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W.P.No.7615 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 06.06.2022

DELIVERED ON : 17.06.2022

CORAM :

THE HON'BLE MR.MUNISHWAR NATH BHANDARI, CHIEF JUSTICE

AND

THE HON'BLE MRS.JUSTICE N.MALA

W.P.No.7615 of 2022

S.Nalini

.. Petitioner

Vs

1.The State of Tamil Nadu,
rep. by the Secretary to Government,
Home, Prohibition and Excise Department,
Secretariat, Chennai - 600 009.

2.The Superintendent of Prison,
Special Prison for Women,
Vellore.

.. Respondents

Prayer: Petition filed under Article 226 of the Constitution of India praying for a writ of declaration declaring that the failure of the Governor of Tamil Nadu to act in accordance with the advice of the Council of Ministers of the State of Tamil Nadu dated 9.9.2018 under Article 161 of the Constitution of India recommending release of the



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petitioner from prison is unconstitutional and consequently directing respondent No.1 to release the petitioner from prison immediately without the approval of the Governor of Tamil Nadu.

For the Petitioner : Mr.M.Radhakrishnan

For the Respondents : Mr.R.Shunmugasundaram
Advocate-General
Mr.P.Muthukumar
State Government Pleader
for respondent No.1
and
Ms.A.G.Shakeenaa

: Mr.Hasan Mohammed Jinnah
State Public Prosecutor
Mr.Muniyapparaj
Addl. Public Prosecutor
Mr.S.Santosh
Govt. Advocate (Crl. Side)
for respondent No.2

ORDER

THE CHIEF JUSTICE

This petition has been filed seeking release of the petitioner, in view of the recommendation of the Council of Ministers dated 9.9.2018 for remission.



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2. The petitioner is a convict in the criminal case registered for the assassination of Mr.Rajiv Gandhi, former Prime Minister of India, on the night of 21.5.1991 along with 15 others, including 9 police personnel. During the course of occurrence, 43 persons suffered grievous or simple injuries. The petitioner and other accused were sentenced to death by the Presiding Judge, Designated Court No.1, Poonamallee (Additional City Civil and Sessions Court, Chennai), by order dated 28.1.1998.

3. By judgment dated 11.5.1999 in Death Reference Case No.1 of 1998 along with Criminal Appeal Nos.321 to 325 of 1998 [***State v. Nalini and others, (1999) 5 SCC 253***], the Apex Court confirmed the conviction and sentence imposed on the petitioner. The review petition filed by the convict was dismissed on 8.10.1999.

4. The petitioner submitted a mercy petition to the Governor of Tamil Nadu on 17.10.1999, which was rejected vide proceedings dated 27.10.1999. Challenging the same, the petitioner filed W.P.No.17655 of 1999 before this Court. By order dated



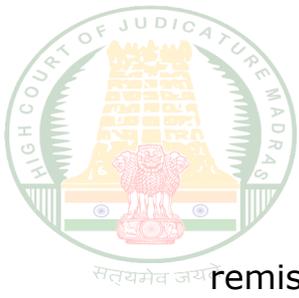
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25.11.1999, this Court remitted the matter for fresh consideration and ultimately based on the recommendation of the Government, the Governor of Tamil Nadu, by order dated 24.4.2000, commuted the death sentence imposed on the petitioner to one of life imprisonment.

5. Pursuant to the direction of the Apex Court in W.P.(Crl.) No.48 of 2014 with Crl. Misc. Petition Nos.6280-6281 of 2017, dated 6.9.2018, the Government of Tamil Nadu considered the petition of the life convict A.G.Perarivalan under Article 161 of the Constitution of India in the Cabinet meeting held on 9.9.2018 along with other six life convicts, including the present petitioner, and resolved to grant remission and sent the recommendation to the Governor of Tamil Nadu on 11.9.2018 for his authorisation. However, till date no order has been passed on the recommendation and, hence, this writ petition.

6. Learned counsel for the petitioner submits that once the Council of Ministers took a resolution on 9.9.2018 for grant of



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remission to the petitioner, the Governor of the State should have acted on the advice, but the decision of the Council of Ministers has not been given effect to and, therefore, the petitioner was left with no other option but to prefer this writ petition to seek release of the petitioner without the authorisation of the Governor of the State.

7. Giving the background of the case, it is submitted that the petitioner is now convict for the offence under Section 302 of the Indian Penal Code (for brevity, "the IPC"), which otherwise remains in the executive domain of the State and, therefore, the Governor ought to have authorised the resolution of the Council of Ministers to extend the remission, instead of sending the matter to the President of India for consideration under Article 72 of the Constitution of India. In view of the above, the Governor of the State has failed to act as per the mandate of Article 161 of the Constitution of India. Thus, in view of the judgment of the Apex Court in the case of **Maru Ram v. Union of India, AIR 1980 SC 2147**, the court should order for release of the petitioner in the light of the resolution of the Council of Ministers dated 9.9.2018.



