IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 28.06.2021

Delivered on : 05.07.2021

CORAM :

THE HONOURABLE MR. JUSTICE M.M.SUNDRESH
AND
THE HONOURABLE MS. JUSTICE R.N.MANJULA

W.A.No.667 of 2020 & CMP No.9331 of 2020
& HCP No.959 of 2020

W.A.No.667 of 2020

1.The Home Secretary (Prison-IV),
Home Department, Secretariat,
Fort St. George, Chennai-600 009.

2.Additional Director General of Police and
Inspector General of Prisons,
Whannels Road, Egmore,
Chennai-600 008.

3.The Superintendent of Prison,
Salem Central Prison, Hasthampatty,
Salem District-636 007. ..Appellants

Vs

A.Palaniswamy @ Palaniappan(M/46)
S/o Andiappan,
Life Convict Prisoner-CT No.6961,
Central Prison, Salem,
Hasthampatty-636 007. ..Respondent

HCP No.959 of 2020

Dinesh Kumar (Male/23)
S/o Palanisamy,
14th Ward, Indira Nagar,
Keerippatti9Post),
Aattur(Taluk), Salem District-636 107. ... Petitioner

Vs.

1.The Home Secretary (Prison-IV),
Home Department, Secretariat,
Fort St. George, Chennai-600 009.

2.Additional Director General of Police and
Inspector General of Prisons,
Whannels Road, Egmore,
Chennai-600 008.

3.The Superintendent of Prison,
Salem Central Prison, Hasthampatty,
Salem District-636 007. .. Respondents

Prayer: Appeal filed under Clause 15 of the Letters Patent against the order dated 04.05.2020 passed in W.P.No.7559 of 2020.

Habeas Corpus Petition is filed under Article 226 of the Constitution of India, 1950, praying to issue a writ of Habeas Corpus to produce the body of the detenu A.Palaniswamy @ Palaniyappan, S/o Andiyappan (Convict Prisoner No.6961) before this Court, who is illegally detained by the third respondent.

For Appellants in W.A.No.667/2020 & respondents in HCP.No.959/2020 : Mr.R.Hasan Mohammed Jinnah
Public Prosecutor

For Petitioner in HCP No.959/2020 & respondent in W.A.No.667/2020 : Mr.R.Radhapandian

: Mr.M.Mohamed Saifulla-Amicus

COMMON JUDGMENT

M.M.SUNDRESH, J.

As the cases on hand deal with the same detenu with the interlinked issues, they are appositely disposed of by a common judgment.

2.The detenu, who is a life convict was found guilty of the offences punishable under Sections 302 and 392 IPC in S.C.No.80 of 2008 by the Additional District and Sessions Judge (Fast Track Court No.I), Erode, on 10.11.2008 and accordingly, he was sentenced to undergo life imprisonment and 10 years rigorous imprisonment respectively.

3.The appeal filed by the convict, on contest, was dismissed in Criminal Appeal No.107 of 2009 on 18.08.2009.

4.The Government Order was passed providing for premature release to the life convict in G.O.Ms.No.64, Home(Prison-IV) Department, dated 01.02.2018 in commemoration of 100th Birthday of former Chief Minister of Tamil Nadu late Dr.M.G.Ramachandran. The following is the operative portion of the said order.

> "5 (II) The life convicts who have competed **10 years** of actual imprisonment as on **25.02.2018** and the life convicts who are aged **60 years** and above and who have completed

> **5 years** of actual imprisonment on **25.02.2018** including those who were originally sentenced to death by Trial Court and modified to life sentence by the Appellate Court (other than those whose convicts have been commuted), may be considered for premature release subject to satisfaction of the following conditions."

5.The writ petitioner, who is the wife of the convict, made a representation on 06.02.2018 seeking inclusion of her husband's name in the list of prisoners eligible for premature release. As the said request was not considered, the convict approached this Court seeking a writ of mandamus in W.P.No.3672 of 2018. The following is the order passed by the learned single Judge on 07.01.2019.

> "3.The learned Additional Public Prosecutor on instructions would submit that the representation will be considered by the 2nd and 3rd respondents and a detailed report will be prepared in accordance with GO.Ms.No.64 dated 01.02.2018 and the same will be placed before the 1st respondent, who will consider the same and submit his recommendation before His Excellency the Governor of Tamil Nadu, if the petitioner is going to be considered for a premature release.
>
> 4.This Court has carefully considered the submissions made on either side and also the materials placed on record.

