IN HIGH COURT FOR THE STATE OF TELANGANA AT HYDERABAD

FRIDAY ,THE FOURTH DAY OF AUGUST
TWO THOUSAND AND TWENTY THREE

PRESENT

THE HONOURABLE SRI JUSTICE K.LAKSHMAN

CONTEMPT CASE NO: 430 OF 2022

Contempt Case filed Under Sections 10 to 12 of Contempt of Courts Act to punish the respondents herein for wilfully and deliberately flouting/non-implementing the Order of the High Court dated 01.06.2021 passed in W.P. No. 21478 of 2020.(Forming part of batch in WP No. 20421/2019)

Between:

Mohd Sarfaraz,

...PETITIONER

AND

1. Ravi Gupta, Principal Secretary, Home Department (Prisons) State of Telangana Secretariat Building Hyderabad
2. Dr Jitender, The Director General of Prisons and Correctional Services, Government of Telangana Hyderabad
3. T. Kalasagar, The Superintendent Prisoners Agriculture Colony, Cherlapalli Medchal District .

...RESPONDENTS

Counsel for the Petitioner :**Mrs. PUSHPINDER KAUR**

Counsel for the Respondents :**Mr. SAMALA RAVINDER, GP FOR HOME (PRISONS & FIRE SERVICES)**

The Court made the following:

HON'BLE SRI JUSTICE K. LAKSHMAN

CONTEMPT CASE No.430 OF 2022

ORDER:

Heard Mrs. Pushpinder Kaur, learned counsel for the petitioner and Mr. Samala Ravinder, learned Government Pleader for Home (Prisons & Fire Services) appearing on behalf of the respondents.

2. This Contempt Case is filed alleging willful and deliberate violation of common order dated 01.06.2021 in W.P. No.21478 of 2020 and batch.

3. Vide the aforesaid order, this Court disposed of W.P. No.21478 of 2020 along with other writ petitions directing respondent No.1 to consider the case of life-convict No.4161 - Mohd. Sarwar, father of the petitioner herein, in terms of the order dated 19.12.2016 passed by this Court in W.P. No.11545 of 2016 and the guidelines framed by the Government vide G.O.Ms.No.195, dated 30.06.1995 within a period of four (04) weeks from the date of receipt of copy of the order. This Court further directed respondent No. to consider the actual sentence and the total sentence completed by the life-convict including the remand period and remission earned and the principle laid down by the Hon'ble Supreme Court and other High Courts mentioned therein, failing which, it will be viewed seriously. This

Court also directed respondent No.1 to consider the directions issued by the Apex Court in **Re: Contagion of Covid 19 Virus in Prisons**[1] and the Division Bench of this Court vide order dated 14.09.2020 in W.P. (PIL) No.164 of 2020 due to the present COVID-19 pandemic situation.

4. According to the petitioner, respondent No.1 willfully and deliberately violated the aforesaid order. Vide Memo No.6555/Ser.III/A2/2021-6, dated 29.07.2021, respondent No.1 rejected the application of the life-convict on the very same ground i.e., the case of the life-convict falls under the category of Clause (III) (a) of Para 5 of G.O.Ms.No.16, Home (Legal) Department, dated 17.02.2016 for murder of 'public servant' while performing duty i.e., undergo minimum actual sentence of 18 years with remand period and total sentence of 24 years including the period of remission, as stipulated therein.

5. This Court in the common order dated 01.06.2021 in W.P. No.21478 of 2020 and batch categorically held that the deceased in W.P. No.21478 of 2020 was killed at 9.30 P.M. and the deceased therein was not a 'public servant' on duty. In paragraph No.9 (xiv) of the said common order, this Court held that the deceased was a

[1]. Suo Motu Writ Petition (C) No.1 of 2020, dated 07.05.2021

Deputy Secretary, A.P. State Wakf Board and the incident had taken place at 9.30 P.M. Thus, the deceased was not on duty at the time of incident. The said fact was not considered by respondent No.1 in the impugned rejection memo. Even then, respondent No.1 rejected the case of life-convict, vide impugned memo dated 29.07.2021 on the same ground. Therefore, according to the petitioner, the respondents have willfully and deliberately violated the aforesaid order.

