

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE R. NARAYANA PISHARADI

WEDNESDAY, THE 14TH DAY OF JULY 2021 / 23RD ASHADHA, 1943

WP(C) NO. 12688 OF 2015

PETITIONER:

S.KAILASAM IYER
KABILA MADAM, PALLISSERIKKAL P.O.,
SATHAMCOTTA, KOLLAM DISTRICT.
BY ADVS.
SRI.M.K.DAMODARAN (SR.)
SRI.GILBERT GEORGE CORREYA
SRI.NISHIL.P.S.
SRI.P.K.VIJAYAMOHANAN

RESPONDENT:

- 1 STATE OF KERALA
REPRESENTED BY THE SECRETARY TO GOVERNMENT,
VIGILANCE (C) DEPARTMENT, GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM - 695 001.
- 2 THE MANAGER
THE COURT OF THE ENQUIRY COMMISSIONER AND SPECIAL
JUDGE, THIRUVANANTHAPURAM - 695 001.
BY ADV GOVERNMENT PLEADER

SRI P N SUMODU-PP

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR
ADMISSION ON 05.07.2021, THE COURT ON 14.07.2021 DELIVERED
THE FOLLOWING:

W.P.(C) No.12688/2015

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"CR"

R.NARAYANA PISHARADI, J

W.P.(C) No.12688 of 2015

Dated this the 14th day of July, 2021

J U D G M E N T

This writ petition was filed by the petitioner when he was an octogenarian. Now he would be a nonagenarian person.

2. The petitioner was a public servant. The petitioner had served as Fisheries Development Officer in the Office of the Deputy Director of Fisheries at Kollam. He was indicted for committing the offences punishable under Section 5(1)(d) read with 5(2) of the Prevention of Corruption Act, 1947 (for short 'the Act') and also under Sections 419, 468, 471 and 120B of the Indian Penal Code (IPC).

3. The trial court found the petitioner guilty of the offences alleged against him. The trial court sentenced him to undergo

rigorous imprisonment for a period of one year and also to pay a fine of Rs.2,000/- and in default of payment of fine, to undergo rigorous imprisonment for a period of three months for the offence punishable under Section 5(2) of the Act. The trial court also sentenced him to undergo rigorous imprisonment for a period of one year each for the offences punishable under Sections 468 and 471 read with 120B of the IPC.

4. The petitioner filed Crl.A.No.476/2001 before this Court challenging the conviction entered against and the sentence imposed on him by the trial court. As per the judgment dated 21.11.2014, this Court confirmed the conviction against the petitioner but modified the sentence awarded to him by the trial court. This Court reduced the sentence of rigorous imprisonment to a period of six months for the offence punishable under Section 5(2) of the Act. This Court also reduced the sentence of rigorous imprisonment to a period of three months each for the offences punishable under Sections 468 and 471 read with 120B of the IPC.

5. The petitioner made a representation dated 15.12.2014 to the Government for commutation of the sentence. As per Ext.P2 order dated 05.02.2015, the Government commuted the sentence of rigorous imprisonment imposed on the petitioner for a fine of Rs.30,000/- under Section 433(c) of the Code of Criminal Procedure, 1973 (for short 'the Code').

6. The petitioner filed Ext.P3 application in the Court of the Enquiry Commissioner and Special Judge (Vigilance), Thiruvananthapuram requesting that he may be granted permission to remit the fine amount as per Ext.P2 order passed by the Government. He also filed Ext.P3(a) application before that court requesting that the warrant issued against him may be recalled.

7. As per Ext.P4 order dated 31.03.2015, learned Special Judge dismissed Exts.P3 and P3(a) applications filed by the petitioner. Learned Special Judge found that Ext.P2 order issued by the Government, commuting the sentence of rigorous imprisonment which was imposed on the petitioner for the offence

punishable under Section 5(2) of the Act, is against the law declared by the Supreme Court in **State of Rajasthan v. Jamil Khan : (2013) 10 SCC 721** and it is an invalid order and it cannot be acted upon.

8. The petitioner has filed this writ petition for quashing Ext.P4 order passed by the learned Special Judge and to direct the Special Court to accept the amount of fine which is payable by him as per Ext.P2 order.

9. Heard the learned counsel for the petitioner and the learned Public Prosecutor.

10. Learned counsel for the petitioner contended that the Special Court has no power of judicial review against Ext.P2 order passed by the Government. Learned counsel for the petitioner also contended that the learned Special Judge exceeded his jurisdiction in finding that Ext.P2 order issued by the Government is invalid.

11. The Under Secretary to Government, Vigilance Department has filed a statement in the writ petition. It is mentioned in this statement that Ext.P2 order issued by the Government is perfectly valid and that the learned Special Judge

went wrong in interfering with that order without sufficient grounds.