5. The wife of the petitioner has made a representation dated 06.02.2018. This representation shall be considered by the 2 nd and 3 rd respondents strictly in accordance with the guidelines given in G.O.Ms.No.64 dated 01.02.2018 and a report shall be placed before the 1st respondent within a period of four weeks form the date of receipt of a copy of this Order. On receipt of the report, the 1st respondent shall take a decision within a period of eight weeks, thereafter."

6.Upon consideration of the said representation, as directed by the learned single Judge, the impugned Government Order was passed in G.O.(D) No.658 Home (Prison-IV) Department dated 26.06.2019 rejecting the case of the convict on the premise that he had completed only 9 years and 24 days of actual imprisonment as on 25.02.2018 instead of mandatory requirement of 10 years completion for eligibility. The requisite part of the order contained in the Government Order referred above is reproduced hereunder.

"6. The Government have examined the request of Tmt. Shanthi seeking premature release of her husband/Life convict prisoner No.6961 Palaniswamy @ Palaniyappan S/o.Andiappan, Confined in Central Prison, Salem with relevant records. **The life convict prisoner No.6961 Palaniswamy @ Palaniyappan S/o. Andiappan has completed only 09 years and 24 days of actual imprisonment as on 25.02.2018 since <u>he has not</u>**

completed of actual imprisonment as on the crucial date he is not eligible for premature release as per G.O (Ms) No.64 Home (Pri-IV) Dept. Dated 01.02.2018. The government, therefore, reject the request of Tmt. Shanthi seeking premature release of her husband/life convict prisoner NO.6961 Palaniswamy @ Palaniyappan S/o. Andiappan, confined in Central Prison, Salem."

7.The wife of the convict once again approached this Court by way of Habeas Corpus Petition in H.C.P.No.2214 of 2019 seeking to set off the period of incarceration during trial. On 15.11.2019 the said petition was disposed of as recorded hereunder.

"3. Taking note of the above submission and the instruction given by the Superintendent, Central Prison, Coimbatore in No.13834/MK3/19 dated 01.11.2019, the period of 349 days for which the convict has undergone incarceration at the Central Prison, Coimbatore is directed to be set off against the conviction rendered in Sessions Case No.80/2008 on the file of the Additional District and Sessions Judge, (F.T.C-1) Erode.

4.In view of the above, the Habeas Corpus Petition stands disposed of."

8.Placing reliance upon the order aforesaid recorded, yet another writ petition in W.P.No.7559 of 2020 was filed challenging the Government Order in G.O.(D) No.658 Home (Prison-IV) Department dated 26.06.2019 with a consequential prayer to release the convict A. Palaniswamy @ Palaniyappan S/o. Andiyappan (Convict Prisoner No- 6961) now confined in Central Prison, Salem herein 3rd respondent. The learned single Judge, by an order dated 04.05.2020, allowed the writ petition inter alia holding that in view of the order passed by the Division Bench, the convict is entitled for premature release. While doing so, the first appellant before us was directed to issue a Government Order to release the convict. The relevant portion of the aforesaid order is hereunder.

> "7. In such a view of the matter, this Court is of the view that the impugned order dated 26.06.2019 in G.O. (D) No.658 dated 26.06.2019 in rejecting the premature release of the Petitioner is hereby set aside. The Petitioner is certainly eligible for consideration for premature release as per G.O. (Ms) No.64 Home (Prison-IV) Department dated 1.2.2018. Accordingly, the 1st Respondent is directed to issue Government Order to release the Petitioner, within two weeks from the date of receipt of copy of this Order."

9.It is against this said order, W.A.No.667 of 2020 has been filed. H.C.P.No.959 of 2020 has been filed by the son of the convict seeking to produce

the convict A.Palaniswamy @ Palaniyappan, S/o Andiyappan (Convict Prisoner No.6961) before this Court, who is illegally detained by the third respondent.

10.When the present writ appeal i.e.,W.A.No.667 of 2020 came up for hearing before the Honourable First Bench, certain issues were raised while entertaining the appeal through the following paragraphs.

> "2.The first question that we have posed to ourselves is the maintainability of an intra court appeal in such a matter where the respondent writ petitioner has been convicted and is suffering imprisonment on account of the conviction and sentence by a criminal Court, and is seeking premature release under the scheme dated 01.02.2018. This question is to be answered first keeping in view the nature of the jurisdiction exercised by the learned single Judge, namely, which was in a writ petition filed under Article 226 of the Constitution of India. The prayer was to quash an order as indicated above seeking benefit of a general pardon by His Excellency, The Governor, in exercise of the power under Article 161 of the Constitution of India. Article 161 is extracted herein below:
>
> > "161. Power of Governor to grant pardons, etc, and to suspend, remit or commute sentences in certain cases The Governor of a State shall have the power to grant pardons, reprieves,

respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends."