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Referring to paragraphs (60) and (61) of the judgment cited supra, it is submitted that the ratio propounded therein clarifies the legal position qua the exercise of power by the Governor under Article 161 of the Constitution of India to the effect that the order of release can be issued pursuant to the decision of the Government even without the Governor's authorisation. Therefore, a prayer is made to issue an order on the Government to release the petitioner pursuant to the resolution of the Council of Ministers dated 9.9.2018.

8. It is further submitted that the decision of the Governor to send the matter to the President of India during the pendency of the writ petition after keeping the advice of the Council of Ministers pending for a long period is also illegal. It is in ignorance of the fact that Article 72 of the Constitution of India does not apply to the case. The petitioner is not a convict for any of the offences which may bring the case within the purview of Article 72 of the Constitution of India. Reiterating the facts, he submits that the petitioner is now suffering the sentence for the offence under



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Section 302 of the IPC, to which the executive power of the State exists and the death sentence has already been commuted to that of life imprisonment by the Governor of Tamil Nadu by the order dated 24.4.2000. Therefore, the decision of the Governor to refer the matter to the President of India has also been questioned by learned counsel for the petitioner.

9. Learned counsel has even made a reference of the recent judgment of the Apex Court in the case of ***A.G.Perarivalan v. State, through Superintendent of Police CBI/SIT/MMDA, Chennai, Tamil Nadu and another, 2022 SCC OnLine SC 635.***

In the said judgment, the issue in hand was considered at length and finding no reason for the Governor of the State to send the matter to the President of India and considering that the convict is behind the bars for the last three decades, the order of release was given. The Apex Court had taken note of the pendency of the recommendation of the Council of Ministers with the Governor for more than two and a half years. Therefore, the judgment of the Apex Court in the case of ***A.G.Perarivalan***, supra, applies to the



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present case also because the recommendation of the Council of Ministers was for the petitioner also.

10. The writ petition has been opposed by learned Advocate General, Mr.R.Shunmugasundaram. It is submitted that the resolution of the Council of Ministers for remission of sentence was sent to the Governor of the State, who is having the authority under Article 161 of the Constitution of India, to act on the advice of the Council of Ministers. However, it cannot be construed that even if the Governor of the State has not authorised the remission, this court should pass an order for release or, for that, the State Government itself should have released the petitioner.

11. He submits that the petitioner was not convicted only for the offence under Section 302 of the IPC, but also for other offences, as would be clear from the judgment of the Apex Court in the case of **Nalini**, supra, confirming the order of conviction and the sentence of death imposed on the accused. The order of the trial court so confirmed by the Apex Court shows that the petitioner



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is a convict for the offences under different provisions of law, which includes the laws where the executive power extends to the Union of India and, therefore, the matter has rightly been sent to the President of India, where it is pending consideration.

12. Clarifying the legal position in regard to Article 161 of the Constitution of India, it is submitted that the Governor may be bound by the advice of the Council of Ministers, but as a constitutional head of the State, it is obligatory to get his acceptance for the remission of sentence to release the petitioner. If the acceptance of the resolution of the Council of Ministers is not required for the release of the petitioner, as argued by learned counsel for the petitioner, then Article 161 of the Constitution of India vesting power on the Governor would become redundant, and the word "Governor" referred therein would be substituted with "Council of Ministers". Therefore, the prayer of the petitioner that even if the matter is pending with the Governor or now with the President of India, this Court should order for release of the petitioner pursuant to the resolution of the Council of Ministers



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going beyond the scope of the constitutional provisions.
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13. Learned Advocate General clarifying the judgment of the Apex Court in **Maru Ram**, supra, submits that the issue therein was not raised in regard to the powers of the President of India or the Governor, but was on a challenge to the amendment in the Criminal Procedure Code, where Section 433-A was inserted by the Amendment Act of 1978. The legislative competence for bringing the amendment in Code of Criminal Procedure was dealt with therein. A reference of Articles 72 and 161 of the Constitution of India was given to indicate that amended provision is offending it. In view of the above, the judgment of the Apex Court in the case of **Maru Ram**, supra, was not on the issue of the powers of the President or the Governor under Articles 72 and 161 of the Constitution of India, but to deal with the constitutional validity of Section 433-A of the Amendment Act. Therein, an observation was made that the President and the Governor are bound by the advice of the Council of Ministers. It was however held that as a matter of constitutional courtesy, the signature of the Governor or that of the



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President of India for release would be necessary. In the instant case, the decision of the Council of Ministers has not been authorised by the Governor of the State or the President by putting signature and thereby the State Government cannot release the petitioner and for that, the court should not pass an order unless it is so authorised by the President of India in this case.