6. Respondent No.1 has filed counter contending that in compliance of the orders of this Court, the case of the life-convict was reviewed on 13.10.2021 along with other convict prisoners, who were also convicted in the same Criminal case No.112 of 1997, dated 24.01.2003 by placing the same before the Screening Committee constituted under G.O.Ms.No.30, Home (Ser.III) Department, dated 26.09.2020 considering the triple factors i.e., (i) Antecedents; (ii) Conduct of Lifers during Incarceration and (iii) Likelihood to abstain from crime. On reconsideration of the same, the Committee recommended for premature release of the life-convicts. The recommendation is pending with the Hon'ble Governor, who has to take decision under Article - 161 of the Constitution of India.

7. It is further contended that as per the powers vested under Article - 161 of the Constitution of India, the Hon'ble Governor of the State shall have the power to grant remission to any convicted prisoner. Therefore, he has complied with the order under contempt. Unless the Hon'ble Governor pardons the Convict in terms of Article - 161 of the Constitution of India, he has no role in the matter. However, he has tendered unconditional apology.

8. It is relevant to note that in the counter affidavit of respondent No.1, there is no mention with regard to the memo dated 29.07.2021 rejecting the case of the life convict on the very same grounds. Respondent Nos.2 and 3 have also filed counter on the same lines.

9. The Apex Court in **The State of Haryana v. Raj Kumar @ Bittu**[2], held as under:

> "21. Therefore, we find that the directions issued by the High Court are not sustainable for the reason that the policies have to be read keeping in view the period of imprisonment undergone by a prisoner. The power of remission is to be exercised by the State Government, as an appropriate Government, if the prisoner has undergone 14

[2]. (2021) 9 SCC 292

years of actual imprisonment in the cases falling within the scope of Section 433-A of the Code and in case the imprisonment is less than 14 years, the power of premature release can be exercised by the Hon'ble Governor though on the aid and advice of the State Government.

22. Consequently, the directions issued by the learned Single Bench are not sustainable and are hereby set aside.

23. The prisoner herein has completed 12 years and 25 days as on 6.7.2021 as per the custody certificate produced by the State. The case for premature release of the prisoner in terms of the policy of the State Government dated 13.8.2008, the policy which was applicable on the date of his conviction, can be considered only after he completes 14 years of actual imprisonment. However, the State Government can consider the prisoner in question for premature release after undergoing imprisonment for less than 14 years only under Article 161 of the Constitution."

10. Paragraph No.17 of the aforesaid judgment is also relevant and the same is extracted as under:

"17. 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."

11. In the present case, according to the life-convict, he has completed 27 years of imprisonment.

12. It is relevant to note that a learned Judge of this Court vide order dated 28.07.2022 in W.P. No.18399 of 2021 relying on the principle laid down by this Court in **Raj Kumar @ Bittu**[2] and also considering the fact that the life-convict therein has completed the actual sentence of sixteen years one month and one day and total remand of twenty three years three months fourteen days and also considering the fact that respondent No.1 rejected the application submitted by the life-convict seeking remission, allowed the writ petition setting aside the rejection memo dated 29.07.2021. Respondent No.1 therein was further directed to pass appropriate orders within a period of three weeks from the date of receipt of copy of the said order. The facts of the present case are also similar to the facts of the said case. However, it is a contempt case.

13. In **A.G. Perarivalan v. State, through Superintendent of Police, CBI/SIT/MMDA, Chennai, Tamil Nadu**[3], the Apex Court held that it has power of judicial review of orders of the Hon'ble Governor under Article - 161 of the Constitution of India, which can be impugned on certain grounds. Non-exercise of the power under Article - 161 of the Constitution of India is not immune from judicial review as held by the Apex Court in **Epuru Sudhakar v.**

3. 2022 SCC OnLine SC 635

Government of Andhra Pradesh[4]. Given petitions under Article - 161 pertain to the liberty of individuals, inexplicable delay not on account of the prisoners is inexcusable as it contributes to adverse physical conditions and mental distress faced by a prisoner, especially when the State Cabinet has taken a decision to release the prisoner by granting him the benefit of remission/commutation of his sentence.

