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W.P.No.25832 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.10.2024

CORAM :

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

AND

THE HONOURABLE MR. JUSTICE V.SIVAGNANAM

W.P.No.25832 of 2024

Mrs.E.Kalaiyarasi

... Petitioner

Vs.

1.The State Represented by its,
The Principal Secretary to Government,
Home (Prison-IVA) Department, Secretariat,
Fort St. George,
Chennai – 600 009.

2.The Director General of Prisons,
Gandhi Irwin Road, CMDA Building,
2nd Tower, Egmore, Chennai – 600 008.

3.The Superintendent of Prison,
Central Prison at Palayamkottai,
Palayamkottai – 627 002.

... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India, praying for the issuance of Writ of Certiorarified Mandamus, to call for the records in impugned order G.O.(D).No.290, dated 07.03.2024, passed by the



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1st respondent and quash the same and directing the respondents to release the father of petitioner / convict namely Mr.Eswaran @ Mareeswaran @ Kaleeswaran S/o. Samuthira Nadar (CT No.34) who is confining at 3rd respondent herein.

For Petitioner : Mr.M.Mohamed Saifulla

For Respondents : Mr.E.Raj Thilak
Additional Public Prosecutor

ORDER

[Order of the Court is made by **S.M.SUBRAMANIAM, J.**]

Under assail is the order of rejection seeking premature release of the convict prisoner issued in G.O.(D).No.290, dated 30.04.2024.

2. The petitioner is the daughter of life convict prisoner Mr.Eswaran @ Mareeswaran @ Kaleeswaran S/o. Samuthira Nadar (CT No.34), who is confined at Central Prison, Palayamkottai. The prisoner was convicted under Section 302 in two counts and he was sentenced to undergo double life imprisonment and fine of Rs.1000 in default to undergo three years imprisonment. Criminal Appeal filed by the prisoner was dismissed. The prisoner is actually undergoing imprisonment for the past about 14 years.



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Thus, the application was submitted seeking premature release under the scheme issued by the Government in G.O.Ms..No.430 Home (Prison-IV) Department dated 11.08.2023. The said application was scrutinized and processed by the Government.

3. It is not in dispute between the parties that the application for premature release was scrutinised by the Government and duly recommended by the State Committee. The recommendation of the State Committee was approved by the Principal Secretary, Home Department, Secretary (Legal Affairs) and Chief Secretary to the Government of Tamil Nadu. Thereafter, it was circulated to State Cabinet decision and the State Cabinet approved the recommendations of the State Committee and consequently the Hon'ble Minister for Law and the Hon'ble Chief Minister approved the recommendations. Finally it was circulated for the approval of the Hon'ble Governor. The Governor has returned the dissenting note stating that “It is a case of double murder by the convict. Remission would be premature and prejudicial to justice”.

4. The opinion of the Hon'ble Governor is that premature is running counter to the terms stipulated under the scheme for remission. The convict



prisoner had already undergone imprisonment for 14 years and therefore, the scheme is to be considered with reference to its terms and eligibility criteria and not based on the nature of offence for which the prisoner is convicted. Once the scheme is applicable to a particular convict prisoner and it is otherwise found eligible in accordance with the scheme and duly recommended by the State Committee and approved by the State Cabinet, the Hon'ble Governor is not empowered to take a dissenting view which is running counter to the rules laid down in number of judicial decisions.

5. Question arises, whether such general opinion formed by the Hon'ble Governor would be binding on the decision of the State Cabinet, which is otherwise taken pursuant to the recommendations made by the State Committee under the scheme of remission which is statutory in nature?

6. The reasons stated by the Hon'ble Governor that it is premature, would not arise, since the scheme itself prescribed eligibility and the petitioner is otherwise eligible under the scheme for submission of application seeking premature release. While so, the opinion that the application for premature release is premature, is not in consonance with the terms and eligibility criteria stipulated under the scheme. That apart, the



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decision of the State Cabinet is binding on the Hon'ble Governor.

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7. In this backdrop, we would like to consider the implications of the dissenting opinion of the Hon'ble Governor counter to the decision taken by State Committee as approved by the State Cabinet. The Law regarding the powers of the Hon'ble Governor with reference to the decision taken by the State Cabinet in the matter of premature release / remission has been settled by the Three Judges Bench of the Hon'ble Supreme Court of India in the case of *A.G.Perarivalan vs. State through Superintendent of Police, CBI/SIT/ MMDA, Chennai*¹. The relevant paragraphs are extracted hereunder;

“18. The power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of an offence against any law related to which the executive power of the State extends is vested in the Governor under Article 161 of the Constitution. Article 162 makes it clear that the executive power of the State shall extend to matters with respect to which the legislature of the State has power to make laws. Article 163 of the Constitution provides that there shall be a Council of Ministers with the chief Minister at the head to aid and advise the Governor in the exercise of his

1. (2023) 8 SCC 257



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functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion.

