



W.P.(MD) No.13918 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED : 15.06.2023

CORAM:

THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

AND

THE HONOURABLE MR.JUSTICE K.K.RAMAKRISHNAN

W.P. (MD) No.13918 of 2023

K.Rajalakhmi

... Petitioner

Vs.

1.The Principal Secretary to the Government of Tamil Nadu,
Home (Prison - IV) Department,
Secretariat,
Fort St. George,
Chennai – 600 009.

2.The Additional Director General of Police,
Inspector General of Prisons,
No. 1, Gandhi Irwin Salai,
Egmore,
Chennai – 600 008.

3. The Superintendent of Prison,
Central Prison,
Madurai.

...Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Mandamus, directing the Respondents to grant parole to the petitioner's husband viz., Kandhasamy



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Pandian, S/o. Pandian, Convict Prisoner No.5861, now confined at Central Prison, Madurai for a period of 5 days by considering the petitioner's representation dated 07.06.2023.

For Petitioner : Mr.S.Krishnan

For Respondents : Mr.A.Thiruvadi Kumar
Additional Public Prosecutor

ORDER

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

The prayer sought for herein is for a Writ of Mandamus, directing the respondents to grant parole to husband of the petitioner viz., Kandhasamy Pandian, S/o. Pandian, Convict Prisoner No.5861, now confined at Central Prison, Madurai, for a period of 5 days, by considering her representation dated 07.06.2023.

2. The short facts, which are supposed to be noticed for disposal of this Writ Petition are as follows:-

The petitioner's husband viz., one Kandhasamy Pandian, S/o. Pandian was convicted in a murder case, punishable under Section 302 of I.P.C., corresponding to Crime No.226 of 2007 in Othakadai Police



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Station. The said judgment and conviction, though was appealed before this Court, which was confirmed by the Judgement of this Court, as against which, Special Leave Petitions have been preferred before the Hon'ble Supreme Court of India in S.L.P. Nos.1433 of 2019 and 1434 of 2019. The said S.L.Ps. are pending before the Hon'ble Supreme Court.

3. In this context, it is the further case of the petitioner that, her husband has been undergoing the jail sentence for the past four years. Earlier the petitioner's husband applied for parole for two times, on the ground of her illness he availed the parole. In both the times parole was granted considering the longer judicial custody and character of the husband of the petitioner.

4. When that being so, now, the petitioner, who is the wife of the convict along with the elders of the family has decided to perform a function for her daughter Kayalvizhi i.e., Puberty function (in tamil பூப்புவித நேராட்டு விழா). The said function was fixed to be held on 28.06.2023. Therefore, in order to make arrangements for the said function and to participate in the function, the petitioner seems to have approached the Jail



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authorities for release of her husband by granting him leave or parole, which was not considered, despite such representation has been made.

5. Therefore, the petitioner has given a representation on 07.06.2023 to the first respondent for grant of such parole / leave to the husband of the petitioner for a period of 5 days, by considering her representation dated 07.06.2023.

6. To issue a Writ of Mandamus to the first and second respondents to consider such representation for grant of such 5 days leave, for the reasons stated therein, the petitioner has filed the present Writ Petition with the aforestated prayer.

7. We have heard Mr.S.Krishnan, the learned counsel appearing for the petitioner, who has reiterated the aforestated prayer, seeking indulgence of this Court.

8. We have also heard Mr.A.Thiruvadi Kumar, learned Additional



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Public Prosecutor, appearing for the respondents. He would submit that, insofar as the consideration of the representation given by the petitioner dated 07.06.2023 is concerned, such a consideration could be made only within the power of the State under the Tamil Nadu Suspension of Sentence Rules, 1982 (In short the 1982 Rules).

9. Under the said Rules, there are two types of leave, one is emergency leave and the another one is ordinary leave. What are all the grounds for grant of emergency leave, that have been mentioned under Rule 6. Like that, what are all the grounds for grant of ordinary leave have been mentioned under Rule 20.

10. Insofar as the leave now sought for by the petitioner for her husband is only ordinary leave and the same has to be dealt with under the provisions of the said Rules. In this context, the learned Additional Public Prosecutor would further submit that, Rule 35 of the said Rules has made it clear that, no prisoner on whom a case is pening trial shall be granted leave, that means, if there is a pending trial, the prisoner shall not be granted leave by exercising the power under the said Rules by the State / authorities



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concerned.

