

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 19.07.2019

CORAM:

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

WP(MD)No.15664 of 2019
and
WMP(MD)No.12339 of 2019

V.Radhakrishnan S/o.Velappan,
Life Time Prisoner No.5863,
Central Prison, Madurai.

... Petitioner

Vs.

- 1.The State of Tamil Nadu,
Rep.by its Secretary to Government,
Home (Prison IV) Department,
Fort St.George, Chennai – 600 009.
- 2.The Additional Director General of Police /
Inspector General of Prison, Chennai – 8.
- 3.The Superintendent of Prison,
Central Prison, Madurai.
- 4.The Superintendent of Prison,
Central Prison, Trichy.

... Respondents

Prayer : This Writ Petition is filed under Article 226 of the Constitution of India, to issue a Writ of Mandamus, to direct the respondents to allow the petitioner to undergo his punishment period at Madurai Central Jail permanently based on his representation dated 23.05.2019.

For Petitioner : Shri.Veerakathiravan, Senior Counsel

WP(MD)No.15664 of 2019

for Shri.C.Jeganathan

For Respondents : Shri.A.Robinson,
Government Advocate (crl.side)

ORDER

The writ petitioner was a death row convict. Following the acceptance of his clemency petition, the death sentence was commuted to life imprisonment with a condition that he shall remain in prison for the whole of the remainder of his natural life. There shall be no remission of the term of imprisonment. The petitioner has been in prison for a quarter of century. He was originally housed in Trichy Central Prison. His mother wanted the petitioner to be transferred to Madurai Central Prison as Madurai is situated closer to her residence. Her request found favour with a learned Single Judge of this Court. But the prison authorities filed WA(MD)No.1272 of 2014 and the Division Bench by order dated 27.11.2018 set aside the order of the learned Single Judge. The Division Bench took the view that there is no provision in the prison rules to consider the application of a prisoner's relative for transfer. But then, liberty was given to the petitioner herein to submit a fresh application for transfer. It was directed that the same shall be considered on any of the grounds enumerated under Rule 568 of the Tamil Nadu Prison Rules, 1983.

WP(MD)No.15664 of 2019

2. Availing the said liberty, the petitioner submitted a representation dated 20.02.2019. Thereupon, the Inspector General of Prison, Chennai – 8 transferred the petitioner from the Central Prison, Trichy to Central Prison, Madurai on 22.04.2019 for a period of three months. Apprehending that he would be re-transferred to Trichy Central Prison following the expiry of the three months period, he submitted one more representation dated 23.05.2019 requesting the authorities to retain him at Madurai Central Jail itself. Since no order was passed thereon, the present writ petition came to be filed.

3. This Court directed the learned Government Counsel to obtain instructions from the authorities and report to the court. The learned Government Counsel produced the communications from the Superintendent of Prison, Madurai and the Superintendent of Prison, Trichy recommending that the petitioner can be kept at Madurai Central Prison permanently. But then, it was submitted that the final decision will have to be taken only by the Inspector General of Prisons, Chennai – 8.

4. The issue is where the prisoner is to be kept ?. Can this be left to the absolute and unfettered discretion of the Inspector General of Prisons or the State Government ? Does the prisoner have no choice in the matter ? Can he

not call upon the authority to accommodate him in a particular prison which is situated close to the place of his family?

5.The Prisons Act, 1894, the Prisoners Act, 1900 and Transfer of Prisoners Act, 1950 are some of the statutes governing prison administration. Section 59 of the Prisons Act, 1894 empowers the State Government to make rules for carrying into effect the purposes of the Act. The State of Tamil Nadu had enacted the Tamil Nadu Prison Rules, 1983. Rule 5 states that the prisoners sentenced to imprisonment for life and those for a period exceeding one month convicted and sentenced by the courts in the districts mentioned in column (2) of the table shall be committed to the prison mentioned in the corresponding entry in column (1) of the table. Chapter 30 of the Prison Rules contains provisions regarding transfer of prisoners from one prison to another. Some of the relevant provisions in the said Chapter are as follows :

“568.Grounds, reasons and circumstances of transfer.- Prisoners may be transferred from one prison to another for the following reasons, namely:-

(i)For custody and treatment in a suitable institution in accordance with the classification, procedure;

(ii)For attendance in Court for the purpose of standing trial, or giving evidence;

(iii)On medical grounds;

(iv)On humanitarian grounds, in the interest of their rehabilitation;

(v)For post-release vigilance by the police;

(vi)For providing essential services;

(vii)On grounds of security, expediency or any other grounds; and

(viii)For other special reasons, if any.

