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W.P.No.32483 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

**DATED : 20.11.2024**

CORAM :

**THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM**  
**AND**  
**THE HONOURABLE MR. JUSTICE M.JOTHIRAMAN**

**W.P.No.32483 of 2024**

Mr.John Basha

... 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,  
2<sup>nd</sup> Tower, Egmore, Chennai – 600 008.

3.The Superintendent of Prison,  
Central Prison at Vellore,  
Thorapadi, Vellore – 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 pertains in impugned order in G.O.(D).No.1225, dated 25.10.2023,



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passed by the 1<sup>st</sup> respondent and quash the same and directing the respondents to release petitioner / convict Mr.John Basha S/o.Khadar Basha (CT.No.2414), who is confining at 3<sup>rd</sup> respondent herein.

For Petitioner : Mr.M.Mohamed Saifulla

For Respondents : Mr.R.Muniyapparaj  
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 in G.O.(D).No.1225, Home (Prison-IVA) Department dated 25.10.2023.

2. The petitioner / convict prisoner was convicted under Sections 364 and 302 of Indian Penal Code (IPC) for life imprisonment and also convicted under Section 302 read with 201 of IPC for a period of seven years imprisonment. The petitioner is in actual imprisonment for about 14 years. The application seeking premature release was submitted under the scheme approved by the Government in G.O.Ms.No.488, Home (Prison-IV)



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Department dated 15.11.2021. Under the scheme for premature release in G.O.Ms.No.488 dated 15.11.2021, completion of ten years imprisonment is fixed as criteria. The application submitted was placed before the State Committee for scrutinisation. The State Committee recommended the case of the petitioner for premature release. The State Cabinet approved the recommendation of the State Committee, but the Hon'ble Governor disagreed with the decision of the State Cabinet approving the recommendations made by the State Committee. Thus, the impugned order came to be passed and the present writ petition filed.

3. The Additional Public Prosecutor appearing on behalf of the respondents produced the original files relating to the application filed by the prisoner seeking premature release. The file reveals that the State Level Committee recommended the case of the prisoner for premature release. The recommendation was approved by the Additional Chief Secretary, Home Department and Secretary Legal Affairs and the Chief Secretary to Government of Tamil Nadu. It was placed before the State Cabinet and the recommendation was approved and accordingly, the Hon'ble Minister for Law and the Hon'ble Chief Minister approved the recommendation.



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However, the Hon'ble Governor dissented, citing that the convict prisoner abducted and murdered a minor boy for ransom. The Governor noted that the prisoner had not completed 14 years of imprisonment, making premature release prejudicial to justice.

4. 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?

5. 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 or premature release is premature, is not in consonance with the terms and eligibility criteria stipulated under the scheme. That apart, the decision of the State Cabinet is binding on the Hon'ble Governor.

6. 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



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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***<sup>1</sup>. 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 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

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1. (2023) 8 SCC 257



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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 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



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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 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



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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.....

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**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 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



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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 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



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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.”

7. Pertinently, in the case of *The State of Haryana and Others vs. Raj Kumar @ Bittu*<sup>2</sup>, 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 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,

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2. 2021 (9) SCC 292



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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 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



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the sovereign, though the Governor is bound to act on the aid and advice of the State Government.”

8. 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*<sup>3</sup>, 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;
- 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.”

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3. 2006(8) SCC 161



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9. 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?

10. 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.

11. 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



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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.

12. 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.

13. 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



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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.

14. However, we are of the considered opinion that the scheme for premature release is statutory in character and once the scheme is approved and implemented by the Government, the eligibility criteria as fixed is to be followed scrupulously. The dissenting opinion of the Hon'ble Governor that the prisoner has to undergo actual imprisonment for 14 years is running counter to the scheme approved by the Government in G.O.Ms.No.488 dated 15.11.2021, which is statutory in nature.

15. In view of the legal position as narrated above, the case of the petitioner is to be considered afresh based on the principles and observations made as above. Accordingly, the impugned rejection order passed by the Government in G.O.(D).No.1049, Home (Prison-IV) Department dated 06.09.2024 is quashed and the matter is remanded back to the 1<sup>st</sup> respondent for re-circulation and for taking fresh decision on taking note of the legal principles and pass appropriate orders in accordance with law as expeditiously as possible.



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

costs.

[S.M.S., J.] [M.J.R., J.]

20.11.2024

(1/2)

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,  
2<sup>nd</sup> Tower, Egmore, Chennai – 600 008.

3.The Superintendent of Prison,  
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4.The Additional Public Prosecutor,  
Madras High Court.



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**S.M.SUBRAMANIAM, J.**  
**AND**  
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