3.This is, therefore, not a case pertaining to a statutory claim of release in terms of Section 432 or 433A of the Code of Criminal Procedure, 1973.

4.Mr.Emalias, learned Additional Advocate General for the appellants / State, submits that the proceedings before the learned single Judge cannot be termed to be arising out of any criminal proceedings, which, in this case, have already culminated with the conviction of the respondent writ petitioner and who is undergoing imprisonment. The writ petition was filed for a premature release which is by invoking the constitutional power of His Excellency The Governor and not an exercise of power in any criminal proceeding.

5.He has invited the attention of the Court to the judgment in the case of CIT vs. Ishwarlal Bhagwandas, reported in AIR 1965 SC 1818 to point out the distinction between a criminal and a civil proceeding. For this, he has also relied on paragraphs 28 to 31 of the judgment in the case of Ram Kishan Fauji vs. State of Haryana, reported in (2017) 5 SCC 533, which has dealt with the aforesaid proposition of law and are gainfully extracted herein

under:-

"28.The Court in Ishwarlal Bhagwandas case [CIT v. Ishwarlal Bhagwandas, (1966) 1 SCR 190 : AIR 1965 SC 1818] referred to Article 133 of the Constitution and took note of the submission that the jurisdiction exercised by the High Court as regards the grant of certificate pertains to judgment, decree or final order of a High Court in a civil proceeding and that "civil proceeding" only means a proceeding in the nature of or triable as a civil suit and a petition for the issue of a high prerogative writ by the High Court was not such a proceeding. Additionally, it was urged that even if the proceeding for issue of a writ under Article 226 of the Constitution may, in certain cases, be treated as a civil proceeding, it cannot be so treated when the party aggrieved seeks relief against the levy of tax or revenue claimed to be due to the State. The Court, delving into the nature of civil proceedings, noted that:(AIR p.1821, para 8)

"8. … The expression "civil proceeding" is not defined in the Constitution, nor in the General Clauses Act. The expression in our judgment covers all proceedings in which a party asserts the existence of a civil right conferred by the civil law or by statute, and claims relief for breach thereof."

29.After so stating, the Court elucidated the nature of criminal proceeding and, in that regard, ruled thus:

(Ishwarlal Bhagwandas case [CIT v. Ishwarlal Bhagwandas, (1966) 1 SCR 190 : AIR 1965 SC 1818] , AIR p. 1821, para 8)

> "8. … A criminal proceeding on the other hand is ordinarily one in which if carried to its conclusion it may result in the imposition of sentences such as death, imprisonment, fine or forfeiture of property. It also includes proceedings in which in the larger interest of the State, orders to prevent apprehended breach of the peace, orders to bind down persons who are a danger to the maintenance of peace and order, or orders aimed at preventing vagrancy are contemplated to be passed."

30.Explicating the concept further, the Court opined that: (Ishwarlal Bhagwandas case [CIT v. Ishwarlal Bhagwandas, (1966) 1 SCR 190 : AIR 1965 SC 1818] , AIR p. 1821, para 8)

> "8. … The character of the proceeding, in our judgment, depends not upon the nature of the tribunal which is invested with authority to grant relief, but upon the nature of the right violated and the appropriate relief which may be claimed."

It further held that a civil proceeding is, therefore, one in which a person seeks to enforce by appropriate relief the alleged infringement of his civil rights against another person or the State, and which, if the claim is proved,

would result in the declaration, express or implied, of the right claimed and relief such as payment of debt, damages, compensation, delivery of specific property, enforcement of personal rights, determination of status, etc.

31.The aforesaid authority makes a clear distinction between a civil proceeding and a criminal proceeding. As far as criminal proceeding is concerned, it clearly stipulates that a criminal proceeding is ordinarily one which, if carried to its conclusion, may result in imposition of (i) sentence, and (ii) it can take within its ambit the larger interest of the State, orders to prevent apprehended breach of peace and orders to bind down persons who are a danger to the maintenance of peace and order. The Court has ruled that the character of the proceeding does not depend upon the nature of the tribunal which is invested with the authority to grant relief but upon the nature of the right violated and the appropriate relief which may be claimed."

Reliance is also placed on paragraphs 32 and 33 to contend that an intra-Court appeal would be maintainable."

