



W.P(MD)No.28831 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 07.12.2023

CORAM :

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

W.P(MD)No.28831 of 2023

Pakiyalakshmi

... Petitioner

vs.

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

2.The Director General of Police and
Inspector General of Prisons and Correctional Service,
Whannels Road, Egmore,
Chennai – 600 008.

3.The Deputy Inspector General of Prisons
and Correctional Services,
Madurai Range, Madurai Central Prison Campus,
New Jail Road, Madurai – 625 016.

4.The Superintendent of Prison,
Central Prison, Palayamkottai.

... Respondents

Petition filed under Article 226 of the Constitution of India praying
for issuance of a Writ of Mandamus, to direct the respondents to grant 40
days ordinary leave for the petitioner's brother namely Sankaranarayanan



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(LCT No.2375) aged 60 years S/o.Krishnasamy, who confined at Palayamkottai Central Prison.

For Petitioner

: Mr.R.Venkatesan

For Respondents

: Mr.A.Thiruvadi Kumar
Additional Public Prosecutor

ORDER

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

Captioned 'Writ Petition' (hereinafter 'WP' for the sake of brevity) has been filed in this Court on 04.12.2023.

2. Factual matrix in a nutshell or in other words short facts (shorn of granular particulars) essential and imperative for appreciating this order are that WP petitioner's brother (elder brother) Thiru.Sankaranarayanan son of Thiru.Krishnasamy aged about 60 years is a convict prisoner now lodged in Central Prison, Palayamkottai and his Convict Prison number is LCT No.2375; that 'WP petitioner's elder brother' who is a convict prisoner shall hereinafter be referred to 'said prison inmate' for the sake of convenience and for the sake of use of better and refined glossary; that said prison inmate has served more than 23 years of sentence; that a plea was made for 40 days ordinary leave without escort for the said prison inmate *inter-alia* on the ground that



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prison inmate's mother (WP petitioner's mother too) who is 85 years old is seriously ill and the said prison inmate has to make arrangements in this regard; that this request was made by WP petitioner *inter-alia* vide 'a representation dated 10.07.2023' (hereinafter 'said representation' for the sake of brevity); that the same remains unattended necessitating filing of the captioned WP in this Court.

3. Issue notice.

4. Mr.A.Thiruvadi Kumar, learned Additional Public Prosecutor accepts notice for all four respondents. Owing to the limited scope of the captioned WP, with the consent of both sides, main WP was taken up and heard out.

5. Learned counsel for WP petitioner reiterating the aforementioned facts (set out as factual matrix in a nutshell) has submitted that WP petitioner is entitled to 40 days ordinary leave without escort and it is a dire necessity considering the serious illness of WP petitioner's (said prison inmate too) 85 year old mother.



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6. In response to the aforementioned submission, learned Prosecutor very fairly submitted that the ground on which ordinary leave is sought is not subjected to factual disputation or contestation. Learned Prosecutor, however, submitted that the request for ordinary leave was made on 10.07.2023 (as already alluded to supra) and as of 10.07.2023, Rule 22(3) of 'Tamil Nadu Suspension of Sentence Rules, 1982' (hereinafter 'said Rules' for the sake of convenience and clarity) was an impediment. Elaborating on this, learned Prosecutor pointed out that Rule 22(3) of said Rules says that a prison inmate shall be granted a subsequent spell of ordinary leave only after completion of one year of imprisonment from the date on which he returns from the last ordinary leave. Learned Prosecutor submitted that the last ordinary leave spell for said prison inmate was from 23.10.2022 to 02.12.2022 and therefore, as of 10.07.2023, one year contemplated/set out in Rule 22(3) of said Rules had not elapsed.

7. This Court after carefully considering the submissions made on both sides and after perusing the case file placed before this Court comes to the conclusion that said prison inmate is entitled to be granted 40 ordinary leave without escort and the reasons are follows:



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(a) Rule 22(3) of said Rules does not come in the way, as of today, as the one year period incorporated in Rule 22(3) of said Rules elapsed on 02.12.2023;

(b) The ground on which ordinary leave has been sought i.e., serious illness of 85 year old mother of said prison inmate has not been subjected to any factual disputation or contestation;

(c) Said prison inmate has not come to the adverse notice of prison authorities or in other words, there is no prison offence against the said prison inmate;

(d) The conduct of said prison inmate during the incarceration thus far i.e., for over 23 years has been blemishless.