14. In **Maru Ram v. Union of India**[5], the Apex Court held in paragraph Nos.59, 60 and 61 as follows:

> "59. It is apparent that superficially viewed, the two powers, one constitutional and the other statutory, are co- extensive. But two things may be similar but not the same. That is precisely the difference. We cannot agree that the power which is the creature of the Code can be equated with a high prerogative vested by the Constitution in the highest functionaries of the Union and the States. The source is different, the substance is different, the strength is different although the stream may be flowing along the same bed. We see the two powers as far from being identical, and, obviously, the constitutional power is 'untouchable' and 'unapproachable' and cannot suffer the vicissitudes of simple legislative processes. Therefore, Section

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4. (2006) 8 SCC 161
5. (1981) 1 SCC 107

433A cannot be invalidated as indirectly violative of Articles 72 and 161. What the Code gives, it can take, and so, an embargo on Section 432 and 433 *(a)* is within the legislative power of Parliament.

60. Even so, we must remember the constitutional status of Articles 72 and 161 and it is common ground that Section 433-A does not and cannot affect even a wee-bit the pardon power of the Governor or the President. The necessary sequel to this logic is that notwithstanding Section 433-A the President and the Governor continue to exercise the power of commutation and release under the aforesaid Articles.

61. Are we back to Square one? Has Parliament indulged in legislative futility with a formal victory but a real defeat? The answer is 'yes' and 'no' Why 'yes'? Because the President is symbolic, the Central Government is the reality even as the Governor is the formal head and sole repository of the executive power but is incapable of acting except on, and according to, the advice of his council of ministers. The upshot is that the State Government, whether the Governor likes it or not, can advise and act under Article 161, the Governor being bound by that advice. The action of commutation and release can thus be pursuant to a governmental decision and the order may issue even without the Governor's approval although,

under the Rules of Business and as a matter of constitutional courtesy, it is obligatory that the signature of the Governor should authorise the pardon, commutation or release. The position is substantially the same regarding the President. It is not open either to the President or the Governor to take independent decision or direct release or refuse release of any one of their own choice. It is fundamental to the Westminster system that the Cabinet rules and the Queen reigns. Being too deeply rooted as foundational to our system no serious encounter was met from the learned Solicitor General whose sure grasp of fundamentals did not permit him to controvert the proposition, that the President and the Governor, be they ever so high in textual terminology, are but functional euphemisms promptly acting on and only on the advice of the Council of Ministers save in a narrow area of power. The subject is now beyond controversy, this court having authoritatively laid down the law in ***Shamsher Singh*** **case**. So, we agree, even without reference to Article 367 and Section 3(8)(b) and 3 (60)(b) of the General Clauses Act, 1897, that, in the matter of exercise of the powers under Arts. 72 and 161, the two highest dignitaries in our constitutional scheme act and must act not on their own judgment but in accordance with the aid and advice of the ministers. Article 74, after the 42nd

> Amendment silences speculation and obligates compliance. The Governor vis a vis his Cabinet is no higher than the President save in a narrow area which does not include Article 161. The Constitutional conclusion is that the Governor is but a shorthand expression for the State Government and the President is an abbreviation for the Central Government."

15. The Apex Court also gave certain directives while upholding the *vires* of Section - 433A of Cr.P.C.

16. In **Sher Singh v. State of Punjab**[6], the Apex Court in paragraph No.23 held as follows:

> "23. We must take this opportunity to impress upon the Government of India and the State Governments that petitions filed under Articles 72 and 161 of the Constitution or under Sections 432 and 433 of the Criminal Procedure Code must be disposed of expeditiously. A self- imposed rule should be followed by the executive authorities rigorously, that every such petition shall be disposed of within a period of three months from the date on which it is received. Long and interminable delays in the disposal of these petitions are a serious hurdle in the dispensation of justice and indeed, such delays tend to shake the

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6. (1983) 2 SCC 344

confidence of the people in the very system of justice."