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11. He would also submit that, admittedly, since the conviction has been confirmed by this Court, that has been appealed before the Hon'ble Supreme Court, where the S.L.Ps. are pending, and the said appeal can very well be treated as a continuation of the trial. Therefore, within the meaning of Rule 35 of the said Rules, the power and authority of the State under the said Rules is denuded so long as the appeal is pending before the appellate Court and in this case, it is before the Hon'ble Supreme Court.

12. Therefore, the learned Additional Public Prosecutor would contend that, the respondents cannot exercise their power within the meaning of the Rules in view of Rule 35 as mentioned above. Therefore, it is for the petitioner to approach the Court, where the appeal is pending to seek for suspension of sentence within the meaning of Section 389 of Cr.P.C. or any other provisions available to the petitioner.

13. In this context, the learned Additional Public Prosecutor has



cited some decisions of this Court, which are as follows:

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- (i) *S.Santhosam v. State & others* reported in *2021-2-L.W. (Crl)* 519;
 - (ii) *L.Wasib Khan v. The State & others* reported in *2022-1-L.W. (Crl)* 416; and
 - (iii) *M.Jeyammal v. State & others* reported in *2022-1-L.W. (Crl.)* 833.

14. By relying upon these decisions, the learned Additional Public prosecutor contended that, the law is well settled in this regard by a number of decisions as has been noted herein above, where, if an appeal is pending against the conviction, only the appellate Court has to deal with any application for grant of leave by way of suspension of sentence and in that case the power of the State within the meaning of the Rules is denuded. Therefore, no Mandamus can be issued as sought for in this Writ Petition, directing the respondents to exercise the power under the Rules to consider the plea of the petitioner for grant of leave for 5 days to her husband i.e., detenu.

15. We have given our anxious consideration to the said



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submissions made by the learned counsel appearing for the parties, especially, the Additional Public Prosecutor, and have perused the materials placed before us.

16. Insofar as the factual matrix of the case in hand is concerned, it is the conviction and sentence earned by the husband of the petitioner for an offence punishable under Section 302 of I.P.C. Therefore, he is a life convict undergoing his sentence at Central Prison, Madurai. As against the conviction of the trial Court, as confirmed by this Court, admittedly, Special Leave Petitions were filed, which are pending before the Hon'ble Supreme Court. When that being the position, what is the role of the State authorities within the meaning of the Rules is to be looked into. If we look at the Scheme of the Rules, the Rules has been framed in exercise of the power conferred by sub-section (5) of Section 432 of the Code of Criminal Procedure, 1973. The Rules is called Tamil Nadu Suspension of Sentence Rules, 1982. Under Rule 2(3), leave means an emergency or ordinary leave. Under Rule 5, leave shall be of two kinds, namely, emergency leave and ordinary leave. Under Rule 6, the grounds for the grant of emergency leave have been mentioned, which read thus:-



“6. Grounds for the grant of emergency leave. -

Emergency leave may be granted for attending death or serious illness of father, mother, wife, husband, son daughter, full brother or full sister, as the case may be, or the wedding of the prisoner or son, daughter, full brother or full sister of the prisoner, as the case may be, and for having delivery outside the prison in the case of female pregnant prisoners.”

17. Like that, under Rule 20, grounds for the grant of ordinary leave have been provided, which read thus:-

”20. Grounds for the grant of ordinary leave. - the grounds for the grant of ordinary leave to a prisoner shall be -

(i) to make arrangements for the livelihood of his family and for settlement of life after release;

(ii) to make arrangements for the admission of the children in the school or college;

(iii) construction or repairing the home-stead;

(iv) to make arrangements or to participate in the marriage of the prisoner, sons, daughters, full brothers or full sisters;

(v) settling family disputes like partition etc.

(vi) agricultural operations like sowing, harvesting



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etc; and

(vii) any other extraordinary reasons; and

(viii) in case of female pregnant prisoners, for having delivery outside the prison.”

18. Under Rule 10, the Superintendent of Prison is empowered to grant emergency leave to the prisoners subject to the other conditions laid down in the Rules. Under Rule 19, the Deputy Inspection General of Prisons is the competent authority to issue order of release of prisoners on ordinary leave subject to the satisfaction of all the conditions in the Rules.

