

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.14908 of 2024

Veera Bharathi ... Petitioner
Vs

1. The State of Tamilnadu,
rep. By The Principal Secretary to Government,
Home (Prison) Department,
TN Govt. Chief Secretariat,
St. George Fort,
Chennai 600 009.
2. The AddGP/DGP of Prisons and Correctional Services,
TN Prison Head Quarters,
Whannels Road,
Egmore, Chennai – 600 008
3. The DIG of prisons (Chennai Range)
TN Prison Head Quarters,
Whannels Road,
Egmore, Chennai – 600 008.
4. The Superintendent,
Central Prison-I,
Puzhal, Chennai 600 066. Respondents

PRAYER: This Writ Miscellaneous Petition filed under Article 226 of Constitution of India to issue a Writ of Certiorarified Mandamus to call for the entire records relating to the impugned order in G.O.(D).No.398, Home(Prison-IV) Department, dated 20.03.2024 passed by the 1st respondent which arbitrarily rejected the petitioner's premature release from life imprisonment, and quashing the same as illegal and consequently directing the respondents to prematurely release the petitioner (Veera Bharathi, S/o. Ponniah, aged about 53/2024 years, LCP No.7209, Central Prison-I, Puzhal, Chennai) from life imprisonment by giving the benefit of the policy G.O.(MS) No.430, Home (Prison-IV) Department, dated 11.08.2023 and as well as under the provisions of Articles 14, 20(1) and 21 of the Constitution of India.

For Petitioner : Mr. Mr.R.Sankara Subbu
for
Mr.D.Mario Johnson

For Respondents : Mr.Hasan Mohamed Jinna,
State Public Prosecutor,
Assisted by

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 the Government issued in G.O.(D) No.398, Home(Prison-IV) Department, dated 20.03.2024.

2. The facts in brief would reveal that the petitioner is a life convict prisoner, admittedly completed more than 20 years of actual imprisonment. The Trial Court imposed sentence of Death Penalty, which was modified by the High Court as Life Sentence. The judgment of the High Court was affirmed by the Hon'ble Supreme Court of India.

3. Mr. Sankara Subbu, the learned counsel appearing for the petitioner would mainly contend that co-accused in the Criminal case Mr.Ilango @ Murugan S/o. Paulchamy naicker, was prematurely released by the Government in G.O.Ms.No.184/Home (Prison-IV) Department, dated 06.03.2024. Scheme introduced by the Government in G. O. (Ms) No.430, Home (Prison-IV) Department, dated 11.08.2023 contemplates eligibility

for premature release. When the benefit of premature release was granted in favour of co-accused, namely, Ilango @ Murugan S/o. Paulsamy Naicker, the said benefit is to be extended to the petitioner before this Court. He cannot be discriminated since the petitioner also had undergone the actual imprisonment for more than 20 years. The eligibility for premature release as contemplated in the said G.O.(Ms)No.430 is completion of 14 years of imprisonment. For all these reasons, the order impugned is to be set aside.

4. Mr. Hasan Mohamed Jinna, learned State Public Prosecutor appearing for the respondents produced the original files relating to the impugned G.O.(D).No.398, Home (Prison -IV) Department, dated 20.03.2024.

5. We have carefully gone through the original files. The eligibility for premature release of the petitioner is not in dispute with reference to the conditions stipulated in G.O.(Ms.)No.430. The State Committee recommended the case of the petitioner for premature release. The file was circulated. The Deputy Secretary, the Principal Secretary, Home

Department, the Secretary, Law Department, the Chief Secretary have approved the recommendations of the State Committee for premature release of the petitioner. The file was circulated to the Hon'ble Minister of Law and thereafter to the Hon'ble Chief Minister. Pertinently, the Hon'ble Law Minister and Hon'ble Chief Minister approved the recommendations of the State Committee for premature release of the petitioner. Finally, it was circulated to the Hon'ble Governor for consideration. The Hon'ble Governor opined that the case of the petitioner deserves no merit for consideration since the convict prisoner is a pedophile and he raped and killed a minor girl. Taking in exception to the nature of offence, the Hon'ble Governor had taken a descending view and disapproved the recommendations of the State Committee for premature release of the petitioner under the Scheme for remission.