8. This Court has repeatedly held that said Rules is a piece of subordinate legislation made by Executive arm 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 such subordinate legislation which has not gone through



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the law making or legislative drill/legislative grind cannot in any manner abridge much less denude the constitutional powers of this Court.

9. In this regard, we deem it appropriate to say that the principle that a piece of subordinate legislation cannot abridge much less denude the constitutional powers of this Court under Article 226 of Constitution of India was laid down by us in *Selvam's* case reported *vide* Neutral Citation 2023:MHC:4258 of Madras High Court being order dated 15.09.2023 in W.P.No.27137 of 2023 and a scanned reproduction of the same is as follows:



W.P.No.27137 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.09.2023

CORAM

THE HONOURABLE MR.JUSTICE MSUNDAR
and

THE HONOURABLE MR.JUSTICE R.SAKTHIVEL

W.P.No.27137 of 2023

Selvam
S/o.Chinnathurai

Vs.

.. Petitioner

1. The State rep. by its
The Deputy Inspector General of Prison
Office of the Deputy Inspector General of Prison
Trichy Range, Race Course Road,
Trichy District - 620 023.
 2. The Superintendent of Prison
Central Prison at Trichy
Trichy - 620 020.
 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 Mandamus to direct the respondents to grant 40 days ordinary leave

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without escort to the petitioner / convict namely, Mr.Selvam, son of Chinnathurai, by considering petitioner's representation dated 28.07.2023 presently, who is detained under third respondent respectively.

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

ORDER

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

Captioned writ petition has been filed in this Court on 11.09.2023 with a mandamus prayer qua writ petitioner's representation dated 28.07.2023 seeking 40 days ordinary leave (to be noted, writ petitioner is a life convict prisoner). To be noted, this representation dated 28.07.2023 shall hereinafter be referred to as 'said representation' for the sake of convenience and clarity.

2. Short facts (short of elaboration / particulars that are not imperative for appreciating this order) are that writ petitioner was convicted in and by judgment of conviction and sentence dated 05.10.1998 in S.C.No.392 of 1997 on the file of learned Principal District and Sessions Judge's Court, Tirunelveli; that originally capital punishment was awarded

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for a 302 of 'the Indian Penal Code, 1860 (Act 45 of 1860)' [hereinafter 'IPC' for the sake of brevity] offence; that thereafter, the matter travelled to this Court, Hon'ble Supreme Court and by way of Mercy pleas before Hon'ble Governor, His Excellency the President; that capital punishment was modified as life imprisonment; that writ petitioner is now lodged in Central Prison, Puzhal, Tiruvallur District - 600 066 (Convict No.23170); that writ petitioner has remained incarcerated from 1994 for 29 years now; that writ petitioner has been granted leave and has gone on leave multiple times (15 times) in the past and on all occasions, he has returned and surrendered without any untoward incident; that now vide said representation, 40 days ordinary leave has been sought on two grounds namely, (a) to make arrangements for admission of writ petitioner's two children in B.E., and M.E. courses and (b) to repair his homestead; that said representation remains unattended is learned petitioner counsel's say and that has necessitated the filing of captioned writ petition in this Court on 11.09.2023 is his further say.

3. In the hearing today, Mr.M.Mohamed Saifulla, learned counsel on

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record for petitioner drew our attention to said representation and submitted that the aforementioned two grounds on which ordinary leave has been sought snugly fits into sub-classes (ii) and (iii) of Rule 20 of the Tamil Nadu Suspension of Sentence Rules 1982 (hereinafter 'said Rules' for the sake of convenience and clarity); that on all earlier occasions of leave, there has been nothing untoward and writ petitioner has returned promptly; that there is no impediment in granting 40 days ordinary leave that has been now sought.