12. Learned Public Prosecutor has submitted that the State supports the challenge made by the petitioner against Ext.P4 order passed by the learned Special Judge. Learned Public Prosecutor supported the contentions raised by the petitioner to challenge Ext.P4 order.

13. Section 433(c) of the Code provides that, the appropriate Government may, without the consent of the person sentenced, commute a sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced, or for fine.

14. A bare perusal of Section 433 of of the Code shows that the powers under that provision can only be exercised by the appropriate Government. These powers cannot be exercised by any Court. At best, the Court can recommend to the Government that such power may be exercised but the power of the appropriate Government cannot be usurped by the Courts and the Government

cannot be directed to pass 'formal compliance order' (See **Raj Kumar v. State of U.P : AIR 2019 SC 4902**).

15. "Commutation" is in essence the alteration of a sentence of one kind into a sentence of less severe kind. It is a change of a sentence to a lighter sentence of a different kind. The powers of commutation exclusively vest with the appropriate Government. The powers conferred upon the appropriate Government under Section 433 of the Code have to be exercised reasonably and rationally keeping in view reasons germane and relevant for the purpose of law, mitigating circumstances and/or commiserative facts necessitating the commutation and factors like interest of the society and public interest (See **State v. Prem Raj : (2003) 7 SCC 121**).

16. The mandate of Section 433 of the Code enables the Government in an appropriate case to commute the sentence of a convict and to prematurely order his release before expiry of the sentence as imposed by the courts. The right to exercise the power under Section 433 of the Code vests in the Government and it has

to be exercised by the Government in accordance with the rules and established principles (See **State of Punjab v. Kesar Singh : AIR 1996 SC 2512**).

17. The appropriate Government shall not, as a matter of routine, indulge in exercising the powers conferred upon it under Section 433 of the Code at its sweet will, pleasure and whim or fancy. Such powers must be exercised in accordance with rules and established principles. While exercising such powers, relevant facts necessitating the commutation and the interest of the society shall be reflected (See **Mohammed Ishaq v. Kazam Pasha : (2009) 12 SCC 748**).

18. When the appropriate Government commutes the sentence, it does so in exercise of its sovereign powers (See **State of Rajasthan v. Mohammad Muslim Tagala : (2014) 10 SCC 658**).

19. Learned Special Judge has relied upon the decision of the Supreme Court in **Jamil Khan** (supra) to find that Ext.P2 order issued by the Government is invalid.

20. In **Jamil Khan** (supra), the Supreme Court has held as follows:

"Parliament is the collective conscience of the people. If it has mandated a minimum sentence for certain offences, the Government being its delegate, cannot interfere with the same in exercise of their power for remission or commutation. Neither Section 432 nor Section 433 of Cr.P.C hence contains a non-obstante provision. Therefore, the minimum sentence provided for any offence cannot be and shall not be remitted or commuted by the Government in exercise of their power under Section 432 or 433 of the Cr.P.C. Wherever the Indian Penal Code or such penal statutes have provided for a minimum sentence for any offence, to that extent, the power of remission or commutation has to be read as restricted; otherwise the whole purpose of punishment will be defeated and it will be a mockery on sentencing".

21. In **Delhi Administration v. Manohar Lal : AIR 2002 SC 3088**, it has been held as follows:

"When, the legislature concerned has chosen to mandate for the imposition of a minimum sentence in a given situation, the responsibility of the

appropriate Government becomes all the more greater and power under Section 433 Cr.P.C, may have to be exercised with great circumspection. Otherwise, the legislative will become a mere dead - letter at the whim of the executive”.

22. No doubt, **Jamil Khan** (supra) holds that, when minimum sentence of imprisonment is provided for an offence, it shall not be commuted by the Government in exercise of the powers under Section 433 of the Code. But, the crucial question is, whether the offence under Section 5(1) of the Act was punishable with any minimum sentence.

23. The punishment for the offences under Section 5(1) of the Act was provided under Section 5(2) of the Act. It stated that, any public servant who committed criminal misconduct shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and shall also be liable to fine. The proviso to Section 5(2) of the Act stated that, the court may, for any special reasons recorded in writing, impose a sentence of imprisonment of less than one year.

24. Undoubtedly, the proviso to Section 5(2) of the Act conferred power on the Court to award less than the minimum punishment, if it was of the opinion that for any special reasons, which the court was under an obligation to record in writing, sentence of imprisonment for a term less than the minimum was called for. The quantum of sentence to be imposed on an accused is in the discretion of the trial court. But, where the legislature has circumscribed and fettered the discretion of the court, by directing imposition of a minimum sentence, the court can exercise its discretion only within the limited sphere, if any, left open. As far as the punishment for an offence under Section 5(1) of the Act was concerned, the legislature circumscribed the discretion of the court by requiring the court to impose the prescribed minimum sentence. But, it left it open to award less than the minimum sentence prescribed for special reasons. Therefore, in case of an offence under Section 5(1) of the Act, the court had always the limited discretion to impose a sentence which was less than the minimum prescribed but only for special reasons to be recorded in writing.