19. Therefore, these two authorities can exercise the power under the Rules in case of emergency leave or ordinary leave as the case may be respectively.

20. Under these Rules only, such a request, since has been made by the petitioner for grant of leave to her husband, who is the life convict, such an exercise since has not been made by the two authorities mentioned in the Rules, as stated supra, ultimately, the petitioner has made a request on 07.06.2023 to the State Government i.e., the first respondent.



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21. After giving such request to the State Government, the petitioner has rushed to this Court, seeking for a Writ of Mandamus, by filing this Writ Petition invoking the extra-ordinary jurisdiction of this Court under Article 226 of the Constitution, seeking for a direction to the first respondent to consider the representation of the petitioner dated 07.06.2023 and grant of 5 days leave to her husband, who is a life convict.

22. When such Mandamus was sought for, it was opposed by the respondents through the learned Additional Public Prosecutor on the aforesaid reasons, especially, in the context of the legal position that, the authority concerned under the Rules to exercise the power to grant such leave either emergency leave or ordinary leave as the case may be are not entitled to or their power is denuded, in case if the appeal is pending before the Court concerned. In this context, the learned Additional Public Prosecutor takes aid of Rule 35 under the heading “pending cases”, where it is stated, no prisoner on whom a case is pending trial shall be granted leave.

23. In this context, the past happenings, which had been taken note in the judgments cited supra are noteworthy to be considered.



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24. In ***Santhosam's*** case (cited supra), a Division Bench of this Court considering the power of the State under Section 432 of Cr.P.C., has held as follows:-

“7. Before proceeding to decide as to whether Gunasekaran is entitled to emergency leave or not, it is felicitous to trace the genesis of the Sentence Suspension Rules. Section 432 (5) Cr.P.C. appears to be the source of power for the Sentence Suspension Rules and it reads as under:

“432 Power to suspend or remit sentences:

(5) The appropriate Government may, by general rules or special orders give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with:

Provided that in the case of any sentence (other than a sentence of fine) passed on a male person above the age of eighteen years, no such petition by the person sentenced or by any other person on his behalf shall be entertained, unless the person sentenced is in jail, and-

(a) where such petition is made by the person sentenced, it is presented through the officer in charge of the jail; or

(b) where such petition is made by any other person, it contains a declaration that the person sentenced is



in jail.”

(emphasis supplied)

8. A reading of the above shows that the Government may, by general rules or special orders, give directions for suspension of sentence for a person who has been convicted of an offence and sentenced therefor. In other words, once a person has been convicted of an offence and sentenced therefor by a Court of law, a duty is cast upon the executive, viz., in this case, the prison authorities, to ensure that the person undergoes the sentence that has been imposed on him by the Court. Thus, the role of the executive to execute a judicially pronounced sentence commences when adjudication by the judiciary ends.

9. Section 432 Cr.P.C. gives power to the appropriate Government to suspend the execution of or remit the sentence imposed on a person for good reasons. The expression “suspension of sentence” used herein is not akin to the usage of the expression used in Section 389 Cr.P.C. Section 389 (1) Cr.P.C. deals with the power of the appellate Court to suspend the sentence, pending disposal of the appeal preferred by the sentenced person.”

25. Subsequently, in *Wasib Khan's* case (cited supra), the Division Bench has considered a similar position where what is the power of the State Government under the Rules for grant of leave in case the



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appeal is pending before the appellate Court has been considered and it has been held by the Division Bench to the following effect:-

“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, 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.’



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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



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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 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.

In the result, this writ petition stands dismissed, however, sans costs.”

26. In *Jeyaammal's* case (cited supra), the Division Bench has considered a similar issue, where Rule 40 of the Rules also has been discussed, from which, the following passages can be usefully referred:-

“8. Ms. *Nadhiya's* second contention is that under Rule 40, *ibid.*, the State has the power to grant exemption which they ought to have exercised, especially taking into



consideration the fact that the convict prisoner is a septuagenarian and he had completed more than two decades of actual imprisonment.

9. To appreciate the aforesaid contention, it is worth extracting Rule 40, *ibid.*:

'40. Power to exempt. - The Government may exempt any person from all or any of the provisions of these rules.'