14. Learned Advocate General referring to the recent judgment of the Apex Court in the case of **A.G.Perarivalan**, supra, submits that the direction to release the accused therein was made by exercising the power under Article 142 of the Constitution of India, which power does not exist in the High Court. Therefore, the judgment in the case of **A.G.Perarivalan**, supra, would not be applicable for issuance of direction for release of the accused. The Apex Court in the case of **A.G.Perarivalan**, supra, referred to the judgment in the case of **M.P. Special Police Establishment v. State of M.P. and others, (2004) 8 SCC 788**, held that the said judgment would not be applicable. However, while considering the issue, a reference to Article 163 of the Constitution of India was



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made in the case of **M.P. Special Police Establishment**, supra, which provides that there shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion. It was held by the Apex Court that exception to the normal circumstances may be that the recommendation is based on irrelevant or extraneous factors not germane to the purpose of arriving at the conclusion and in such cases, the Governor can act in his own discretion, otherwise there would be a complete breakdown of the rule of law. The Apex Court did not apply the ratio propounded in the case of **M.P. Special Police Establishment**, supra, as no argument was put forward to make out a case of non consideration of the relevant factors by the State Government or the Council of Ministers or consideration of irrelevant or extraneous factors. It is, however, submitted that by virtue of the aforesaid, the Apex Court has recognised the power of the Governor of the State to look into the matter on certain issues which fall under Article 163 of the Constitution of India and if it is found that the



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recommendation of the Council of Ministers is for extraneous consideration or suffers from other irrelevant considerations, the Governor can exercise the powers conferred under Article 163 of the Constitution. Therefore, the decision of the Council of Ministers by itself would not make the accused entitled for release.

15. Referring to the case in hand, learned Advocate General submits that the involvement of the petitioner in the commission of the offence has been elaborately dealt with by the Apex Court in the case of **Nalini**, supra. The petitioner herein was one of the main accused involved in the assassination of Mr.Rajiv Gandhi, former Prime Minister of India, along with 15 others, including 9 police personnel and during the course of occurrence, 43 persons suffered grievous or simple injuries. It was thus not to be considered to be a case of assassination of the former Prime Minister of India alone, but 15 other innocent persons, apart from the grievous or simple injuries suffered by 43 others. Whether the decision of the Council of Ministers vitiates on account of non consideration of the relevant facts or suffers from extraneous consideration is to be looked into



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by the Governor of the State or the President of India, as the case may be. Thus, the resolution passed by the Council of Ministers should not be construed to be an order for release even without the authorisation of the Governor of the State or the President of India.

16. A reference of the previous litigation raised by the petitioner has also been given. It is submitted that prior to the filing of the present writ petition, the petitioner preferred three writ petitions in a series for the same relief. Giving details of those litigations, it was contended that the present writ petition is not even maintainable. It is more so when the present writ petition has been filed during the pendency of H.C.P.No.2881 of 2019. A reference of it has been given in the affidavit submitted by the petitioner in this case, though with the statement that the judgment therein was not pronounced till the filing of the present writ petition. During the pendency of the habeas corpus petition, virtually praying for the same relief, the present writ petition was preferred without waiting for the outcome of the earlier writ petition and, therefore, the present writ petition deserves to be dismissed



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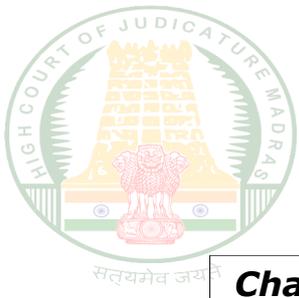
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on the aforesaid ground also. A prayer was made to take it as a preliminary issue and dismiss the writ petition on that count itself.

17. We have considered the rival submissions and perused the records.

18. The facts on record show that the Designated Court convicted and sentenced the petitioner as under:

Charge No.	Offences u/s.	Finding	Sentence
<i>Common to all 26 accused</i>			
1	120-B r/w 302, 326, 324, 201, 212, 216 of IPC. 3, 4 and 5 of the Explosive Substances Act, 25 of Arms Act, 12 of Passport Act, 14 of Foreigners Act, 6(1-A) of Wireless Telegraphy Act, 3, 4 and 5 of TADA	Guilty	Death
<i>Nalini (A-1)</i>			
2 to 17	302 r/w 34 IPC	Guilty	Death (16 counts)
18 to 34	326 r/w 34 IPC	Guilty	3 years' RI (13 counts)
35 to 40	324 r/w 34 IPC	Guilty	1 year's RI (6 counts)