4. Issue notice.

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

6. Learned Prosecutor, on instructions, submits that said representation is being processed and a call has to be taken qua said representation by first respondent owing to Rule 19 of said Rules. It is also submitted by learned Prosecutor that as part of said representation being

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considered, report of jurisdictional Probation Officer has been obtained and there is nothing adverse in the same. To state with specificity, learned Prosecutor says that jurisdictional Probation Officer's report says that leave as sought for shall be granted after with except to jurisdictional Probation Officer's report.

7. In the light of the narrative thus far, it comes to light that the captioned matter turns on a very narrow compass and therefore with the consent of both sides, the captioned writ petition was taken up and heard out.

8. After careful consideration of facts and the trajectory the matter has taken thus far, including the trajectory of incarceration of writ petitioner (so nearly three decades (29 years) now (born 1994) we are of the view that request / plea qua said representation has to be acceded to i.e., writ petitioner has to be granted 40 days ordinary leave as sought for and reasons are as follows:

(i) As rightly pointed out by learned counsel for writ petitioner, two grounds i.e., admission of children and repair work of homestead snugly fit into sub-classes (ii) and (iii) of

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Rule 20 of said Rules captioned 'Grounds for the grant of ordinary leave'. There is no dispute or contestation about these grounds;

(ii) Convict prisoner has gone on leave as many as 15 times thus far and details of the same as placed before us by learned Prosecutor are as follows:



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W.P.No.27157 of 2023

S.No		Name of the Bench		Date of the Order		Subject		Remarks	
1	1	1	1	1	1	1	1	1	1
2	2	2	2	2	2	2	2	2	2
3	3	3	3	3	3	3	3	3	3
4	4	4	4	4	4	4	4	4	4
5	5	5	5	5	5	5	5	5	5
6	6	6	6	6	6	6	6	6	6
7	7	7	7	7	7	7	7	7	7
8	8	8	8	8	8	8	8	8	8
9	9	9	9	9	9	9	9	9	9
10	10	10	10	10	10	10	10	10	10
11	11	11	11	11	11	11	11	11	11
12	12	12	12	12	12	12	12	12	12
13	13	13	13	13	13	13	13	13	13
14	14	14	14	14	14	14	14	14	14
15	15	15	15	15	15	15	15	15	15

The above tabulation makes it clear that on 2 out of 15 occasions, this Court i.e., Hon'ble coordinate Division Benches of this Court have granted leave. Be that as it may, what is of

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greater significance is, on all 15 occasions, nothing untoward has happened, convict prisoner has returned and surrendered on the leave period elapsing;

(iii) As regards said representation which we are concerned with in the captioned matter i.e., representation dated 28.07.2023, it is submitted that jurisdictional Probation Officer's report does not say anything adverse and it only says that it is desirable to grant 40 days leave with escort. To be noted, learned counsel for writ petitioner, on instructions, submits that writ petitioner is willing to go with escort. This submission is recorded;

The aforementioned two reasons, i.e., the reasons which snugly fit into sub-clauses (ii) and (iii) of Rule 20 of said Rules, in our view are very compelling as it pertains to education of writ petitioner's children. 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

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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

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of Unlawful Activities (Prevention) Act, 1967, principle applies in all four 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 may not even abridge Constitutional powers.

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9. In the light of the reasons set out supra, we make the following

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(i) Writ petitioner is granted 40 days ordinary leave with escort from 21.09.2023 10.30 a.m. to 01.11.2023 5.30 p.m.;

(ii) Writ petitioner shall surrender before third respondent by dusk on 01.11.2023 Wednesday i.e., by 5.30 p.m.;

(iii) The strength of the escort shall be decided by jurisdictional police depending on the ground situation;

(iv) Writ petitioner shall utilize the leave only for the purpose which has been granted i.e., education of his children and repair work of his homestead and shall not partake in any other activities;

(v) Writ petitioner being granted leave with escort does not mean that writ petitioner will be confined in his house and it shall not be treated as house arrest.