Then, it cannot be found that an offence under Section 5(1) of the Act was an offence in respect of which the court had no discretion at all to impose a sentence below the minimum prescribed.

25. It may be noted that, in the corresponding provision of the Act of 1988 [Section 13(2) of that Act], there is no such proviso as in Section 5(2) of the Act and no power whatsoever is given to the court to impose a sentence less than the minimum, even if there are special reasons for doing so. The legislature fixed the minimum sentence of imprisonment of one year under the Act of 1947 by making an amendment to it in the year 1958. The proviso to Section 5(2) of the Act was in the form of a rare exception by giving power to the court for imposing the sentence of imprisonment below one year when there were special reasons to be recorded in writing.

26. Having found that the offence under Section 5(1) of the Act was not an offence for which the minimum sentence of imprisonment provided under Section 5(2) of the Act should invariably be passed by the court, but it was an offence for which a

sentence of imprisonment below the minimum provided could be passed for special reasons, I am of the view that the dictum laid down in **Jamil Khan** (supra) with regard to the curtailment of the power of the Government under Section 433 of the Code does not apply to such a case. In fact, in appeal, this Court reduced the sentence of imprisonment which was imposed on the petitioner by the trial court and the modified sentence awarded by this Court in appeal was below the minimum provided under Section 5(2) of the Act. It would be an anomaly to find that, when the court has discretion to impose a sentence below the minimum prescribed for special reasons, the appropriate Government has no discretion to commute the sentence for such reasons in exercise of its sovereign powers.

27. In Ext.P2 order issued by the Government, it is stated as follows:

"In the representation read as 3rd paper above Shri.S.Kailasam Iyer has stated that he is aged 84 and suffering from dementia, metabolic encephalopathy and other cardiological and neurological problems and is not able to perform his

own routine without the assistance of others. Hence he has requested the mercy of Government to commute the sentence of rigorous imprisonment for fine, invoking Section 433(C) of Cr.PC. Government have examined the matter in detail. The alleged offence which led to the prosecution occurred during 1985-86. The sufferings of the petitioner during the long span of 30 years itself can be considered as a sort of punishment. Moreover he is aged 84 years. So taking into account his pathetic physical and mental health, it is found just and proper to consider the request for commutation of sentence of rigorous imprisonment on humanitarian grounds."

28. The reasons stated by the Government for commuting the sentence of rigorous imprisonment imposed on the petitioner cannot be found to be flimsy. In **Union of India v. Sriharan : (2016) 7 SCC 1**, it has been held by the Constitution Bench of the Supreme Court as follows:

"An exercise of such power may be required and called for depending upon exigencies and fact situation. A person may be on the death bed and as such the appropriate Government may deem fit to grant remission so that he may breathe his last in the comfort and company of his relations. Situations

could be different. It would be difficult to put the matter in any straight jacket or make it subject to any guidelines”.

29. Having found that the dictum laid down by the Supreme Court in **Jamil Khan** (supra) with regard to commutation of sentence does not apply to the facts of the present case, Ext.P4 order passed by the Special Judge is liable to be set aside.

30. Consequently, the writ petition is allowed. Ext.P4 order passed by the learned Special Judge is set aside. The Court of the Enquiry Commissioner and Special Judge (Vigilance), Thiruvananthapuram is directed to permit the petitioner to remit the fine amount which he is liable to pay as per Ext.P2 Government order. On remitting such amount, the warrant, if any, issued by the Special Court against the petitioner in execution of the sentence imposed on him in the case shall be recalled by that court.

(sd/-)

R.NARAYANA PISHARADI, JUDGE

jsr

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APPENDIX OF WP (C) 12688/2015

PETITIONER'S ANNEXURES:

EXHIBIT-P1-TRUE COPY OF THE APPLICATION DATED 15/12/2014 WITH ITS ENCLOSURES SUBMITTED BY THE PETITIONER BEFORE THE GOVERNMENT.

EXHIBIT-P2-TRUE COPY OF THE GOVERNMENT ORDER G.O(RT) 15/15/VIG. DATED 05/02/2015.

EXHIBIT-P3-TRUE COPY OF THE PETITION FILED BEFORE THE SPECIAL COURT PRAYING TO PERMIT THE PETITIONER TO REMIT THE FINE.

EXHIBIT-P3(A)-TRUE COPY OF THE PETITION FILED BEFORE THE SPECIAL COURT PRAYING TO RECALL THE WARRANT ISSUED AGAINST THE PETITIONER.

EXHIBIT-P4-TRUE COPY OF THE COMMON ORDER DATED 31/03/2015 OF THE COURT OF ENQUIRY COMMISSIONER AND SPECIAL JUDGE, THIRUVANANTHAPURAM.

RESPONDENTS' EXHIBITS : NIL

True copy

PS to Judge