6.He has also pointed out that the Division Bench judgment of this Court in the case of **D.Kumar vs. Raichand Daga and Ors., decided on 03.08.2020 (W.A. SR 44351 of 2020)** also affirms the said position and the stand taken in this regard.

7.He has then urged that the impugned judgment suffers from being coram non judice, as in view of the Division Bench judgment in H.C.P.(MD)No.10 of 2014 **(Selvi vs. The Principal Secretary to Government and Others)** decided on 23.03.2020 and other connected matters, the case ought to have been placed before the Division Bench and could not have been adjudicated by the learned single Judge. For this, he has also relied on the circular issued on the administrative side by the High Court on 29.05.2020 bearing R.O.C.No.31686-A/2020/F1 dated 29.05.2020. He has then urged that in view of the provisions of Order I Rule 1(a) read with Rule 2 of the Madras High Court Appellate Side Rules, once the roster in such matters is of the Division Bench, the learned single Judge could not have proceeded to entertain the writ petition before him.

8.The next contention is that even otherwise in view of the latest judgment of the Apex Court which is in respect of the very same scheme involved herein, the Apex Court has clearly held that the High Court could not have issued any directions for release and could have only issued directions to the Government to consider the same in the light of the observations made therein. The judgment of the Apex Court is in the case of **Home Secretary and others vs. H.Nilofer Nisha, reported in 2020 SCC OnLine SC 73**.

9.He has then contended that the learned single Judge has erroneously even counted the period of remand

invoking the provisions of Section 428 Cr.P.C. which could not have been done, hence, the impugned judgment deserves to be set aside.

10.However, reverting back to the first question of maintainability, he submits that a Writ Appeal is maintainable, as the exercise of jurisdiction by the learned single Judge was not a jurisdiction of any criminal description but an order passed under Article 161 of the Constitution of India, which extends to the executive power of the State, hence, the same is an administrative exercise of power governing civil rights of the respondent writ petitioner seeking premature release. In such a situation, the Writ Appeal would be maintainable, hence, the same deserves to be entertained.

11.Considering the submissions raised, we find this question posed to be a little complex to be answered straightaway without putting the respondent writ petitioner to notice at this stage and therefore, it would be appropriate that the respondent writ petitioner is called upon to answer the same.

12.Accordingly, we issue notice to the respondent writ petitioner and also call upon the learned counsel for the appellants to serve a notice on the counsel for the respondent writ petitioner who had appeared before the learned single Judge to assist the Court on the issue of maintainability and the other issues raised in this regard."

11.The issues as dealt with by the Division Bench reduced in nutshell are follows:

i.Whether this intra-court appeal is maintainable, because he was convicted by the criminal court- Nature of Jurisdiction?

ii.Whether a person who was convicted for the life imprisonment, he is entitled to the benefits of Set-off under Section 428 of Cr.,P.C?

iii.Whether a case of premature release shall be placed before the division bench?

iv. Whether the High court can direct the state to release the convict under the premature release scheme?

12.With the abovesaid factual matrix, we have heard Mr.R.Radhapandian, learned counsel appearing for the petitioner in HCP No.959 of 2020 in respondent in W.A.No.667 of 2020, Mr.R.Hasan Mohammed Jinnah, the learned Pubic Prosecutor appearing for the appellants in W.A.No.667 of 2020 and respondents in HCP No.959 of 2020 and Mr.Mohamed Saifulla, learned Amicus Curiae and perused the written submission.

13.**Issue No.1:-**

13.1.This issue has been raised on the premise that in an appeal against the order of the learned single Judge dealing with the criminal matter, could not be

maintainable before the same Court. The power of the revision is the one which is to be exercised by His Excellency the Governor under Article 161 of the Constitution of India. Such a power can also be exercised by His Excellency the President under Article 72 of the Constitution of India. There is no restriction qua the number of years for the life convict. On the same lines, there is no right vested seeking a premature release after undergoing certain extent of incarceration. Therefore, the release is controlled and circumscribed by the powers conferred under Article 72 of the Constitution of India. In other words, we cannot go beyond the Government Order or Rule or a Scheme introduced in exercise of the power under Article 161 of the Constitution of India. In this connection, we would like to quote the following decisions on the period of imprisonment for a life convict.