Captioned Writ Petition is disposed of in the aforesaid manner with the aforesaid directives. There shall be no order as to costs.

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(M.S.,J.)
15.09.2023

(R.S.V.,J.)

Index : Yes
Speaking
Neutral Citation : Yes

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Note: Upload forthwith

P.S.: Though captioned writ petition is disposed of, Registry to list the captioned writ petition under the cause list caption 'FOR REPORTING COMPLIANCE' on 03.11.2023.

MSUNDAR, J.
and
R.SAKTHIVELU, J.

mk

To

1. The State rep. by its

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10. As would be evident from **Selvam's** case, we have laid down the principle by respectfully following the ratio laid down by 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]** and **K.A.Najeeb** case **[Union of India Vs. K.A.Najeeb]** reported in **(2021) 3 SCC 713]**. To be noted, it is captured in sub paragraph (iii) of paragraph No.8 of **Selvam's** case.

11. We respectfully follow the recent judgment of Hon'ble Supreme Court rendered in **Benedict's** case i.e., **[Benedict Denis Kinny Vs. Tulip Brian Miranda and Others]** with **Prachi Prasad Parab Vs. State of Maharashtra and Others** reported in **2020 SCC Online SC 802]** and the most relevant paragraphs are as follows:

'.....10. From the submissions of the learned counsel for the parties and pleadings on record the following points arise for consideration:

10.1. (i) Whether the jurisdiction of the High Court under Article 226 of the Constitution of India is ousted due to statutory scheme of Section 5-B of the Mumbai Municipal Corporation Act?

10.2. (ii) Whether the High Court had no jurisdiction to



pass an interim or final order, the effect of which is to interdict the statutory fiction under Section 5-B to the effect that in the event the caste scrutiny certificate is not submitted within six months (now twelve months) from the date of election, the election shall be deemed to have been terminated retrospectively and the candidate shall be disqualified from being Councillor?

10.3. (iii) *Whether the interim order dated 18-8-2017 [Tulip Brian Miranda v. State of Maharashtra, 2017 SCC OnLine Bom 9997] in Writ Petition No. 2269 of 2017 staying the order dated 14-8-2017 of the Caste Scrutiny Committee with direction to Respondents 2 to 4 not to take any action of disqualification as well as the final judgment dated 2-4-2019 [Kesharben Murji Patel v. State of Maharashtra, 2019 SCC OnLine Bom 562 : (2019) 3 Bom CR 742] remanding the matter to the Caste Scrutiny Committee during which the writ petitioner was held to be entitled to continue, were the orders beyond jurisdiction of the High Court under Article 226 and could not have been passed in view of the statutory scheme of Section 5-B?*

10.4. (iv) *Whether the interim order of the High Court dated 22-8-2017 [Sudha Shambhunath Singh v. State of Maharashtra, 2017 SCC OnLine Bom 9996] passed in Writ Petition No. 145 of 2018 directing the respondents not to take any*



coercive action against the writ petitioner on the basis of the Caste Scrutiny Committee's order as well as the final judgment of the High Court dated 2-4-2019 [Kesharben Murji Patel v. State of Maharashtra, 2019 SCC OnLine Bom 562 : (2019) 3 Bom CR 742] allowing the writ petition and holding that the writ petitioner was entitled to continue on her seat, were the orders beyond jurisdiction of the High Court under Article 226 and could not have been passed in view of the statutory scheme delineated in Section 5-B?.....

.....

22.The nature of jurisdiction exercised by the High Courts under Article 226 came for consideration by this Court in large number of cases. In Sangram Singh v. Election Tribunal [Sangram Singh v. Election Tribunal, AIR 1955 SC 425] , Article 226 of the Constitution of India in reference to Section 105 of the Representation of the People Act, 1951 came for consideration. Section 105 of the Representation of the People Act provided that “every order of the Tribunal made under this Act (Representation of the People Act) shall be final and conclusive”. Argument was raised in the above case that neither the High Court nor the Supreme Court can itself transgress the law in trying to set right what it considers is an error of law on