570.Powers of Inspector-General. *(1) The Inspector of General subject to the order and under the control of the Government is authorized to sanction the transfer from one prison to another within the State of such prisoners as are referred to in [Section 29](#) of the Prisons Act, 1900 ([Central Act-III 1900](#)) except those under sentence of death.*

(2)The powers to transfer any prisoner under sentence of death from one prison to another shall vest with the State Government.

573.Prisoners convicted in the same case.- *Prisoners convicted in the same case may be transferred to different prisons, if, in the opinion of the Superintendent, such transfers are absolutely essential in the interests of discipline and maintenance of order in the prison.”*

Section 3 of Transfer of Prisoners Act, 1950 is as under :

3. Removal of prisoners from one State to another.—
(1) Where any person is confined in a prison in a State,— (a) under sentence of death, or (b) under, or in lieu of, a sentence of imprisonment or transportation, or (c) in default of payment of a fine, or (d) in default of giving security for keeping the peace or for maintaining good behavior; the Government of that State may, with the consent of the Government of any other State, by order, provide for the removal of the prisoner from that prison to any prison in the other State.

A bare reading of the aforesaid provisions gives an impression that the prison authority can decide where the prisoner will reside. In fact, the Hon'ble Division Bench of the Madras High Court in the decision reported in **[(1995) 1 MWN (Cri) 91 Dhanalakshmi vs. State]**, proceeded on that footing. But then, no textual reading can remain constant. The jurisprudential ground beneath has shifted. To quote the iconic Justice Albie Sachs, there is a paradigm shift from an approach derived from formal reasoning to one based on balancing. In other words, any decision of the administrator will have to take into account the principle of proportionality.

6.The proportionality test involves a structured, multi stage examination of the content of the decision under challenge. Firstly, the court must ask if

the government body is acting in pursuit of a legitimate objective. If the answer is “No”, the action is unlawful. If the answer is “yes”, the court will then consider if attaining that legitimate objective necessarily demands that the body interfere with a presumptively lawful entitlement possessed by an individual or company. Again, if the answer is “No”, the action is unlawful. If the answer is again 'Yes', the court will ask itself, thirdly if the government body has chosen the means to achieve its legitimate end which interferes as little as possible with the presumptive entitlements. Only if the answer to that final question is also 'Yes' will the governmental decision have survived proportionality review. (vide Constitutional Law By Ian Loveland, Sixth Edition, Page 471).

7.In fact, the proportionality principle has now become entrenched in our jurisprudence. In *Bachan Singh vs. State of Punjab* (1982) 3 SCC 24, it was held that this principle is implicit in Articles 14, 19 and 21 of the Constitution. In *Chairman, All India Railway Recruitment Board and Anr. vs. K.Shyam Kumar and Ors.* (2010) 6 SCC 614, it was held as follows :

“37.Proportionality, requires the Court to judge whether action taken was really needed as well as whether it was within the range of courses of action which could reasonably be followed. Proportionality is more concerned with the aims and

intention of the decision-maker and whether the decision-maker has achieved more or less the correct balance or equilibrium. Courts entrusted with the task of judicial review has to examine whether decision taken by the authority is proportionate, i.e. well balanced and harmonious, to this extent court may indulge in a merit review and if the court finds that the decision is proportionate, it seldom interferes with the decision taken and if it finds that the decision is disproportionate i.e. if the court feels that it is not well balanced or harmonious and does not stand to reason it may tend to interfere.

38.Leyland and Anthony on Textbook on Administrative Law (5th edn. OUP, 2005) at p.331 has amply put as follows:

Proportionality works on the assumption that administrative action ought not to go beyond what is necessary to achieve its desired results (in every day terms, that you should not use a sledgehammer to crack a nut) and in contrast to irrationality is often understood to bring the courts much closer to reviewing the merits of a decision.

39.Courts have to develop an indefeasible and principled approach to proportionality till that is done there will always be an overlapping between the traditional grounds of review and the principle of proportionality and the cases would continue to be decided in the same manner whichever principle is adopted. Proportionality as the word indicates has reference to variables

or comparison, it enables the Court to apply the principle with various degrees of intensity and offers a potentially deeper inquiry into the reasons, projected by the decision maker.”

8.Obviously, the proportionality principle can be invoked while adjudicating the rights of a prisoner. This is because the expression “person” occurring in Article 21 of the Constitution of India includes a convicted prisoner also. They are also entitled to certain fundamental rights (vide (2016) 3 SCC 1 (Inhuman Conditions in 1382 Prisons, in Re). Incarceration or conviction does not reduce a prisoner into a non person. While there may be a sharp and drastic shrinkage of fundamental rights, there is still some residue left. It is obligation of the prison authorities to protect the human rights of the prisoners [(2016) 10 SCC 17].