13.2.In ***Gopal Vinayak Godse*** –Vs- ***State of Maharashtra*** **((1961) 3 SCR 440),** the Apex Court has held as follows:

> "**Para 5:** If so, the next question is whether there is any provision of law where under a sentence for life imprisonment, without any formal remission by appropriate Government, can be automatically treated as one for a definite period. No such provision is found in the Indian Penal Code, Code of Criminal Procedure or the Prisons Act. Though the Government of India stated before the Judicial Committee in the case cited supra that, having regard to s. 57of the Indian Penal Code, 20 years'

imprisonment was equivalent to a sentence of transportation for life, the Judicial Committee did not express its final opinion on that question. The Judicial Committee observed in that case thus at p. 10:

> "Assuming that the sentence is to be regarded as one of twenty years, and subject to remission for good conduct, he had not earned remission sufficient to entitle him to discharge at the time of his application, and it was therefore rightly dismissed, but in saying this, their Lordships are not to be taken as meaning that a life sentence must and in all cases be treated as one of not more than twenty years, or that the convict is necessarily entitled to remission."

Section 57of the Indian Penal Code has no real bearing on the question raised before us. For calculating fractions of terms of punishment the section provides that transportation for life shall be regarded as equivalent to imprisonment for twenty years. It does not say that transportation for life shall be deemed to be transportation for twenty years for all purposes; nor does the amended section which substitutes the words imprisonment for life "for" transportation for life enable the drawing of any such all-embracing fiction. A sentence of transportation for life or imprisonment for life must prima facie be treated as transportation or **imprisonment for the whole of the remaining period of the convicted person's natural life**".

13.3. In the decision of the Constitution Bench of the Apex Court in Rajiv Gandhi Assassination case in ***Union of India*** –Vs- ***V.Sriharan @ Murugan and others*** **(2015 (4) MLJ (Criminal) 645), in paragraph 163** it has been

observed as under:

> "**Answers to the questions referred in seriatim**
>
> **Question 52.1** Whether imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission and whether as per the principles enunciated in paras 91 to 93 of Swamy Shraddananda (2), a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond application of remission?
>
> **Ans.** Imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code only means imprisonment for rest of life of the convict. The right to claim remission, commutation, reprieve etc. as provided under Article 72 or Article 161 of the Constitution will always be available being Constitutional Remedies untouchable by the Court".

13.4.In ***Laxman Naskar*** Vs. ***Union of India*** **(2000 AIR (SC) 986),** the Apex Court has held as follows:

> "3. It is settled position of law that life sentence is nothing less than lifelong imprisonment and by earning remissions a life convict does not acquire a right to be released prematurely; but if the Government has framed any rule or made a scheme for early release of such convicts then those rules or schemes will have to be treated as guidelines for exercising its power under Article 161 of

the Constitution and if according to the Government policy/instructions in force at the relevant time the life convict has already undergone the sentence for the period mentioned in the policy/instructions, then the only right which a life convict can be said to have acquired is the right to have his case put up by the prison authorities in time before the authorities concerned for considering exercise of power under Article 161 of the Constitution. When an authority is called upon to exercise its powers under Article 161 of the Constitution that will have to be done consistently with the legal position and the Government policy/instructions prevalent at that time"

13.5.In ***State of Haryana*** Vs. ***Mohindersingh(*** **2000 AIR (SC) 890)** the Apex Court has held as follows:

"**8**. The circular granting remission is authorised under the law. It prescribes limitations both as regards the prisoners who are eligible and those who have been excluded. Conditions for remission of sentence to the prisoners who are eligible are also prescribed by the circular. Prisoners have no absolute right for remission of their sentence unless except what is prescribed by law and the circular issued thereunder. That special remission shall not apply to a prisoner convicted of a particular offence can certainly be relevant consideration for the State Government not to exercise power of remission in that case. Power of remission, however, cannot be

> exercised arbitrarily. Decision to grant remission has to be well informed, reasonable and fair to all concerned".

13.6.A party is well within his right to approach this Court when his or her case was not considered for remission under the relevant Government Order, which provides so as against the similarly placed others. Such a challenge made would not par take the character of a criminal case. Resultantly, a writ petition is maintainable and consequently, an appeal would lie. This is for the reason that the criminal case involved has reached its finality and what remains to be seen and adjudicated upon is the liberty of the convict dehors the case. In this connection, we would like to quote the following paragraph in the decision of the Apex Court in **C.S.Agarwal V. State and others (ILR (2011) VI Delhi 701)**.