10. Be it noted, Rule 40, *ibid.*, is a negative power to grant exemption in a given case that is vested with the Government and it does not confer any right to a prisoner for the purpose of issuance of a writ of mandamus. Trite it is that in the absence of any legal right, a writ of mandamus cannot lie. At this juncture, apropos it is to allude to the following observation of the Supreme Court in ***Mani Subrat Jain and Others v. State of Haryana and Others [(1977) 1 SCC 486]***:

'It is elementary though it is to be restated that no one can ask for a mandamus without a legal right. There must be a judicially enforceable right as well as a legally protected right before one suffering a legal grievance can ask for a mandamus. A person can be said to be aggrieved only when a person is denied a legal right by someone who has a legal duty to do something or to abstain from doing something. (See Halsbury's Laws of England, 4th Edn., Vol. I, para 122; ***State of Haryana Vs. Subash Chander***



Marwaha [(1974) 3 SCC 220 : 1973 SCC (L&S) 488 : (1974) 1 SCR 165] ; Jasbhai Motibhai Desai Vs. Roshan Kumar Haji Bashir Ahmed [(1976) 1 SCC 671 : (1976) 3 SCR 58] and Ferris : Extraordinary Legal Remedies, para 198.)'

11. Further, the power to exempt is a discretionary one vested with the State Government. The exercise of such discretion cannot be arbitrary or uncanalised, but, must be based on objective and intelligible material. It goes without saying that the exercise of such power is always subject to judicial review.

12. That apart, it is trite equally that a writ of mandamus would not lie to compel the exercise of discretion by an authority. The position is put beyond the ken of any controversy by a Constitution Bench of the Supreme Court in ***State of Karnataka v. State of A.P. [(2000) 9 SCC 572]***, wherein, it was observed thus:

“The law as regards the issuance of a mandatory order or writ depends upon the authority exercising the power as well as the nature of the function and obligations arising therefrom. It is settled law that such a direction cannot possibly be granted so as to compel an authority to exercise a power which has a substantial element of discretion.'

(emphasis supplied)



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13. Ergo, no mandamus can be issued to the Government to pass an order under Rule 40, *ibid.* Of course, if the Government passes an order under Rule 40, *ibid.* in a given case, the legality of it, can be subjected to judicial review by the Constitutional Court.”

27. In analyzation of these judgements, which are almost in the same line, of course, on the basis of what has been held by the Hon'ble Supreme Court in ***Manokaran v. State of Tamil Nadu (Crl.A.No.866 of 2020)***, the State authorities practice hitherto follow till such time was in fact frowned upon by the Hon'ble Supreme Court, therefore, the State authority i.e., the Joint Secretary to Government of Tamil Nadu, Home Department, appeared before the Supreme Court and what he has stated has been extracted in the said Judgement, where the practice of granting leave by the Government authorities, when appeal is pending before the appellate Court, has grown in the State of Tamil Nadu and it was assured on behalf of the State Government that in future the State Government would act strictly according to the requirements of the Statute and not *de hors* to the Statute.

28. It was further assured that, the question of continuity of there being any practice being followed henceforth would not arise and the same



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has been discarded by the State Government. Not stopping with that, pursuant to the said stand taken by the State Government in clear terms in **Manoharan's** case cited supra, the Additional Director General of Prisons had issued an Office Memoranda in O.M.No.43880/PS4/2002 dated 21.10.2002, which in fact has been extracted in para 13 of the Judgment of Wasib Khan by the Division Bench as cited supra.

29. In the said Office Memoranda, the ADGP i.e., the Additional Director General of Prisons had made it clear that, the Supreme Court has observed that the practice being followed in the State for granting leave to prisoners even for short duration during the pendency of their appeal is not in accordance with the 1982 Rules and it is also contrary to the Constitution Bench Judgment of Supreme Court in **K.M.Nanavati v. State of Bombay, AIR 1961 SC 112**.

30. It has further been stated in the O.M. that, the Supreme Court of India 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



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scrupulously followed in future.

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31. Taking note of the order of the Hon'ble Supreme Court, the memoranda further states that, the Jail Superintendents attention was invited to Government letter No.66517/Prison.V/2000-15, Home Department dated 20.06.2002, communicated by letter dated 04.08.2002, where 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.

