



W.P.(MD)No.4365 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED : 07.03.2023

CORAM:

THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

AND

THE HONOURABLE MR.JUSTICE K.K.RAMAKRISHNAN

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T.Ramalakshmi

... Petitioner

Vs.

1.The Additional Director General of Police,
The Inspector General of Prisons,
C.M.D.A. Towers-II, No.1, Gandhi-Irvin Road,
Egmore, Chennai-8.

2.The Superintendent of Prisons,
Central Prison, Palayamkottai,
Tirunelveli District.

3.The Inspector of Police,
Kadayam Police Station,
Tenkasi District.

...Respondents

PRAYER: Petition filed under Article 226 of the Constitution of India, to issue a Writ of Mandamus, directing the respondents 1 and 2 to grant parole for a period of 1 week to Thirukumaran, S/o.Late Thangaraja, now confined at the Central Prison, Palayamkottai, Tirunelveli District based on the petitioner's representation dated 17.02.2023.



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For Petitioner : Mr.R.L.Dhiliphan Pandian,
For Mr.D.Rajaboopathy
For Respondents : Mr.A.Thiruvadi Kumar,
Additional Public Prosecutor

ORDER

(Order of the Court was made by ***R.SURESH KUMAR, J.***)

This Writ Petition is filed for a direction to the respondents 1 and 2 to grant parole for a period of 1 week to one Thirukumaran, S/o.Late Thangaraja, now confined at the Central Prison, Palayamkottai, Tirunelveli District, based on the petitioner's representation dated 17.02.2023.

2.The learned Additional Public Prosecutor appearing for the respondents has pointed out that the request made already by the petitioner having been considered, was rejected through an order dated 01.03.2023 of the Jail Superintendent, Central Prison, Palayamkottai, where the reason stated for such rejection is that when an appeal was pending against conviction, the authorities under the Tamil Nadu Suspension of Sentence Rules, 1982, cannot consider for such plea for grant of leave and therefore, by following the dictum of the Hon'ble Supreme Court of India, which has



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been reiterated by an order of this Court made in W.P.No.10265 of 2021, dated 18.02.2022, which is reported in **2022 (1) LWC 416**, it may not be possible for the respondents to consider the plea of the petitioner for grant of leave and it is apt to the petitioner to move proper application within the meaning of Section 389 Cr.P.C., before the Court, where the appeal is pending, seeking for such suspension of sentence or even for interim bail for few days on the ground of medical emergency, where it is alleged that the mother of the detainee has been hospitalized.

3.We have considered the said stand taken by the learned Additional Public Prosecutor for the respondents and have gone through the judgment of this Court stated supra, where a Division Bench of this Court has passed the following order:-

“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 seizin 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 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 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 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 2020] 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 dated 01.10.2002:

“Mr.J.A. Syed Abdul Khader, Joint Secretary to Government of Tamil Nadu, Home Department,



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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 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 prisoner's 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 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



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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.”

4.Considering the decision of the earlier Division Bench of this Court, as we are concurring with the same, we are not inclined to grant an order as has been sought for in this Writ Petition. Hence, this Writ Petition is liable to be dismissed, accordingly, it is dismissed. However, it is open to the petitioner to file an appropriate petition / application under Section 389 Cr.P.C., as discussed herein above on medical emergency, seeking for suspension of sentence / interim bail. No costs.

(R.S.K., J.) & (K.K.R.K, J.)

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NCC : Yes / No

Index : Yes / No

Internet : Yes / No

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Note: Issue Order copy on 07.03.2023.

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AND

K.K.RAMAKRISHNAN, J.

MYR

To

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2.The Superintendent of Prisons,
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Tirunelveli District.

3.The Inspector of Police,
Kadayam Police Station,
Tenkasi District.

4.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

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