9.The Hon'ble Supreme Court has taken note of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules) in the decision reported in (2017) 10 SCC 658 [In Re: Inhuman Conditions in 1382 Prisons (15.09.2017 – SC)]. Some of the relevant provisions of the Mandela Rules are as follows :

“Rule 3 : -Imprisonment and other measures that result in cutting off persons from the outside world are

afflictive by the very fact of taking from these persons the right of self-determination by depriving them of their liberty. Therefore the prison system shall not, except as incidental to justifiable separation or the maintenance of discipline, aggravate the suffering inherent in such a situation.

Rule 36 : - Discipline and order shall be maintained with no more restriction than is necessary to ensure safe custody, the secure operation of the prison and a well ordered community life.

Rule 43 (3) : - Disciplinary sanctions or restrictive measures shall not include the prohibition of family contact. The means of family contact may only be restricted for a limited time period and as strictly required for the maintenance of security and order.

Rule 58.1 : - Prisoners shall be allowed, under necessary supervision, to communicate with their family and friends at regular intervals: (a)By corresponding in writing and using, where available, telecommunication, electronic, digital and other means; and

(b)By receiving visits.

Rule 59 : - Prisoners shall be allocated, to the extent possible, to prisons close to their homes or their places of social rehabilitation.

Rule 106 : - Special attention shall be paid to the maintenance and improvement of such relations between

a prisoner and his or her family as are desirable in the best interests of both.”

10.The Union Ministry of Home affairs has prepared a model prisoner manual in which it has been stated that the prisoners may be transferred from one prison to another so that they can be nearer to their home district.

11.It is useful to refer to an English case. Section 12 of the Prisons Act, 1952 confers power on the Secretary of State to transfer a prisoner from one prison to another prison. The provision reads as under :

“(1) A prisoner, whether sentenced to imprisonment or committed to prison on remand or pending trial or otherwise, may be lawfully confined in any prison. (2) Prisoners shall be committed to such prisons as the Secretary of State may from time to time direct ; and may by direction of the Secretary of State be removed during the term of their imprisonment from the prison in which they are confined to any other person.”

It was argued in Regina vs. Secretary of State (1984) 1 WLR 1408 that the above provision confers a wide and virtually absolute discretion on the Secretary of State and that it is not reviewable by the court. Rejecting the said contention, it was held that the Secretary of State's powers under Section 12 are reviewable in principle and can be reviewed if it is shown that the Secretary of State has misdirected himself in law. It would be a misdirection if

the Secretary of State took the view that he was entitled to exercise his powers under that section without regard to such rights as a prisoner has in relation to visits by his family, friends and lawyers.

12.Of course, one must not forget the cautionary note sounded by the Hon'ble Supreme Court in *Asha Ranjan v. State of Bihar* (2017) 4 SCC 397. When a dreaded prisoner was sought to be transferred from one State to another, he contended that his right to fair trial will be affected. Rejecting the same, it was held that the right to fair trial is not singularly absolute and that it takes in its ambit and sweep the right of the victim and the society at large.

13.One can therefore safely conclude that subject to considerations of security, prison discipline and public interest, the competent authority is obliged to respect the choice of the convict prisoner. A convict prisoner is entitled to call upon the authority to house him in a prison where the rights conferred by the Mandela Rules can be better exercised. The choice of the convict prisoner can be governed by a variety of factors. One such factor can be the proximity of the prison to the place where his family resides. A prisoner is also a fellow human being and not a soul-less chattel.

WP(MD)No.15664 of 2019

14.In the case on hand, the petitioner has proved to be of good character. He has even authored a poetry book. His mother is 92 years old. She wants to visit her son as often as possible. The prison authorities have also recommended that the petitioner can be kept at Madurai permanently. I therefore direct the second respondent to issue proceedings permitting the retention of the petitioner at Central Prison, Madurai to undergo the remaining part of his punishment period. Of course, if circumstances warrant, the authority is always at liberty to pass appropriate orders transferring the petitioner to some other prison.

15.With this liberty to the second respondent, the writ petition stands allowed. Consequently, connected miscellaneous petitions are closed. No costs.

19.07.2019

Index : Yes / No

Internet : Yes / No

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To

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Fort St.George, Chennai – 600 009.

WP(MD)No.15664 of 2019

- 2.The Additional Director General of Police /
Inspector General of Prison, Chennai – 8.
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G.R.SWAMINATHAN, J.

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