32. The memoranda further states that, the Superintendent/Deputy Inspector General of Prisons, (who are the authorities to exercise the power under the 1982 Rules for grant of emergency leave or ordinary leave) therefore, should act in accordance with the aforesaid orders of the Supreme Court of India and they should desist from releasing any prisoner on emergency or ordinary leave when his appeal is pending before the appropriate Court without a prior permission of the Court.

33. By citing these developments, the stand of the State Government before the Hon'ble Supreme Court and the observation made in



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the said order in *Manoharan's* case (cited supra) and the subsequent O.M. issued in this regard by the Additional Director General of Police dated 23.10.2002, were heavily relied upon by the learned Additional Public Prosecutor.

34. According to him, as of now, either emergency leave or ordinary leave under 1982 Rules shall be considered for grant by the authority concerned under the Rules or the State Government in consonance with the said Rule, of course, under Section 432(1) of Cr.P.C. Therefore, he would submit that, in case appeal is pending before any appellate forum that may be either the lower appellate Court or High Court or the Supreme Court, as per the O.M. no such short term release should be made by the competent authority without informing the Court, in which, prisoner's appeal is pending. It means, here in the case in hand, admittedly, the appeal is pending before the Supreme Court, therefore, without the concurrence of the Supreme Court or orders of the Supreme Court, such a short term release also should not be made by the competent authority. Therefore, the learned Additional Public Prosecutor would contend that, the petitioner has to necessarily approach the Hon'ble Supreme Court of India in the pending



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appeal to seek for suspension of sentence either for short term or even for more days for emergency leave or ordinary leave, and such power since has been denuded in view of the pendency of the appeal, it cannot be exercised as of now by the State authorities under 1982 Rules.

35. What has been argued in this regard, as stated supra, by the learned Additional Public Prosecutor is appealing to us.

36. However, recently, a Coordinate Bench of this Court (Principal Seat) in *Shakila W/o. Manoharan v. the State & others in W.P.No.2761 of 2023* has delivered the judgement on 10.02.2023, under which, such a plea was raised by the petitioner therein for grant of emergency leave of a convict. According to the learned Additional Public Prosecutor, whose appeal is pending before the Hon'ble Supreme Court, hence, there was an opposition on behalf of the respondents in the *Shakila's case* (cited supra) stating that, in view of the pendency of the appeal before the Hon'ble Supreme Court of India, that the power to exercise its discretion under Article 226 of the Constitution to issue a Mandamus may not be exercisable as the parties to be relegated to approach the Hon'ble Supreme



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Court to file a petition therein in the pending appeal to seek for a suspension of sentence as in the case such a plea to be raised before the High Courts or first appellate Court within the meaning of Section 389(1) and (2) of Cr.P.C. respectively.

37. Though such an opposition was made on behalf of the prosecution before the Division Bench, which dealt with *Shakila's* case (cited supra), that was not accepted by the Division Bench. On this context, the Division Bench had stated that, there is a Rule called Rule 40 of 1982 Rules, which is a power to exempt, under which, the Government may exempt any person from all or any of the provisions of these rules. Quoting the said rule 40, the Coordinate Bench in *Shakila's* case has gone further saying that *K.Rajamanickam & Ors. v. State of Tamil Nadu & Ors.* reported in *1991 SCC Online Mad 897* and *L.Wasib Khan* (cited supra) cases did not deal with the impact of Rule 40. The Division Bench has further stated that a careful perusal of Rule 40 makes it clear that the Executive itself has ample and adequate powers to exempt any one from the provisions of said Rules. The Division Bench further states that, therefore, the said Rules has an inbuilt provisions vesting the Executive itself with the



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power to exempt a convict prisoner from the operation of said Rules, this makes it clear that, the said Rules or provisions thereunder are not absolute and cannot come in the way or become an impediment in judiciary exercising its power to grant leave.

38. Ultimately, the Division Bench in ***Shakila's*** case (cited supra) allowed the Writ Petition by giving directions to the authorities concerned to release the convict prisoner on ordinary leave for 10 days.

39. This judgement has also been brought to our notice by the learned Additional Public Prosecutor, which infact has taken completely an opposite stand of the earlier three Division Bench judgements, which we have quoted herein above.