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Charge No.	Offences u/s.	Finding	Sentence
41 to 60	324 r/w 34 IPC	Not Guilty	Acquitted (20 counts)
61 to 76	3(2)(i) TADA r/w 34 IPC	Guilty	Death (16 counts)
77 to 99	3(2)(ii) TADA r/w 34 IPC	Guilty (not guilty for charges 79, 82, 84, 93 acquitted for four counts)	Life (19 counts)
100 to 119	3(2)(ii) TADA r/w 34 IPC	Not Guilty	Acquitted (20 counts)
120	3(3) TADA	Guilty	Life
121	4(3) TADA nad 4(1) r/w 34 IPC	Guilty	Life

19. By judgment in the case of **Nalini**, supra, the Apex Court confirmed the death sentence imposed on the petitioner, who is the first accused, as it explicitly clear from the following paragraphs:

"Order of the Court

732. The conviction and sentence passed by the trial court of the offences of Section 3(3), Section 3(4) and Section 5 of the TADA Act are set aside in respect of all those appellants who were found guilty by the trial court under the said counts.



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733. The conviction and sentence passed by the trial court of the offences under Sections 212 and 216 of the Penal Code, 1860, Section 14 of the Foreigners Act, 1946, Section 25(1-B) of the Arms Act, Section 5 of the Explosive Substances Act, Section 12 of the Passport Act and Section 6(1-A) of the Wireless Telegraphy Act, 1933, in respect of those accused who were found guilty of those offences, are confirmed. If they have already undergone the period of sentence under those counts it is for the jail authorities to release such of those against whom no other conviction and sentence exceeding the said period have been passed.

734. The conviction for the offence under Section 120-B read with Section 302 Penal Code, 1860 as against A-1 (Nalini), A-2 (Santhan @ Raviraj), A-3 (Murugan @ Thas), A-9 (Robert Payas), A-10 (Jayakumar), A-16 (Ravichandran @ Ravi) and A-18 (Perarivalan @ Arivu) is confirmed.

735. We set aside the conviction and sentence of the offences under Section 302 read with Section 120-B



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passed by the trial court on the remaining accused.

736. The sentence of death passed by the trial court on A-1 (Nalini), A-2 (Santhan), A-3 (Murugan) and A-18 (Arivu) is confirmed. The death sentence passed on A-9 (Robert), A-10 (Jayakumar) and A-16 (Ravichandran) is altered to imprisonment for life. The Reference is answered accordingly.

737. In other words, except A-1 (Nalini), A-2 (Santhan), A-3 (Murugan), A-9 (Robert Payas), A-10 (Jayakumar), A-16 (Ravichandran) and A-18 (Arivu), all the remaining appellants shall be set at liberty forthwith."

20. However, based on the recommendation of the Government, the Governor of Tamil Nadu, by order dated 24.4.2000, commuted the death sentence imposed on the petitioner to life imprisonment. Thus, the petitioner is serving life imprisonment as a consequence thereof. It is not in dispute that the petitioner is in prison for the last few decades. The facts on record show that a resolution was passed by the Council of Ministers



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to grant remission to six life convicts, including the petitioner. The matter was sent to the Governor of the State in the year 2018 itself and is pending authorisation.

21. During the pendency of the writ petition, learned Advocate General informed that the Governor of the State has referred the matter to the President of India for the reason that the conviction and sentence imposed on the petitioner was not only for the offence under Section 302 IPC, but also in reference to other offences, indicated above. It is thus argued that the Governor has rightly sent the matter to the President of India, because it now falls within the purview of Article 72 of the Constitution of India.

22. The moot question would however be as to what are the consequences of the resolution of the Council of Ministers under Article 161 of the Constitution of India – whether it needs a formal authorisation of the Governor of the State; or, whether a mere resolution of the Council of Ministers and delay in taking action by the Governor of the State to authorise the resolution by itself would



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empower the State Government to release the accused.

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23. A reference of the judgment of the Apex Court in **Maru Ram**, supra, has been given to substantiate the arguments, but before taking up the main issue raised by the petitioner herein, it would be necessary to deal with the preliminary issue raised by learned Advocate General about the maintainability of the writ petition.

24. From the facts on record and as stated by learned counsel for the petitioner himself, this is the fourth writ petition by the petitioner after the decision of the Council of Ministers. The first writ petition, bearing W.P.No.14261 of 2019, seeking a writ of mandamus to implement the decision of the Council of Ministers dated 9.9.2018 was dismissed by this court by order dated 29.8.2019. The second writ petition, being W.P.No.SR67881 of 2019, was filed even during the pendency of the first writ petition seeking a direction on the Governor of Tamil Nadu to countersign the advice of the Council of Ministers. The said writ petition was



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dismissed by order dated 18.7.2019 holding that the writ petition arraying the Governor of the State as a respondent is not maintainable. The petitioner thereafter filed H.C.P.No.2881 of 2019 seeking immediate release of the petitioner. The case was heard by the Court and reserved on 20.2.2020 and before the pronouncement of the judgment, the present writ petition has been filed to seek the same relief in an indirect way, which otherwise was sought in the habeas corpus petition to hold the detention of the petitioner to be illegal and to set her at liberty forthwith.