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the part of the court or tribunal whose records are under consideration. It was held that jurisdiction of the High Court remains to its fullest extent despite Section 105. This Court also held that jurisdiction of the High Court in Article 226 and under Article 136 conferred on this Court cannot be taken away by a legislative device. In para 13, the following has been laid down : (AIR pp. 428-29)

“13. The jurisdiction which Articles 226 and 136 confer entitles the High Courts and this Court to examine the decisions of all tribunals to see whether they have acted illegally. That jurisdiction cannot be taken away by a legislative device that purports to confer power on a tribunal to act illegally by enacting a statute that its illegal acts shall become legal the moment the tribunal chooses to say they are legal. The legality of an act or conclusion is something that exists outside and apart from the decision of an inferior tribunal.

It is a part of the law of the land which cannot be finally determined or altered by any tribunal of limited jurisdiction. The High Courts and the Supreme Court alone can determine what the law of the land is vis-à-vis all other courts and tribunals and they alone can pronounce with authority and finality on what is legal and what is not. All that an inferior tribunal can do is to reach a tentative conclusion which is subject to review under Articles



226 and 136. Therefore, the jurisdiction of the High Courts under Article 226 with that of the Supreme Court above them remains to its fullest extent despite Section 105.”

23. A seven-Judge Bench of this Court in Kerala Education Bill, 1957, In re [Kerala Education Bill, 1957, In re, AIR 1958 SC 956] had occasion to consider the jurisdiction of the High Court under Article 226 in reference to a provision in the Kerala Education Bill, 1957. Clause 33 of the Kerala Education Bill provided:

“33. Courts not to grant injunction.—
Notwithstanding anything contained in the Code of Civil Procedure, 1908, or in any other law for the time being in force, no court shall grant any temporary injunction or make any interim order restraining any proceedings which is being or about to be taken under this Act.”

25. Answering Question 4, this Court held that no enactment of the State Legislature can take away or abridge the jurisdiction and power conferred on the High Court under Article 226. The learned counsel appearing for the State of Kerala submitted before this Court that the Constitution is the paramount law of the land, and nothing short of a constitutional amendment as provided for under the Constitution can affect any



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of the provisions of the Constitution, including Article 226. It was submitted that the power conferred upon the High Courts under Article 226 of the Constitution is an overriding power entitling them, under certain conditions and circumstances, to issue writs, orders and directions to subordinate courts, tribunals and authorities notwithstanding any rule or law to the contrary. The Constitution Bench in para 35 has noticed the stand taken on behalf of the State of Kerala in the following words : (Kerala Education Bill, 1957, In re case [Kerala Education Bill, 1957, In re, AIR 1958 SC 956] , AIR p. 987)

“35. ... The State of Kerala in their statement of case disowns in the following words all intentions in that behalf:

‘52. Kerala State asks this Honourable Court to answer the fourth question in the negative, on the ground that the power given to High Courts by Article 226 remains unaffected by the said Clause 33.

53. Kerala State contends that the argument that Clause 33 affects Article 226 is without foundation.

54. The Constitution is the paramount law of the land, and nothing short of a constitutional amendment as provided for under the Constitution can affect any of the provisions of the Constitution, including Article 226. The power conferred upon High Courts under Article 226 of the Constitution



is an overriding power entitling them, under certain conditions and circumstances, to issue writs, orders and directions to subordinate courts, tribunals and authorities notwithstanding any rule or law to the contrary.’ ”

24. In exercise of power vested in him by Article 143(1), the President of India had referred to this Court four questions for consideration. Question 4, which is relevant for the present case was to the following effect : (Kerala Education Bill, 1957, In re case [Kerala Education Bill, 1957, In re, AIR 1958 SC 956] , AIR p. 970, para 10)

“10. ... ‘...(4) Does Clause 33 of the Kerala Education Bill or any provisions thereof, offend Article 226 of the Constitution in any particulars or to any extent?’ ”

26. This Court expressed its agreement with the submissions made by the State of Kerala and held that Clause 33 is subject to the overriding provisions of Article 226 of the Constitution of India. This Court laid down the following : (Kerala Education Bill, 1957, In re case [Kerala Education Bill, 1957, In re, AIR 1958 SC 956] , AIR p. 987, para 35)