6. The learned State Public Prosecutor would further submit that since the Hon'ble Governor has taken a descending view, the Government has issued the impugned G.O. and in all other aspects, the Government formed an opinion that the petitioner is eligible for premature release under

the Scheme and the State Committee recommended the case of the petitioner, which was approved by the State Cabinet. Consequently, the Hon'ble Minister for Law and the Hon'ble Chief Minister approved the file.

7. In this backdrop, we would like to consider the implications of the descending 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 in the case of *A.G.Perarivalan /vs/ State through Superintendent of Police, CBI/SIT/MMDA, Chennai* reported in *(2023) 8 SCC 257*. 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 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 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 ©, 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 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 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 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*** reported in ***2021 (9) SCC 292***, the 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, 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 the sovereign, though the Governor is bound to act on the aid and advice of the State Government.

9. The 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 Andhrapradesh and others* reported in *2006(8) SCC 161*, 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. “”*

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 to the 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.

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 the case of *Epuru Sudhakar* 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.

14. The power of an appropriate Government to issue General or Special orders allowing remissions is traceable under Section 432 Cr.P.C. and the policies in question were framed in exercise of the powers conferred on appropriate Government under Section 432 Cr.P.C. 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 the present case, we have considered the reasons assigned for rejection of sentence by High Court against the sentence of Death Penalty imposed by the Trial Court. The High Court made an observations that “who has actually murdered the Girl is therefore remained a mystery. Again

it cannot be said as to which accused has played what part". The said finding by the High Court resulted in reduction of sentence from Death Penalty to Life Sentence. When such a finding is the reason for reduction of sentence, we are of the considered opinion that the opinion formed by the Hon'ble Governor may not be wholly relevant with reference to the commission of offence by the petitioner in the present case. That apart, the co-convict in the present case, namely, Mr. Ilango @ Murugan S/o. Paulchamy Naicker, has already been prematurely released by the Government in G.O.(Ms).No.184 Home (Prison-IV) Department, dated 06.03.2024. The said fact was not considered by the Hon'ble Governor while deciding the issues. It would be insufficient to merely reject an application for premature release on the ground that the offence committed is heinous in nature. For the offence committed, the prisoner actually underwent imprisonment and the scheme itself provides eligibility criteria for grant of remission. When the scheme is approved by the Government and is of statutory in nature, thereafter, raising any doubt regarding the offence proved would have no implication and thus, the extraordinary and exceptional circumstances must stand beyond the scrutiny of the scheme

and in normal circumstances, such a stand would not only dilute the scheme of remission, but will defeat the scheme by itself. Therefore, we are not convinced with the decision taken by the Hon'ble Governor disapproving the recommendation of the State Committee and the approval granted by the State Cabinet signed by the Hon'ble Minister for Law and the Hon'ble Chief Minister and the Chief Secretary to Government of Tamil Nadu.

16. We are aware that the premature release is not an absolute right. The Government order issued in G.O.(Ms).No.430, Home (Prison-IV) Department, dated 11.08.2023, itself stipulates that the guidelines fringing into the eligibility of life convict for consideration of the Government and mere fulfilment of conditions prescribed in the guidelines does not confer any right for premature release of life convicts. Therefore, it is not an absolute right to be claimed by a convict prisoner. Since it is a scheme formulated by the State Government, which is statutory in nature, and when the High Court in exercise of the powers of Judicial Review finds that the decision taken and the reasons stated for passing the impugned order are neither candid nor convincing, the Court is left with no option but to

remand the matter back to the Government for recirculation and for fresh consideration.

17. Accordingly, this Writ Petition is allowed and the order impugned passed by the first respondent in G.O.(D).No.398, Home (Prison-IV) Department, dated 20.03.2024 is quashed and the first respondent/Government is directed to recirculate the files and thereafter, take a decision afresh and issue orders on merits and in accordance with law as expeditiously as possible.

[S.M.S., J.]

[V.S.G., J.]

17.10.2024

To

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1. The Principal Secretary to Government,
Home (Prison) Department,
TN Govt. Chief Secretariat,
St. George Fort, Chennai 600 009.
2. The AdDGP/DGP of Prisons and Correctional Services,
TN Prison Head Quarters,
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