19. The limits within which the executive Government can function under the Indian Constitution can be ascertained without much difficulty by reference to the form of the executive which our Constitution has set up. Our Constitution, though federal in its structure, is modelled on the British parliamentary system where the executive is deemed to have the primary responsibility for the formulation of governmental policy and its transmission into law though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State. The Governor occupies the position of the head of the executive in the State but it is virtually the Council of Ministers in each State that carries on the executive Government. In the Indian Constitution, therefore, we have the same system of parliamentary executive as in England and the Council of Ministers consisting, as it does, of the members of the legislature is, like the British Cabinet, “a hyphen which joins, a buckle which fastens the legislative part of the State to the executive part”.

20. Under the cabinet system of Government as embodied in our constitution the Governor is the Constitutional or formal head of the State and he



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exercises all his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers, save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion. Wherever the Constitution requires the satisfaction of the President or the Governor for the exercise of any power or function by the President or the Governor, as the case may be, as for example in Articles 123, 213, 311(2) proviso (c), 317, 352(1), 356 and 360, the satisfaction required by the Constitution is not the personal satisfaction of the President or of the governor but is the satisfaction of the President or of the Governor in the constitutional sense under the cabinet system of Government. It is the satisfaction of the Council of Ministers on whose aid and advice the President or the Governor generally exercises all his powers and functions.

.....

24. The law laid down by this Court, as detailed above, is clear and explicit. The advice of the State Cabinet is binding on the Governor in matters relating to commutation/remission of sentences under Article 161. No provision under the Constitution has been pointed out to us nor any satisfactory response tendered as to the source of the Governor's power to refer a recommendation made by the State Cabinet to the President of India. In the instant case, the Governor



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ought not to have sent the recommendation made by the State Cabinet to the President of India. Such action is contrary to the constitutional scheme elaborated above. It is relevant to point out that the recommendation made by the State Cabinet was on 09.09.2018, which remained pending before the Governor for almost two-and-a-half years without a decision being taken. It was only when this Court started enquiring about the reason for the decision being delayed, the Governor forwarded the recommendation made by the State Government for remission of the appellant's sentence to the President of India.....

.....

38. 1. The law laid down by a catena of judgments of this Court is well settled that the advice of the State Cabinet is binding on the Governor in the exercise of his powers under Article 161 of the Constitution.

38.2. Non-exercise of the power under Article 161 or inexplicable delay in exercise of such power not attributable to the prisoner is subject to judicial review by this Court, especially when the State Cabinet has taken a decision to release the prisoner and made recommendations to the Governor to this effect.

38.3. The reference of the recommendation of the Tamil Nadu Cabinet by the Governor to the President of India two-and-a-half years after such recommendation



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had been made is without any constitutional backing and is inimical to the scheme of our Constitution, whereby “ the Governor is but a shorthand expression for the State Government” as observed by this Court.

38.4. The judgment of this Court in M.P.Special Police Establishment has no applicability to the facts of this case and neither has any attempt been made to make out a case of apparent bias of the State Cabinet or the State Cabinet having based its decision on irrelevant considerations, which formed the fulcrum of the said judgment.

38.5. The understanding sought to be attributed to the judgment of this Court in Sriharan with respect to the Union Government having the power to remit/commute sentences imposed under Section 302 IPC is incorrect, as no express executive power has been conferred on the Centre either under the Constitution or law made by Parliament in relation to Section 302. In the absence of such specific conferment, it is the executive power of the State that extends with respect to Section 302 IPC, assuming that the subject matter of Section 302 IPC is covered by List III Entry 1.

38.6. Taking into account the appellant's prolonged period of incarceration, his satisfactory conduct in jail as well as during parole, chronic ailments from his medical records, his educational qualifications



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acquired during incarceration and the pendency of his petition under Article 161 for two-and-a-half years after the recommendation of the State Cabinet, we do not consider it fit to remand the matter for the Governor's consideration. In exercise of our power under Article 142 of the Constitution, we direct that the appellant is deemed to have served the sentence in connection with Crime No.329 of 1991. The appellant, who is already on bail, is set at liberty forthwith. His bail bonds are called.”

8. Pertinently, in the case of *the State of Haryana and others vs. Raj Kumar @ Bittu*², the Hon'ble Apex Court reiterated that the power under Article 161 of the Constitution can be exercised by the State Governments, not by the Governor on his own. The advice of the appropriate Government binds the Head of the State, which reads as under:

“12. Thus, the power under Article 161 of the Constitution can be exercised by the State Governments, not by the Governor on his own. The advice of the appropriate Government binds the Head of the State. No separate order for each individual case is necessary but any general order made must be clear enough to identify the group of cases and indicate the

2. 2021 (9) SCC 292



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application of mind to the whole group. Therefore, the policies of the State Government are composite policies encompassing both situations under Article 161 of the Constitution and Sections 432, 433 and 433-A of the Code. The remission under Article 161 of the Constitution will override Section 433-A of the Code, if the State Government decides to be governed of its constitutional power.