40. In this context, it is to be noted that, in the matter of ***The State, represented by the Home Secretary v. Yesu reported in 2011 (5) CTC 351***, a Full Bench of this Court has considered various issues.

41. One such issue was the consideration of Rule 40 of the 1982 Rules, where the Full Bench has held as follows:-



42. A perusal of the same would show that if a prisoner is so exempted by the Government from the provisions of the said Rules in toto, then the Government cannot grant suspension at all. But at the same time, the Government can exempt some of the provisions such as provisions relating to bond etc., in respect of a particular prisoner and release him on leave. Such exercise of the power by the Government exempting some of the provisions of the Suspension Rules shall be for reasons to be recorded and the same shall not be exercised in an arbitrary manner. As rightly pointed out by Mr.P.N.Prakash, the Amicus Curiae, the entire Suspension Rules may be exempted in respect of an individual prisoner for valid reasons. For example, if the prisoner is a hardcore terrorist, even if he satisfies the conditions enumerated in the Suspension Rules, the Government will be within its competence to exempt him from all the provisions of the Suspension Rules and to decline to release him temporarily either on emergency leave or ordinary leave.”

42. On perusal of the said decision of the Full Bench, especially, in the context of Rule 40 of 1982 Rules, the Full Bench agreed with the Amicus Curiae that the entire Suspension Rules viz., the 1982 Rules may be exempted in respect of a individual prisoner for valid reasons. The Full



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Bench has further stated that, for example, if the prisoner is a hardcore terrorist, even if he satisfies the conditions enumerated in the Suspension Rules the Government will be within its competence to exempt him from all the provisions of the Suspension Rules and to decline to release him temporarily either on emergency leave or ordinary leave.

43. Therefore, the exemption provision according to the Full Bench, as provided under Rule 40, can be exercised in the negative sence, that means, if a convict becomes otherwise eligible to seek for ordinary leave on the basis of the various provisions of 1982 Rules, still if the authority does not want to release him under ordinary leave or emergency leave for the specific reasons attached to the said convict concerned as his release or his presence in the public may be endanger to the public, law and order or public order or for any reason for the security of the nation, such kind of right even conferred under the said Rules on any convict can be suspended, for which the exemption provision can be invoked by the authority concerned.

44. Therefore, only in that context, Rule 40 has been considered and that was held by the Full Bench in the said Judgment in para 42 as



referred to above.

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45. The said position has in fact been reiterated on further consideration by the Division Bench in *Santhosam's* case (cited supra), where in para 17, the Division Bench has held as follows:-

“17. The next submission of Mrs. Nadhiya is that the State should invoke Rule 40 of the Sentence Suspension Rules to exempt the petitioner-s brother from the operation of Rule 35, *ibid.* We are, however, afraid that this does not cut ice with us. The scope of Rule 40, *ibid.*, came up for consideration before a Full Bench of this Court in *State vs. Yesu, 2011 (5) CTC 353*, wherein, at paragraph 42, it was held that if Rule 40, *ibid.* was exercised to exempt a person from the Sentence Suspension Rules, the resultant position was that the State Government would have no power to grant suspension of sentence at all. This is because the Full Bench, at paragraph 52, has observed that “outside the scope of the Tamil Nadu Suspension of Sentence Rules, no authority has got any power to grant suspension of sentence in any form.” Ex consequenti, the power to exempt cannot be used to grant leave outside the four corners of the Sentence Suspension Rules, as there exists no plenary power with the State Government to grant leave dehors the provisions of the Sentence Suspension Rules. What



cannot be done on account of the express bar contained in Rule 35, *ibid.*, cannot be indirectly circumvented through the back door of Rule 40, *ibid.* The decision of the Full Bench in *Yesu* (*supra*), binds us, with the result that the contention premised on Rule 40, *ibid.* cannot be countenanced.”

46. Also another Division Bench in *Jeyammal's* case (cited *supra*), has dealt with Rule 40, which in fact, has been quoted herein above already.

47. Therefore, it is not a first time, the Rule 40 has been dealt with by a Division Bench in *Shakila's* case (cited *supra*). It is apposite to mention that the Full Bench, as cited *supra*, has considered the Rule 40 and has held that, from the purview of 1982 Rules, a prisoner can be exempted, that means, exempted not for the benefit of the prisoner but towards the safety and security of the locality concerned or the State in general.