17. Referring to the same, the Apex Court in **Shatrughan Chauhan v. Union of India**[7] held in paragraph Nos.53 to 57 as follows:

> "53. Obviously, the mercy petitions disposed of from 1989 to 1997 witnessed the impact of the observations in the disposal of mercy petitions. Since the average time taken for deciding the mercy petitions during this period was brought down to an average of 5 months from 4 years thereby paying due regard to the observations made in the decisions of this Court, but unfortunately, now the history seems to be repeating itself as now the delay of maximum 12 years is seen in disposing of the mercy petitions under Article 72/161 of the Constitution.
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> 54. We sincerely hope and believe that the mercy petitions under Article 72/161 can be disposed of at a much faster pace than what is adopted now, if the due procedure prescribed by law is followed in verbatim. Although, no time frame can be set for the President for disposal of the mercy petition but we can certainly request the concerned Ministry to

[7]. (2014) 3 SCC 1

follow its own rules rigorously which can reduce, to a large extent, the delay caused.

55. Though guidelines to define the contours of the power under Article 72/161 cannot be laid down, however, the Union Government, considering the nature of the power, set out certain criteria in the form of circular as under for deciding the mercy petitions.

55.1. Personality of the accused (such as age, sex or mental deficiency) or circumstances of the case (such as provocation or similar justification);

55.2. Cases in which the appellate Court expressed doubt as to the reliability of evidence but has nevertheless decided on conviction;

55.3. Cases where it is alleged that fresh evidence is obtainable mainly with a view to see whether fresh enquiry is justified;

55.4. Where the High Court on appeal reversed acquittal or on an appeal enhanced the sentence;

55.5. Is there any difference of opinion in the Bench of High Court Judges necessitating reference to a larger Bench;

55.6. Consideration of evidence in fixation of responsibility in gang murder case;

55.7. Long delays in investigation and trial etc.

56. These guidelines and the scope of the power set out above make it clear that it is an extraordinary power not limited by judicial

determination of the case and is not to be exercised lightly or as a matter of course. We also suggest, in view of the jurisprudential development with regard to delay in execution, another criteria may be added so as to require consideration of the delay that may have occurred in disposal of a mercy petition. In this way, the constitutional authorities are made aware of the delay caused at their end which aspect has to be considered while arriving at a decision in the mercy petition. The obligation to do so can also be read from the fact that, as observed by the Constitution Bench in *Triveniben* (supra), delays in the judicial process are accounted for in the final verdict of the Court terminating the judicial exercise.

57. Another vital aspect, without mention of which the present discussion will not be complete, is that, as aforesaid, Article 21 is the paramount principle on which rights of the convict are based, this must be considered along with the rights of the victims or the deceased's family as also societal consideration since these elements form part of the sentencing process as well. It is the stand of the respondents that the commutation of sentence of death based on delay alone will be against the victim's interest."

18. In the light of the aforesaid law laid down by the Apex Court, coming to the facts of the present case on hand, as discussed supra, vide common order dated 01.06.2021 in W.P No.21478 of 2020 and batch, this Court held that the deceased was not a 'public servant'. However, this Court directed respondent No.1 to consider the case of life-convict for granting remission. Even then, vide memo No.6555/Ser.III/A2/2021-6, dated 29.07.2021, rejected the case of the life-convict on the very same ground i.e., he committed murder of 'public servant'. Therefore, the action of respondent No.1 in issuing memo dated 29.07.2021 is a clear contempt of common order dated 01.06.2021 in W.P. No.21478 of 2020 and batch. Respondent No.1 is not expected to reject the case of life-convict on the very same ground.

19. In the present contempt case, respondent No.1 filed counter contending that he has considered the case of life-convict and also the recommendation of the Screening Committee. They have recommended for release of the life-convict. The file is pending with her Excellency, the Governor, who has to consider the case of the life-convict as per Article - 161 of the Constitution of India. However, he has tendered unconditional apology.

20. Learned Government Pleader for Home has also produced copy of letter No.6555/Ser.V/2021, dated 08.12.2022, wherein it is stated that there is no enabling provision in the Rules for pursuing the matters with Her Excellency, the Governor, for early disposal of the file pertaining to the grant of remission to the life-convict as and when the orders of Her Excellency, the Governor, are received, further necessary orders will be issued accordingly.