“35. ... The learned counsel for the State of Kerala submits that Clause 33 must be read subject to Articles 226 and 32 of the Constitution. He relies on the well known principle of construction that if a



provision in a statute is capable of two interpretations then that interpretation should be adopted which will make the provision valid rather than the one which will make it invalid. He relies on the words “other law for the time being in force” as positively indicating that the clause has not the Constitution in contemplation, for it will be inapt to speak of the Constitution as a “law for the time being in force”. He relies on the meaning of the word “law” appearing in Articles 2, 4, 32(3) and 367(1) of the Constitution where it must mean law enacted by a legislature. He also relies on the definition of “Indian law” in Section 3(29) of the General Clauses Act and submits that the word “law” in Clause 33 must mean a law of the same kind as the Civil Procedure Code of 1908, that is to say, a law made by an appropriate legislature in exercise of its legislative function and cannot refer to the Constitution. We find ourselves in agreement with this contention of the learned counsel for the State of Kerala. We are not aware of any difficulty — and none has been shown to us — in construing Clause 33 as a provision subject to the overriding provisions of Article 226 of the Constitution and our answer to Question 4 must be in the negative.”

27. What has been laid down by the Constitution Bench of this Court in above case makes it beyond any doubt that the power under Article 226 of the Constitution overrides any



contrary provision in a statute and the power of the High Court under Article 226 cannot be taken away or abridged by any contrary provision in a statute.

28. Gajendragadkar, C.J. speaking for a Constitution Bench of this Court in Powers, Privileges & Immunities of State Legislatures, In re [Powers, Privileges & Immunities of State Legislatures, In re, AIR 1965 SC 745 : (1965) 1 SCR 413] held that existence of judicial power in the High Court under Article 226 and this Court under Article 32 postulate the existence of a right in the citizen to move the Court otherwise the power conferred on the High Courts and this Court would be rendered virtually meaningless. In para 129 the following was held : (AIR p. 787)

“129. If the power of the High Courts under Article 226 and the authority of this Court under Article 32 are not subject to any exceptions, then it would be futile to contend that a citizen cannot move the High Courts or this Court to invoke their jurisdiction even in cases where his fundamental rights have been violated. The existence of judicial power in that behalf must necessarily and inevitably postulate the existence of a right in the citizen to move the Court in that behalf; otherwise the power conferred on the High Courts and this Court would be rendered virtually meaningless. Let it not be forgotten that the judicial power conferred on the High Courts and this Court is meant for the protection of the citizens' fundamental rights, and so, in the existence of the said judicial power itself is



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necessarily involved the right of the citizen to appeal to the said power in a proper case.”

12. The aforementioned list of authorities rendered by Hon'ble Supreme Court makes it clear that even a statute which has gone through legislative drill cannot abridge much less denude the constitutional powers of a constitutional Court in exercising powers under Article 226 of the Constitution of India. The case on hand is in a much better footing as we are dealing with a piece of subordinate legislation i.e., said Rules which has been made without legislative grind or law making drill. Therefore, we are of the considered but certain view that said Rules cannot become an impediment for this Court granting leave. Furthermore, the case on hand is on a better footing in another view of the matter also. That another view is, on a demurrer assuming that Rule 22(3) of said Rules operates, it still does not come in the way because as of 02.12.2023, the one year cooling period ingrained in Rule 22(3) of said Rules had elapsed and therefore, there is no impediment as of today in grant of leave.



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13. In the typed set placed before us, there is also an order made in WP petitioner's case with regard to the same prison inmate being order dated 23.09.2023 in W.P.(MD) No.22254 of 2022 where another Hon'ble Coordinate Bench has held that orders regarding extension of leave can be granted only within the four corners of said Rules. This order is distinguishable on facts as it pertains to extension of leave and not grant of leave.