> "29. It would be necessary to clarify here that it cannot be said that in any of the cases under Article 226 of the Constitution, the Court is exercising „criminal jurisdiction". It would depend upon the rights sought to be enforced and the nature of relief which the petitioner seeks in such proceedings. For example, if a writ petition seeking writ of habeas corpus is filed, while dealing with such a petition, the Court is not exercising criminal jurisdiction as no criminal proceedings are pending. In fact, the order of preventive detention is made without any trial under the criminal law. Likewise, when a person is convicted and sentenced after the conclusion of

> criminal trial and such an order of conviction has attained finality and he files writ petition under Article 226 of the Constitution challenging the orders of the Government refusing to grant parole while dealing with such a petition, the Single Judge is not exercising criminal jurisdiction, as no criminal proceedings are pending."

The aforesaid reasoning of the Division Bench being sound, legally and logically correct, requires to be accepted.

13.7.Therefore, we have no hesitation in agreeing with the submissions made by the learned Public Prosecutor and the learned Amicus Curiae and accordingly, we hold that the Intra Court Appeal is maintainable as we are not dealing with the criminal case per se.

14.**Issue No.2:-**

14.1.In the very same case itself, the Division Bench of this Court in H.C.P.No.2214 of 2019 has given the benefit to the effect, which order has become final between inter se parties. To consider the said issue further, we would like to extract Section 428 of the Code of Criminal Procedure, 1973, which enure to the benefit of the convict.

> "**428.Period of detention undergone by the accused to be set off against the sentence of imprisonment.--** Where an accused person has, on conviction, been

> sentenced to imprisonment for a term, [not being imprisonment in default of payment of fine], the period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case and before the date of such conviction, shall be set off against the term of imprisonment imposed on him on such conviction, and the liability of such person to undergo imprisonment on such conviction shall be restricted to the remainder, if any, of the term of imprisonment imposed on him. [Provided that in cases referred to in section 433A, such period of detention shall be set off against the period of fourteen years referred to in that section.] **Amendment by act 25 of 2005 (w.e.f. 23-06-2006)"*

14.2.Section 428 of the Code of Criminal Procedure, 1973, has been considered by the Constitutional Bench of the Apex Court in ***Bhagirath & Another*** –Vs. ***Delhi Administration*** **(1985 (2) SCC 580)**, wherein the following statement of law has been made.

> **"8.** To say that a sentence of life imprisonment imposed upon an accused is a sentence for the term of his life does offence neither to grammar nor to the common understanding of the word 'term'. To say otherwise offend not only against the language of the statute but against the spirit of the law, that is to say, the object with which the law was passed. A large number of cases in which the

accused suffer long under trial detentions are cases punishable with imprisonment for life. Usually' those who are liable to be sentenced to imprisonment for life are not enlarged on bail. To deny the benefit of section 428 to them is to withdraw the application of a benevolent provision from a large majority of cases in which such benefit would be needed and justified.....

13. We have considered with great care the reasoning upon which the decision in *Kartar Singh* proceeds. With respect, we are unable to agree with the decision. We have already discussed why imprisonment for life is imprisonment for a term, within the meaning of section 428. We would like to add that we find it difficult to agree that the expressions 'imprisonment for life' and imprisonment for a term' are used either in the Penal Code or in the Criminal Procedure Code in contra-distinction with each other. Sections 304, 305, 307 and 391 of the penal Code undoubtedly provide that persons quality of the respective offences shall be punished with imprisonment for life or with imprisonment for a term not exceeding a certain number of years. But, that is the only manner in which the Legislature could have expressed its intention that persons who are guilty of those offences shall be punished with either of the sentences mentioned in the respective sections. The circumstance on which the learned judges have placed reliance in *Kartar Singh*, do not afford any evidence,

intrinsic or otherwise' of the use of the two expressions in contra-distinction with each other. Two or more expressions are often used in the same section in order to exhaust the alternatives which are available to the Legislature. That does not mean that there is, necessarily, an antithesis between those expressions."

14.3.A Division Bench of this Court in **Kumar Vs. State of Tamil Nadu reported in Manu/TN/3212/2014** has held as follows.

"7. Whenever the Government decides to GRANT Pre-mature release, the Government will fix a definitive period of detention for extending the benefit and would call for reports from the Superintendent of Jails in the State. For example, in G.O. Ms No. 1155 dated 11.09.2008, the Government has said that, the G.O. will apply to "life convicts who have completed 7 years of actual imprisonment as on 15.09.2008". At that time, the jail authorities will identify the prisoners who have undergone the period of detention fixed by the Government for being considered for premature release. If the jail authorities do not have the pre-conviction detention particulars of a prisoner, they will only furnish to the Government the post-conviction detention particulars. The prisoner cannot be made to suffer for the fault of the Presiding Officer of the Court in not giving the pre-conviction detention particulars of a prisoner to the jail authorities. *Actus curiae*

> *neminemgravabit*. [An act of the Court shall prejudice no man]. If the prison authorities do not send correct particulars to the Government, the prisoner will be seriously prejudiced inasmuch as he will be held disqualified for premature release though fully qualified."