25. The question for our consideration would be as to whether the fourth writ petition in a row for the same relief would be maintainable when H.C.P.No.2881 of 2019, filed under Article 226 of the Constitution of India, was dismissed by this Court by its order dated 11.3.2020 after dealing with all the issues that have been urged by learned counsel for the petitioner while pressing the present writ petition. The finding recorded in the judgment dated 11.3.2020 in H.C.P.No.2881 of 2019 would otherwise be binding on this court, more so when it is on the same issues as urged in the



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present writ petition.
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26. It is well settled that the decision of the Co-ordinate Bench is binding on the subsequent Bench of equal strength. That apart, the finding in regard to the same issues between the same parties in the earlier litigation has sanctity and is to be maintained by this court in the subsequent litigation. A writ petition would not be maintainable on the same subject and to consider the same issue. It would be relevant to refer the judgment dated 11.3.2020 in H.C.P.No.2881 of 2019 filed by the petitioner herself. Paragraphs (17) and (18) of the said judgment are quoted hereunder for ready reference:

17. The learned counsel for the petitioner vehemently relied on the decision of the Honourable Supreme Court in Maru Ram Case mentioned supra. In Maru Ram case relied on by the learned counsel for the petitioner, the Honourable Supreme Court had an occasion to consider the scope and ambit of the amendments brought to Section 433-A of the Code of Criminal Procedure, whereby a condition was imposed that the person who was imposed with life



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*sentence or who was imposed with death sentence but subsequently such sentence was commuted to life imprisonment, shall not be released from prison unless he had served at least fourteen years of imprisonment. The Honourable Supreme Court also considered the position that existed prior to the amendments being brought into Section 433-A of the Code and whether those who were sentenced to life or death prior to amendment can still have to wait till they serve actual 14 years of sentence for their premature release in view of the amendments made. It is in that context, the Honourable Supreme Court has held that under Article 161 of The Constitution of India, the Governor is bound by the advice of the Council of Ministers, but yet, it is obligatory that the signature of the Governor is mandatory to authorise the pardon, commutation or release. Therefore, the contention urged on behalf of the petitioner that the Governor's approval or consent is not necessary and the petitioner can be released on the basis of the advice given by the Council of Minister on 09.09.2018 cannot be countenanced. In this context, we are fortified by the decision relied on by the learned Additional Solicitor General of India in the case of **Registrar, High Court of Madras vs.***



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R.Rajiah mentioned supra. This decision was rendered by the Honourable Supreme Court interpreting Service Law jurisprudence. In that case, the respondent therein, a Judicial Officer, was imposed with a punishment of compulsory retirement by the High Court. Such an order passed by the High Court has not been approved by the Governor and therefore, it was held by the Honourable Supreme Court that however formal it may be, unless the order of compulsory retirement passed against the respondent herein is approved by the Governor, it will not take effect. In this context, useful reference can be made to the observations in para-20 of the Judgment, which reads as follows:-

"20. But however formal it is, the compulsory retirement of the member concerned will take effect after the order is passed by the Governor. The High Court, in the present cases, sought to derive its power to compulsorily retire the respondents from Rule 56 (d) of the Fundamental Rules and in exercise of its power of control it decided to compulsorily retire the respondents, but ignored the power of the Governor under



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Rule 56 (d) of the Fundamental Rules to make the order of compulsory retirement in accordance with the recommendation of the High Court. It may be that the power of the Governor under Rule 56 (d) of the Fundamental Rules is very formal in nature, for the Governor merely acts on the recommendation of the High Court by signing an order in that regard. But however formal it may be, yet the procedure has to be complied with. So long as there is no formal order by the Governor, the compulsory retirement, as directed by the High Court, could not take effect. We are unable to accept the contention of the learned Additional Solicitor General that to send the recommendation to the Governor for the purpose of making a formal order of compulsory retirement would be in derogation of the power of control of the High Court as vested in it under Article 235 of the Constitution. As has been discussed above, the power of control is a power to make the decision as to whether any action would be taken against a member of the



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subordinate judicial service and if so, what would be the nature of the action. In the case of compulsory retirement, when the High Court comes to a decision that the member should be compulsorily retired from service, its decision or recommendation has to be communicated to the Governor so that he may pass a formal order of compulsory retirement. In the instant cases, as there is no formal order by the Governor under Rule 56 (d) of the Fundamental Rules, the impugned orders of the High Court are ineffective. The view expressed by one of the learned Judges of the Division Bench that it was not the High Court but the Governor who had to pass formal orders of compulsory retirement, is correct. The contention made on behalf of the High Court that as Rule 56 (d) of the Fundamental Rules impinges upon the power of control of the High Court, as vested in it under Article 235 of the Constitution, it should be declared ultra vires insofar as it confers power on the Governor to compulsorily retire government servants, who, in the instant cases, are members of



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the subordinate judicial service, is without any substance whatsoever and is rejected."