14. Be that as it may, even as per law of precedents, the aforementioned cases, namely, ***Vernon*** case, ***K.A.Najeeb*** case and ***Benedict*** case were not brought to the notice of Hon'ble Division Bench. Therefore, going by law of precedents, we respectfully follow the law laid down by Hon'ble Supreme Court without resorting to reference. To be noted, if the aforementioned case laws, namely, ***Vernon*** case, ***K.A.Najeeb*** case and ***Benedict*** case have been placed before other Hon'ble Coordinate Bench, then a reference would have become necessary.

15. Hon'ble Supreme Court has repeatedly held that grant of leave is one of the facets of '*Reformative Theory*' of punishment. To be noted, '*Retributive Theory*' is now obsolete and anomalous. It is considered as



an ancient and archaic.

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16. In *Mofil Khan's* case [*Mofil Khan Vs. State of Jharkhand* reported in (2015) 1 SCC 67], principle of reformatory theory was articulated and elucidated by Hon'ble Supreme Court which is instructive and we are respectfully following the same.

17. In the course of discussion, learned Prosecutor for the purpose of completion of discussion drew our attention to an order dated 28.02.2022 made in W.P.No.2768 of 2022 (*Chitra's case*) [*Chitra Vs. The State rep. by its, The Secretary to Government of Tamil Nadu*] by another Hon'ble Coordinate Bench. We heard learned Prosecutor on *Chitra's* case. We also perused the order. *Chitra's* case also does not come in the way for the following two reasons:

(i) This is not a case where we are compelling or directing the Executive to exercise power and grant leave, on the contrary, we are exercising our powers under Article 226 of the Constitution of India and granting leave; and

(ii) This is not a case where recourse is taken to Rule 40 of said Rules. As already alluded to supra in a



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long line of authorities, recourse to Rule 40 will arise only when the Government exercise its powers. Here is the case where this Court is exercising constitutional powers under Article 226 of the Constitution of India.

18. In the light of the narrative, discussion and dispositive reasoning thus far, the following order is made:

18.1 The said prison inmate, namely, Thiru.Sankaranarayanan son of Thiru.Krishnasamy, (LCT No.2375), now detained in Central Prison, Palayamkottai, is granted 40 days leave from 18.12.2023, 10:30 AM to 26.01.2024. To be noted, it is 40 days ordinary leave without escort;

18.2 The said prison inmate shall surrender in the office of the fourth respondent on the leave period elapsing by dusk i.e., (5.30 p.m.) on 27.01.2024 (Saturday);

18.3 The said prison inmate shall appear and sign before jurisdictional Magistrate (we are informed



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that jurisdictional Magistrate is Judicial Magistrate,
Sattur) everyday in the forenoon;

18.4 The said prison inmate during the period of leave shall stay either with his sister (WP petitioner) in Sivakasi at the address given in WP or with his mother in Sattur and no other place;

18.5 The said prison inmate shall utilize the leave only for the purpose for which it has been availed/granted and he shall not partake in any other activities which is outside the realm of the grounds on which leave is being granted;

19. Captioned WP is disposed of in the aforesaid manner with the aforesaid discussion/observation and directives. There shall be no order as to costs.

(M.S., J.) (R.S.V., J.)
07.12.2023

Index : Yes/No
Neutral Citation : Yes/No
PKN

**P.S: (i) Upload forthwith.
(ii)Registry to forthwith communicate this order to Jail
authorities in Central Prison, Palayamkottai.**



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To

1. The Secretary to Government,
State of Tamil Nadu,
Home (Prison IV) Department,
Secretariat, Fort St.George,
Chennai – 600 009.
2. The Director General of Police and
Inspector General of Prisons and Correctional Service,
Whannels Road, Egmore,
Chennai – 600 008.
3. The Deputy Inspector General of Prisons
and Correctional Services,
Madurai Range, Madurai Central Prison Campus,
New Jail Road, Madurai – 625 016.
4. The Superintendent of Prison,
Central Prison, Palayamkottai.
5. Judicial Magistrate, Sattur
6. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.



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

PKN

ORDER MADE IN
W.P(MD)No.28831 of 2023

07.12.2023