

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.09.2023

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THE HONOURABLE MR.JUSTICE M.SUNDAR
and

THE HONOURABLE MR.JUSTICE R.SAKTHIVEL

W.P.No.27137 of 2023

Selvam

S/o.Chinnathurai

.. Petitioner

Vs.

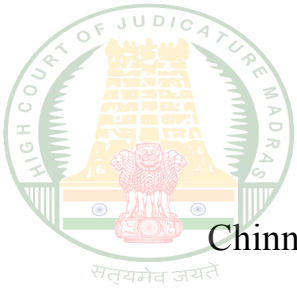
1. The State rep. by its
The Deputy Inspector General of Prison
Office of the Deputy Inspector General of Prison
Trichy Range, Race Course Road,
Trichy District - 620 023.

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 without escort to the petitioner / convict namely, Mr.Selvam, son of



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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

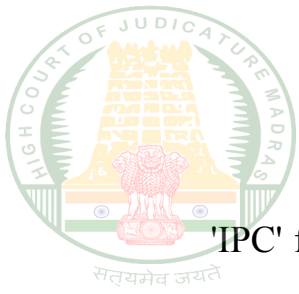
ORDER

[Order of the Court was made by M.SUNDAR, 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 (shorn 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 for a 302 of 'the Indian Penal Code, 1860 (Act 45 of 1860)' [hereinafter

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'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 record for petitioner drew our attention to said representation and submitted

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that the aforementioned two grounds on which ordinary leave has been sought snugly fits into sub-clauses (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 Thilak, 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 considered, report of jurisdictional Probation Officer has been obtained and

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there is nothing adverse in the same. To state with specificity, learned

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Prosecutor says that jurisdictional Probation Officer's report says that leave as sought for shall be granted albeit with escort is 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 for nearly three decades (29 years) now (from 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-clauses (ii) and (iii) of Rule 20 of said Rules captioned 'Grounds for the grant of



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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 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



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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 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



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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 of Unlawful Activities (Prevention) Act, 1967, principle applies in all fours 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



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fundamental rights do not part ways at the prison gates. To put it in a nutshell, Subordinate Legislation cannot denude nay not even abridge Constitutional powers.

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

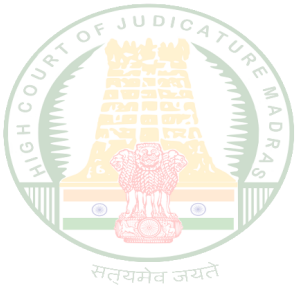
(i) Writ petitioner is granted 40 days ordinary leave with escort from 21.09.2023 10.30 a.m. to 01.11.2023 5.30 p.m.;

(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



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not mean that writ petitioner will be confined in his house and

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

(M.S.,J.)

(R.S.V.,J.)

15.09.2023

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.



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

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