18. Thus, it is evident from the above decision that the order to be passed by the Governor of the State, though formal, assumes significance that without the consent of the Governor or his signature on the proposal sent to him, such proposal or consent shall not take effect. Similarly, in this case, the Council of Ministers have tendered their advice to the Governor of the State on 09.09.2018 for premature release of the petitioner and others. Such advice has not been acted upon and it is pending consideration of the Governor. No order has been passed thereof as on date. While so, merely based on the advice of the Council of Minister on 09.09.2018 for premature release of the petitioner, her detention cannot be declared by this Court as illegal or unreasonable. The mere advice tendered by the Council of Minister on 09.09.2018 will not entitle the petitioner to get released prematurely unless it was accepted or signed by the Governor. In order to get the benefit of premature release, the signing of the order by the Governor of the State, on the advice tendered by the Council of Ministers, is mandatory and in the



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absence of the signature of the Governor of the State, the petitioner cannot get the benefit of premature release in her favour.”

27. The paragraphs quoted above refer to the same arguments as urged by learned counsel for the petitioner herein in reference to Article 161 of the Constitution of India and the judgment in the case of **Maru Ram**, supra. Considering both the issues, a finding was recorded by the Division Bench and the same is binding on this court. It is apart from the fact that the petitioner could not have filed a series of writ petitions for one and the same cause. Rather, after the detailed judgment of the Division Bench of this court in H.C.P.No.2881 of 2019, the present writ petition would not be maintainable. It cannot be said that the aforesaid was a habeas corpus petition, while the present one is not. A perusal of the habeas corpus petition shows nothing but the same prayer and even the arguments. Thus, there is a mere change in the nomenclature of the petition, but the contentions raised are one and the same. Thus, we are in agreement with learned Advocate General that the present writ petition is not maintainable in the light



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of the facts given herein above. Accordingly, the writ petition is held to be not maintainable.

28. However, we would be touching upon the arguments of learned counsel for the petitioner on merits in view of the fact that the Apex Court has given a judgment recently in the case of **A.G.Perarivalan**, supra. The judgment aforesaid has been referred to support the contentions raised by learned counsel for the petitioner and, therefore, it would be proper for this court to refer to the judgment to deal with the arguments of learned counsel for the petitioner.

29. Before going into the issues raised, it would be gainful to refer to Articles 72 and 161 of the Constitution of India, which are quoted thus:

"72. Power of President to grant pardons, etc., and to suspend, remit or commute sentences in certain cases.—

(1) The President shall have the power to grant pardons, reprieves, respites or remissions of



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punishment or to suspend, remit or commute the sentence of any person convicted of any offence—

(a) in all cases where the punishment or sentence is by a Court Martial;

(b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;

(c) in all cases where the sentence is a sentence of death.

(2) Nothing in sub-clause (a) of clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court Martial.

(3) Nothing in sub-clause (c) of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force.

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



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sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends.”

30. The provisions aforesaid have been quoted to deal with the issue in reference to the judgment of the Apex Court in the case of **Maru Ram**, supra, as for the first time it is argued by the side opposite that the Constitution Bench judgment in the case of **Maru Ram**, supra, is not an authority on Article 72 and Article 161 of the Constitution of India. It is on the ground that what was the subject matter before the Apex Court in **Maru Ram**, supra, was the constitutional validity of Section 433-A of the Code of Criminal Procedure, inserted by the Amendment Act of 1978. The challenge to the aforesaid provisions was made not only in reference to Articles 14, 19 and 21 of the Constitution of India, but by referring to Articles 72 and 161 of the Constitution of India and the Apex Court has dealt with the issue of constitutional validity and even made observations in regard to the jurisdiction under Articles 72 and 161 of the Constitution of India. In fact, delay in consideration of the advice of the Council of Ministers by the Governor or the



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President under Articles 161 or 72, respectively, was not the issue before the Apex Court. Learned Advocate General has thus urged that an observation on an issue not involved in a case before the court has to be taken as an obiter dictum.

31. The next plank of argument made by learned counsel for the petitioner is that once the recommendation was made by the Council of Ministers to grant remission to the accused, the authorisation of the Governor is not necessary and for that paragraphs (60) and (61) of the judgment in **Maru Ram**, supra, are quoted hereunder:

"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.