14.4.Thus, in the light of the aforesaid pronouncements and taking note of the underlying object enshrined under Section 428 of the Code of Criminal Procedure, 1973, we have no hesitation to hold that 'set off ' is permissble even for a life convict.

15.**Issue No.3.**

15.1.This issue would not arise for consideration in the present case. The notification came into being in view of the same being sought for by the High Court on the judicial side, we would like to quote the order passed in H.C.P.No.10 of 2014 on 23.03.2020.

> "The last question that requires to be decided is whether such a writ petition should be heard by a Single Bench or a Division Bench. This decision is the prerogative of the Hon'ble Chief Justice, who is the master of the roster under order 1 Rule 1-A of the Appellate Side Rules. However, in our opinion, when axiomatically the parent criminal case of a prisoner seeking premature

release would have been finally decided either by a Single Bench or a Division Bench, it will be just and proper if the claim for premature release which will, a fortiori, arise only after the prisoner has exhausted the appeal remedy, is decided by a Division Bench as Writ Petition (Criminal) and not by a Single Bench.

Accordingly, we direct the Registry to convert the instant habeas corpus petitions as writ petitions (criminal). We further direct the Registry to place this matter before the Hon'ble Chief Justice for appropriate orders as to whether such petitions should be posted before a Single Bench or a Division Bench."

15.2Accordingly, the following notification came into being.

"All petitions relating to premature release filed by the prisoners, who are serving sentence pursuant to their convictions for offences shall be numbered as Writ petition and be heard by the Hon'ble Division Bench dealing with Criminal Side matters.

All such petitions pending before Principal Seat at Madras and in the Madurai Bench of Madras High Court as Habeas Corpus Petitions, Criminal Original Petitions (filed under the provisions of Criminal Procedure Code) shall be converted into Writ petitions and be listed before the Hon'ble Division Bench dealing with Criminal Side matters.

15.3The Government Order in G.O.(D) No.658 Home (Prison-IV) Department, dated 26.06.2019 rejecting the case of the convict, was challenged in the writ petition in W.P.No.7559 of 2020 on 04.05.2020. A notification was issued on 26.05.2020. As rightly observed by the Division Bench in the Judgment supra, it is the absolute prerogative of the Hon'ble Chief Justice to decide as to whether the particular type of case is to be posted before the learned single Judge or Division Bench. The decision being prospective in the form of a notification with the order of the learned single Judge preceding it, we are inclined to hold that though a case of premature release is required to be placed before the Division Bench, the notification has got no effect on the writ petition filed and disposed of and so also the appeal before us.

16.**Issue No.4:-**

16.1.The last issue is in respect of the power of this Court to release the convict by issuing a writ of mandamus. A writ of mandamus is a command. However, it can only be issued on certain contingencies. A direction cannot be issued to an authority vested with the power to act in a particular way. The aforesaid position was made clear by the judgment of the Apex Court in **Home Secretary (Prison) and others Vs. H.Nilofer Nisha ((2020) 14 Supreme Court**

Cases 161) in the following paragraphs.

> "31. The issue before us in the present case is whether the High Court can direct the release of a petitioner under G.O.(Ms.) No.64 dated 01.02.2018. We do not think so. In all these cases, the representations made by the detenus had not been decided. In our view, the proper course for the Court was to direct that the representations of the detenus be decided within a short period. Keeping in view the fact that the Scheme envisages a report of the Probation Officer, a reference by the District Level Committee and thereafter the matter has to be placed before the concerned Range Deputy Inspector General and before Regional Probation Officer and thereafter before the State Level Committee, we feel that it would be reasonable to grant 2-3 months depending on the time when the representation was filed for the State to deal with them. When the petition is filed just a few days before filing the representation then the Court may be justified in granting up to 3 months' time to consider the same. However, if the representation is filed a couple of months earlier and the report of the Probation Officer is already available then lesser time can be granted. No hard and fast timelines can be laid down but the Court must give reasonable time to the State to decide the representation.
>
> 32. We are clearly of the view that the Court itself cannot examine the eligibility of the detenu to be granted release under the Scheme at this stage. There are various factors, enumerated above, which have to be considered by the committees. The report of the Probation Officer is only one of them. After that, the District Committee has to make a recommendation and

finally it is the State Level Committee which takes a final call on the matter. We are clearly of the view that the High Court erred in directing the release of the detenu forthwith without first directing the competent authority to take a decision in the matter. Merely because a practice has been followed in the Madras High Court of issuing such type of writs for a long time cannot clothe these orders with legality if the orders are without jurisdiction. Past practice or the fact that the State has not challenged some of the orders is not sufficient to hold that these orders are legal.