48. Therefore, the Rule 40 exemption cannot be fit in as has been held by the said judgment in *Shakila's* case (cited *supra*) by the coordinate



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Bench. Therefore, to that extent the observation made in the said judgement in ***Shakila's*** case (cited supra) is not in consonance with the law held by the Full Bench of this Court in ***Yesu's*** case (cited supra).

49. That apart, if we look at the scheme of suspension of sentence within the meaning of Cr.P.C., there is a dichotomy, first one is Section 389 of Cr.P.C. Section 389 lies under the heading 'suspension of sentence pending the appeal; release of appellant on bail under that section made it clear that, pending any appeal by convict, the appellate Court may for reasons to be recorded, by which, in writing order that the execution of the sentence or order appealed against be suspended. Therefore, if an appeal is pending against the conviction, such sentence can be suspended only on a petition to be filed in this regard to seek for suspension of sentence under Section 389(1) Cr.P.C. before the said Court where the appeal is pending.

50. In case the appeal is pending before the lower appellate Court other than the High Court even then such a power can be exercised by the High Court under sub-section 2 of Section 389. Therefore, under both circumstances, i.e., at the time of appeal pending before the High Court or



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even before the lower appellate Court such a power is exercisable by the High Court either under 389(1) or under Section 389(2) of Cr.P.C.

51. But at the same time, if a person has been convicted, against the conviction, when there has been no appeal filed or the appeal has been filed and it has become final and all appeal remedies have been exhausted, in that case, the power of consideration of grant of leave which can also be called as suspension of sentence either for emergency purpose or for ordinary time i.e., made available to be exercised by an Executive Authority under Section 432 of the Cr.P.C. Under sub-section 2 of Section 432 Cr.P.C., whenever an application is made to the appropriate Government for the suspension or remission of the sentence, the appropriate Government may require the Presiding Judge of the Court before or by which the conviction was had or confirmed and after getting the opinion, orders can be passed suspending the sentence or granting leave.

52. Under Section 432(5) of Cr.P.C., the appropriate Government may, by rules or special orders give directions as to the suspension of



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sentences and the conditions on which petitions should be presented and to be dealt with. Only by exercising such a power under sub-section (5) of 432 Cr.P.C., the 1982 Rules have been framed by the State Government. Therefore, the power being exercised by the State authorities under 1982 Rules is in consonance with Section 432 of Cr.P.C., in other words the source of power for exercising the jurisdiction under 1982 Rules by the State authorities is to be derived only from Section 432 of Cr.P.C.

53. However, it is to be noted that, the power to be exercised by the State Government under 1982 Rules by taking the source of power from 432 Cr.P.C. is available only when no appeal against conviction is pending before any appellate Court, which means, the moment any appeal has been filed either before the first appellate Court, or before the High Court or ultimately before the Hon'ble Supreme Court and such an appeal is pending, the Court in which such appeal is pending has to be approached by the convict to get suspension of sentence within the meaning of Section 389(1) and (2).

54. The very same position is prevailing or it should be followed in case where such appeal is pending before the Hon'ble Supreme Court of



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India. This legal position can be safely drawn or culled out from the observation made by the Hon'ble Supreme Court in *Manokaran's* case (cited supra).

55. In the said *Manokaran's* case (cited supra) the practice of exercising power by the State in granting suspension of sentence or parole or leave, undmindful of the pendency of the appeal before the Supreme Court, was frowned upon by the Supreme Court and the Joint Secretary to the Government was summoned and whose undertaking has been recorded by the Supreme Court as discussed herein above.

56. Following the said judgement in *Manokaran's* case (cited supra), Official Memorandum dated 21.10.2002 was issued by the ADGP and the import of the said memorandum has also been discussed herein above. Therefore, the said judgement of *Manokaran's* case (cited supra), followed by the O.M. issued by the ADGP have made it abundantly clear that, even during the pendency of the appeal before the Hon'ble Supreme Court, such a kind of power to be exercised by the State within the meaning of 1982 Rules is completely denuded as in the case of the pendency of the



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appeal either before the lower appellate Court or before the High Court.