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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 anyone 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



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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 have in a narrow area of power. The subject is now beyond controversy, this Court having authoritatively laid down the law in Shamsheer Singh v. State of Punjab, (1974) 2 SCC 831. So, we agree, even without reference to Article 367(1) and Sections 3(8)(b) and 3(60)(b) of the General Clauses Act, 1897, that, in the matter of exercise of the powers under Articles 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-à-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.”



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WEB COPY 32. It is no doubt true that in paragraphs quoted above, the Apex Court made observation about the powers of the Governor and the President under Articles 161 and 72, respectively, but it is with a clarity that as a constitutional courtesy the signature of the Governor would be required in a case falling under Article 161 of the Constitution of India. In view of the aforesaid, mere recommendation of the Council of Ministers would not mean that the Government is competent to release the accused without its authorisation by the Governor.

33. If the argument of learned counsel for the petitioner that a mere recommendation of the Council of Ministers to grant remission is sufficient and authorisation of the Governor is not required is accepted, then virtually the court would be declaring Article 161 of the Constitution of India redundant qua the power of the Governor. It may be true that the Governor of the State is bound by the recommendation of the Council of Ministers, but it would not mean that the formal acceptance as per the constitutional



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courtesy would not be required.

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34. The argument raised by learned counsel for the petitioner is to be viewed from another angle also. If the resolution of the Council of Ministers itself is sufficient for release of the accused without the authorisation of the Governor, then the word "Governor" occurring in Article 161 is required to be omitted and otherwise it is settled law that the court cannot alter a provision of law and in this case a constitutional provision. Therefore, Article 161 of the Constitution of India has to be read as it stands without omitting the word "Governor". It cannot be held that since the Governor of the State is bound by the recommendation of the Council of Ministers, his acceptance is not required if there is a delay. We are, therefore, unable to accept the contention of learned counsel for the petitioner on the issue.

35. The view taken aforesaid is substantiated from the fact that even the Apex Court in the case of **A.G.Perarivalan**, supra, has not ordered for release of the accused holding that without the



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signature of the Governor to accept the resolution, a direction can be given by the High Court. Rather, to order for release, the Apex Court invoked its power under Article 142 of the Constitution of India. The power under Article 142 of the Constitution of India can be exercised only by the Apex Court and no such power exists with the High Court. The aforesaid goes to the root of the case to hold that without the signature of the Governor to authorise the resolution, this court cannot pass an order directing the State Government to release the accused, otherwise the direction therein would not only offend Article 161 of the Constitution of India, but also Article 163 of the Constitution of India.

36. Article 163 of the Constitution of India stipulates that there shall be a Council of Ministers to aid and advise the Governor. Article 163 of the Constitution of India is quoted hereunder:

“163. Council of Ministers to aid and advise Governor.—

(1) There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in



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so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion.

(2) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion.

(3) The question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any court."

37. The issue in reference to Article 163(2) of the Constitution of India was considered by the Apex Court in the case of **M.P. Special Police Establishment**, supra, and it was held that the Governor has discretion to exercise his powers within the four corners of the provisions as and when there is an advice of the Council of Ministers. Thus, it is not that the Governor of the State has no discretion. Article 163 of the Constitution of India was not



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referred in the case of **Maru Ram**, supra, but was considered by the Apex Court in the case of **M.P. Special Police Establishment**, supra, wherein after referring to a decision of the Seven-Judge Bench in the case of **Samsher Singh v. State of Punjab, (1974) 2 SCC 831**, it was observed as under:

*"12. Mr Sorabjee relies on the case of Samsher Singh v. State of Punjab [(1974) 2 SCC 831]. **A seven-Judge Bench of this Court, inter alia, considered whether the Governor could act by personally applying his mind and/or whether, under all circumstances, he must act only on the aid and advice of the Council of Ministers. It was inter alia held as follows:***

'54. The provisions of the Constitution which expressly require the Governor to exercise his powers in his discretion are contained in articles to which reference has been made. To illustrate, Article 239(2) states that where a Governor is appointed an administrator of an adjoining Union Territory he shall exercise his functions as such administrator independently of his Council of Ministers. The other articles which speak of the discretion



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of the Governor are paragraphs 9(2) and 18(3) of the Sixth Schedule and Articles 371-A(1)(b), 371-A(1)(d) and 371-A(2)(b) and 371-A(2)(f). The discretion conferred on the Governor means that as the constitutional or formal head of the State the power is vested in him. In this connection, reference may be made to Article 356 which states that the Governor can send a report to the President that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution. Again Article 200 requires the Governor to reserve for consideration any Bill which in his opinion if it became law, would so derogate from the powers of the High Court as to endanger the position which the High Court is designed to fill under the Constitution.

