ.2/2023 made by the third respondent is set aside

WEB COPY

for reasons articulated supra;

ii) this Court having answered the certiorari limb of the captioned WP prayer in the affirmative, now moves on to the mandamus limb of the captioned WP prayer grants 28 days ordinary leave without escort to the prison inmate. The 28 days leave will be from 01.10.2023 to 28.10.2023, both days inclusive in full. This means that the prison inmate should return to the office of third respondent on 29.10.2023 by dusk i.e., by 05.30 pm.

10. The aforementioned 28 days leave will be subject to the following conditions:

(a) the prison inmate shall sign before the jurisdictional Magistrate [we are informed that Judicial Magistrate II, Panruti is the jurisdictional Magistrate] on every Monday and Friday. If Monday or Friday turns out to be a public holiday, he shall sign on the next working day;

b) the prison inmate shall utilize the 28 days ordinary



W.P.No.28162 of 2023

WEB COPY

leave only for the purpose for which it has been granted and shall not partake in any other activities;

c) the prison inmate shall stay with the writ petitioner [to be noted, victim in the trial Court is spouse of the prison inmate now as already alluded to supra] at the address given in the short cause title, namely Salem Main Road (Opp. To Bank of Baroda), Anguchettipalayam, Panruti, Cuddalore- 607 106 through out the leave period.

Captioned Writ Petition 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

Speaking order

gpa

P.S: Though captioned WP is disposed of, Registry is directed to post the matter under the caption 'COMPLIANCE REPORT' on 03.11.2023.



W.P.No.28162 of 2023

To

WEB COPY

1. The Secretary to Government of Tamilnadu
Department of Home
Fort St.George
Chennai – 600 009
2. The Deputy Inspector General of Police
Vellore Range
Vellore – 632 002
3. The Superintendent
Cuddalore Central Prison
Cuddalore – 607 004
4. The Public Prosecutor
High Court, Madras.



WEB COPY



W.P.No.28162 of 2023

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

gpa

W.P.No.28162 of 2023

27.09.2023