33.In case, as pointed out above, a petition is filed without any decision(s) of the State Level Committee in terms of Para 5(I) of the G.O. in question, the Court should direct the concerned Committee/authority to take decision within a reasonable period. Obviously, too much time cannot be given because the liberty of a person is at stake. This order would be more in the nature of a writ of mandamus directing the State to perform its duty under the Scheme. The authorities must pass a reasoned order in case they refuse to grant benefit under the Scheme. Once a reasoned order is passed then obviously the detenu has a right to challenge that order but that again would not be a writ of habeas corpus but would be more in the nature of a writ of certiorari. In such cases, where reasoned orders have been passed the High Court may call for the record of the case, examine the same and after examining the same in the context of the parameters of the Scheme decide whether the order rejecting the prayer for premature release is justified or not. If it comes to the conclusion that the order is not a proper order then obviously it can direct the release of the prisoner by giving him

> the benefit of the Scheme. There may be cases where the State may not pass any order on the representation of the petitioner for releasing him in terms of the G.O.(Ms) No.64 dated 01.02.2018 despite the orders of the Court. If no orders have been passed and there is no explanation for the delay then the Court would be justified in again calling for the record of the case and examining the same in terms of the policy and then passing the orders."

16.2.From the aforesaid paragraphs, one could see that the scope of interference would arise when a wrong order is passed by issuing a writ of certiorari. The issue of a positive direction would come into play when the reasons assigned are found to be not correct either on fact or law. One cannot postulate a situation and therefore, a case has to be dealt with on its own facts. We would only make it clear as we understand from the orders of the Honourable Apex Court that a power to issue positive order to release will arise when a reasoned order is passed by considering the materials required to do so and upon the Court finding that they are not done properly. If the Court finds that the exercise will have to be redone or it has not been done, the way forward is to ask the concerned authority to do so. In other words, the requirements cannot be by-passed or overlooked or dealt with by the Court, when they are absent while considering the request for premature release. After all, in a writ of certiorari, we are concerned with the decision making process primarily. If the Court has got sufficient materials

available before it while finding the reasons assigned on them are not correct, then the consequential order of issuing would arise. Accordingly, we hold that in a case where a reasoned order is not available, a Court is not expected to take the role of the authorities and issue a positive direction.

17.Having discussed the aforesaid issues, let us come to the facts on hand. The impugned order under challenge passed by the Government merely deals with the eligibility of the convict and thus, does not deal with the entitlement for release. For doing so, certain procedural compliance is required, such as, the report of the Probation Officer, Report of the Police Officer and that of the Prison authority. We find considerable force in the submission made by the learned Public Prosecutor on this issue. Once, the impugned order does not deal with the other issues, except by saying that the convict does not come within the zone of consideration, the Court is expected to remit the matter for fresh consideration after setting aside the order under challenge by pointing out the mistake committed. Though the order of the Division Bench in HCP No.2214 of 2019 is subsequent, it is only an interpretation of law governing set off. Therefore, it certainly enures to the benefit of convict. However, the consequential direction issued to release the convict requires to be interfered with.

18.In such view of the matter, while confirming the order of the learned single Judge with respect to the impugned order being quashed, the direction issued to release the convict within a period of two weeks from the date of receipt of the said order stands set aside. The appellants are directed to redo the exercise in the light of the discussion made and take a decision within a period of eight weeks from the date of receipt of a copy of this order.

Writ Appeal stands disposed of accordingly. Consequently, Habeas Corpus Petition stands closed. CMP No.9331 of 2020 is also closed.

(M.M.S., J.) (R.N.M., J.)
05. 07.2021

Internet : Yes

raa

To:

1.The Home Secretary (Prison-IV),
Home Department, Secretariat,
Fort St. George, Chennai-600 009.

2.Additional Director General of Police and
Inspector General of Prisons,
Whannels Road, Egmore,
Chennai-600 008.

3.The Superintendent of Prison,
Salem Central Prison, Hasthampatty,
Salem District-636 007.

M.M.SUNDRESH,J.
and
R.N.MANJULA,J.

(raa)

W.A.No.667 of 2020
& HCP No.959 of 2020

05.07.2021