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57. In such circumstances, the convict has to approach only the Court where the appeal is pending. Here, if at all the appeal is pending before the Hon'ble Supreme Court, naturally the convict has to approach the Hon'ble Supreme Court of India to seek for suspension of sentence by way of granting leave either on emergency basis or for ordinary leave as the case may be.

58. When that being the position, now the question is whether this Court can, in exercising its jurisdiction under Article 226 of the Constitution of India, entertain a Writ Petition for issuance of Mandamus for release of the convict prisoner from jail, that too, on an ordinary leave without relegating or driving the convict to go before the Court, where the appeal is pending, knowing well that such appeal is pending, admittedly, before the Hon'ble Supreme Court.

59. In this context, the aforestated Judgements as well as the earlier Judgement of the Constitution Bench in *Nanavati's* case (cited



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supra), which is the law earliest was declared by the Hon'ble Supreme Court of India, since are available, any deviation against such law declared by the Hon'ble Supreme Court cannot be permitted to take place and this has been made very clear by the State Government before the Supreme Court in ***Manokaran's*** case, followed by the Official Memorandum dated 21.10.2002, where specifically the verdict of the Constitution Bench of the Hon'ble Supreme Court in ***Nanavati's*** (cited supra) has been mentioned. When that being the legal position, the consistent view that was taken by various Judgements, which we have quoted hereinabove that, when a Criminal Appeal is pending against the conviction, the Executive cannot power to exercise the power under the 1982 Rules. Therefore, no Mandamus can be sought for to exercise such power by the said authorities and this has been made clear in more than one Division Bench Judgements as stated supra, especially, in para 10 of ***Jeyammal's*** case (cited supra).

60. When that being the legal position, which has been consistently taken, on the basis of the ***Nanavati's*** case (cited supra) as well as the Full Bench judgement in ***Yesu's*** case (cited supra) and atleast three Division Bench decisions, cited supra, the only deviation, now noticed is



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that the *Shakila's* case by a Coordinate Bench, which in fact is not in consonance with the Constitution Bench decision as well as the subsequent Judgements, which have taken very consistent view in consonance with the Constitution Bench decision and this has been fortified by the order passed by the Hon'ble Supreme Court in *Manokaran's* case, followed by the Official Memorandum, which has given a clarification and quitus to the issue.

61. Ergo we are of the view that the plea raised by the petitioner herein seeking for Writ of Mandamus, by invoking the extraordinary power of this Court under Article 226 of the Constitution to give a direction to the respondents, especially, the first respondent to exercise his power under 1982 Rules to consider the representation given by petitioner for grant of ordinary leave to the convict, who is the husband of the petitioner, while, admittedly, the appeal is pending before the Hon'ble Supreme Court, is unacceptable.

62. The only option that is available before the petitioner is to approach the Hon'ble Supreme Court in the pending appeal. When such an



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appeal is pending, the power either under Section 389 of Cr.P.C., or under Article 226 of the Constitution, shall not be invoked by this Court, which will transgress the jurisdiction of the Hon'ble Supreme Court in view of the plethora of decisions, which we have hereinabove discussed.

63. Since the view taken by the Division Bench in ***Shakila's*** case (cited supra) is not in consonance with the Hon'ble Supreme Court's Judgement as well as the Full Bench decision, cited supra, which are having a binding effect on this Bench, we are not inclined to accept the plea raised by the petitioner and at the same time the stand taken by the respondents as projected by the learned Additional Public Prosecutor is to be accepted, accordingly, we are inclined to dismiss the Writ Petition, hence, it is dismissed. However, there shall be no order as to costs.

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

15.06.2023

NCC : Yes / No
Index : Yes / No
Internet : Yes / No
SJ

R.SURESH KUMAR, J.

AND

K.K.RAMAKRISHNAN, J.



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SJ

To

- 1.The Principal Secretary to the Government of Tamil Nadu,
Home (Prison - IV) Department,
Secretariat,
Fort St. George,
Chennai – 600 009.
- 2.The Additional Director General of Police,
Inspector General of Prisons,
No. 1, Gandhi Irwin Salai,
Egmore,
Chennai – 600 008.
3. The Superintendent of Prison,
Central Prison,
Madurai.

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