.....

19. Section 433-A of the Code starts with a non-obstante clause restricting the right of the appropriate Government, to suspend the sentence of imprisonment for life imposed on conviction of a person for an offence for which death is one of the punishments provided by law, that such person shall not be released from prison unless he has served at least 14 years of imprisonment. Therefore, the power of the appropriate Government to release a prisoner after serving 14 years of actual imprisonment is vested with the State Government. On the other hand, the power conferred on the governor, though exercised on the aid and advice of the State, is without any restriction of the actual period of imprisonment undergone by the prisoner. Thus, if a prisoner has undergone more than 14 years of actual imprisonment, the State Government, as an appropriate government, is competent to pass an order of premature release, but if the prisoner has not undergone 14 years



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or more of actual imprisonment, the Governor has a power to grant pardons, reprieves, respites and remissions of punishment or to suspend, remit or commute the sentence of any person de hors the restrictions imposed under Section 433-A of the Constitution. Such power is in exercise of the power of the sovereign, though the Governor is bound to act on the aid and advice of the State Government.”

9. Question arises, whether High Court in exercise of powers of judicial review can interfere with the decision taken by the Hon'ble Governor under Article 161 of the Constitution of India. The answer is found in the case of *Epuru Sudhakar and Another vs. Government of Andhra Pradesh and other*³, wherein, the Court held as follows:

“34. The position, therefore, is undeniable that judicial review of the order of the President or the Governor under Article 72 or Article 161, as the case may be, is available and their orders can be impugned on the following grounds:

- a. that the order has been passed without application of mind;
- b. that the order is malafide;

3. 2006(8) SCC 161



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- c. that the order has been passed on extraneous or wholly irrelevant considerations;
- d. that relevant materials have been kept out of consideration ;
- e. that the order suffers from arbitrariness.”

10. Holistic reading and consideration of the principles settled by the Apex Court of India, the question to be considered by this Court is whether Hon'ble Governor is bound by State's recommendations in the matter relating to premature release or not?

11. The law laid down by a catena of judgments of this Court is well settled that the advice of the State Cabinet is binding on the Governor in the exercise of his power under Article 161 of the Constitution of India. It is held that non exercise of the Power under Article 161 or inexplicable delay in exercise of such power not attributable to the prisoner is subject to the judicial review by the Court, especially when the State Cabinet has taken a decision to release the prisoner and made recommendations to the Hon'ble Governor to this effect.



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12. The power under Article 161 of the Constitution can be exercised by the State Governments, not by the Governor on his own. The advice of the appropriate Government binds the Head of the State. No separate order for each individual case is necessary, but any general order made must be clear enough to identify the group of cases and indicate the application of mind to the whole group. Therefore, the policies of the State Government are composite policies encompassing both situations under Article 161 of the Constitution and Section 432, 433 and 433(A) of the Code. The remission under Article 161 of the Constitution will override Section 433(A) of the Code, if the State Government decides to be governed of its constitutional Power.

13. The Judicial scrutiny on the Constitutional power to grant remission by the Governor under Article 161 is also settled by the Courts. In ***Epuru Sudhakar*** case cited *supra*, the principles are laid down that if the order has been passed on extraneous or wholly irrelevant considerations or relevant materials have been kept out of consideration, the Courts are empowered to exercise the powers of judicial review for interference.



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14. The power of an appropriate Government to issue General or Special orders allowing remissions is traceable under Section 432 Criminal Procedure Code and the policies in question were framed in exercise of the powers conferred on appropriate Government under Section 432 Criminal Procedure Code and hence, are statutory in nature. In the context of the above policy, the power under Article 161 can be exercised by the State Government, not by the Governor on his own. The advice of appropriate Government binds the Head of the State.

15. In view of the fact that the dissenting note of the Hon'ble Governor is not in consonance with the scheme formulated for premature release by the Government and further the reasons are neither candid nor convincing, we are inclined to remand the matter back for fresh consideration.

16. Accordingly, the impugned rejection order passed by the Government in G.O.(D).No.290, Home (Prison-IV) Department dated 07.03.2024 is quashed and the matter is remanded back to the 1st respondent for re-circulation and for taking fresh decision on taking note of the legal principles and pass appropriate orders as expeditiously as possible.



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17. With the above directions, the Writ Petition stands allowed. No

costs.

[S.M.S., J.] [V.S.G., J.]

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Index : Yes

Speaking order

Neutral Citation : Yes

Jeni

To

1.The Principal Secretary to Government,
The State,
Home (Prison-IVA) Department, Secretariat,
Fort St. George,
Chennai – 600 009.

2.The Director General of Prisons,
Gandhi Irwin Road, CMDA Building,
2nd Tower, Egmore, Chennai – 600 008.

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4.The Additional Public Prosecutor,
Madras High Court.



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AND
V.SIVAGNANAM, J.

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