21. Vide another letter dated 27.07.2023 addressed to learned Government Pleader for Home (Prisons and Fire-Services), High Court of Telangana, Hyderabad, the Principal Secretary to Government, Home (Services-V) Department, reiterated the aforesaid stand.

22. It is relevant to note that the respondents cannot simply send recommendations to the Hon'ble Governor and keep quiet. They have to pursue with the Hon'ble Governor and get the clearance of the proposal.

23. As discussed supra, in **Shersingh**[6], the Apex Court held that a self-imposed rule should be followed by the Executive Authorities rigorously, that every such petition shall be disposed of within a period of three (03) months from the date on which it is

received. In the light of the same, respondent Nos.1 and 2 shall appraise the timelines fixed by the Apex Court in disposal of applications submitted by life-convicts seeking remission to the Hon'ble Governor and shall get clearance of the file. They cannot wash their hands and keep quiet by simply sending the file to the Hon'ble Governor. They cannot contend that there is no enabling provision in the Rules for pursuing the matters with the Hon'ble Governor. The said action of respondent No.1 is deprecated and unwarranted.

24. In view of the aforesaid discussion, this Contempt Case is disposed of with the following observations/directions:

(i) Rejection of request made by the life-convict seeking remission by respondent No.1 vide memo dated 29.07.2021 on the very same ground i.e., the deceased is a 'public servant' is in violation of the common order dated 01.06.2021 passed by this Court in W.P. No.21478 of 2020 and batch.

(ii) Information furnished by respondent No.1 to the learned Government Pleader for Home vide letters dated 08.12.2022 and 27.07.2023 stating that there is no enabling provision in the Rules for pursuing the matters with the Hon'ble Governor is absurd. He cannot keep quiet stating that he

sent the file to the Hon'ble Governor. The said action of respondent No.1 is deprecated.

(iii) Respondent No.1 is warned not to repeat such acts and the same will be viewed seriously.

(iv) Respondent No.1 shall pursue with the Hon'ble Governor by appraising the time-lines fixed by the Apex Court in disposal of petitions filed by life-convicts seeking remission under Article - 161 of the Constitution of India and get clearance of the file.

(v) Respondent No.1 shall also consider the principle laid down in **Raj Kumar @ Bittu**[2].

(vi) Respondent No.1 shall complete the aforesaid exercise as expeditiously as possible and see that life-convict be released at least on 15th August, 2023.

In the circumstances of the case, there shall be no order as to costs.

As a sequel thereto, miscellaneous petitions, if any, pending in the contempt case shall stand closed.

Sd/- Ch. VENKATESWARLU
DEPUTY REGISTRAR

//TRUE COPY//

SECTION OFFICER

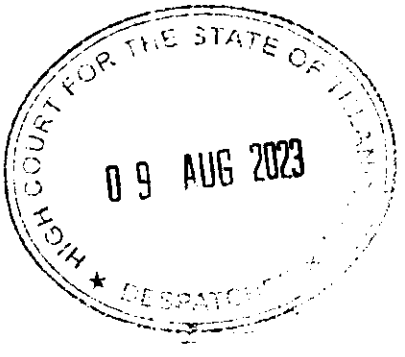
To,

1. The Chief Secretary to the Government, Government of Telangana, Secretariat Hyderabad.
2. The Superintendent, Central Prision, Cherlapalli, Medchal District, Hyderabad.
3. Ravi Gupta, Principal Secretary, Home Department (Prisons) State of Telangana Secretariat Building Hyderabad
4. Dr Jitender, The Director General of Prisons and Correctional Services, Government of Telangana Hyderabad
5. T. Kalasagar, The Superintendent Prisoners Agriculture Colony, Cherlapalli Medchal District .
6. One CC to Mrs. PUSHPINDER KAUR, Advocate [OPUC]
7. Two CCs to GP FOR HOME (PRISONS & FIRE SERVICES),High Court for the State of Telangana. [OUT]
8. Two CD Copies

HIGH COURT

KL,J

DATED:04/08/2023



ORDER

CC.No.430 of 2022

CC IS DISPOSED OFF

TC

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9/8/23