55. In making a report under Article 356 the Governor will be justified in exercising his discretion even against the aid and advice of his Council of Ministers. The reason is that the failure of the constitutional machinery may be because of the conduct of the



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Council of Ministers. This discretionary power is given to the Governor to enable him to report to the President who, however, must act on the advice of his Council of Ministers in all matters. In this context Article 163(2) is explicable that the decision of the Governor in his discretion shall be final and the validity shall not be called in question. The action taken by the President on such a report is a different matter. The President acts on the advice of his Council of Ministers. In all other matters where the Governor acts in his discretion he will act in harmony with his Council of Ministers. The Constitution does not aim at providing a parallel administration within the State by allowing the Governor to go against the advice of the Council of Ministers.

56. Similarly Article 200 indicates another instance where the Governor may act irrespective of any advice from the Council of Ministers. In such matters where the Governor is to exercise his discretion he must discharge his duties to the best of his judgment. The Governor is required to



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pursue such courses which are not detrimental to the State.'

The law, however, was declared in the following terms:

"154. We declare the law of this branch of our Constitution to be that the President and Governor, custodians of all executive and other powers under various articles shall, by virtue of these provisions, exercise their formal constitutional powers only upon and in accordance with the advice of their Ministers save in a few well-known exceptional situations. Without being dogmatic or exhaustive, these situations relate to (a) the choice of Prime Minister (Chief Minister), restricted though this choice is by the paramount consideration that he should command a majority in the House; (b) the dismissal of a Government which has lost its majority in the House, but refuses to quit office; (c) the dissolution of the House where an appeal to the country is necessitous, although in this area the head of State should avoid getting involved in



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politics and must be advised by his Prime Minister (Chief Minister) who will eventually take the responsibility for the step. We do not examine in detail the constitutional proprieties in these predicaments except to utter the caution that even here the action must be compelled by the peril to democracy and the appeal to the House or to the country must become blatantly obligatory. We have no doubt that de Smith's statement (Constitutional and Administrative Law — by S.A. de Smith — Penguin Books on Foundations of Law) regarding royal assent holds good for the President and Governor in India:

'Refusal of the royal assent on the ground that the Monarch strongly disapproved of a Bill or that it was intensely controversial would nevertheless be unconstitutional. The only circumstances in which the withholding of the royal assent might be justifiable would be if the Government itself were to advise such a course — a highly improbable



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contingency — or possibly if it was notorious that a Bill had been passed in disregard to mandatory procedural requirements; but since the Government in the latter situation would be of the opinion that the deviation would not affect the validity of the measure once it had been assented to, prudence would suggest the giving of assent.’ ”

*Thus, as rightly pointed out by Mr Sorabjee, a seven-Judge Bench of this Court has already held that **the normal rule is that the Governor acts on the aid and advice of the Council of Ministers and not independently or contrary to it. But there are exceptions under which the Governor can act in his own discretion. Some of the exceptions are as set out hereinabove. It is, however, clarified that the exceptions mentioned in the judgment are not exhaustive. It is also recognised that the concept of the Governor acting in his discretion or exercising independent judgment is not alien to the Constitution.** It is recognised that there may be situations where by reason of peril to democracy or democratic principles, an action*



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may be compelled which from its nature is not amenable to Ministerial advice. Such a situation may be where bias is inherent and/or manifest in the advice of the Council of Ministers.”

[emphasis supplied]

38. In the instant case, learned Advocate General has referred to the role played by the accused in the assassination of Mr.Rajiv Gandhi, former Prime Minister of India, where 15 other innocent persons, including 9 police personnel, died. The issue aforesaid can be taken into consideration by the Governor of the State to determine whether the Council of Ministers was erroneous to recommend grant of remission of sentence to the accused, though the contest in regard to aforesaid was not made before the Apex Court in the case of **A.G.Perarivalan**, supra. The Apex Court observed that the argument raised by the learned Additional Solicitor General to justify the decision of the Governor to send the matter to the President of India cannot be accepted. It was held that the matter would fall under Article 161 of the Constitution of India for the reason that conviction of the accused is under Section



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सत्यमेव जयते 302 IPC.

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39. The Apex Court in the case of **A.G.Perarivalan**, supra, has also observed that our Constitution, though federal in its structure, is modelled on the British parliamentary system, where the executive is deemed to have the primary responsibility for the formulation of governmental policy and its transmission into law. It was also observed that the Governor occupies the position of the head of the executive in the State, but it is virtually the Council of Ministers in each State that carries on the executive Government. The Governor is thus required to exercise all his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers and therein the satisfaction required by the Constitution is not the personal satisfaction, but the satisfaction of the Governor in the constitutional sense under the Cabinet system of government. Though the Governor may be authorised to exercise some functions under different provisions of the Constitution, the same are required to be exercised only on the basis of the aid and advice tendered to him, unless the Governor



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has been expressly authorised by or under a constitutional provision to discharge the function concerned in his own discretion.

Paragraphs (15) to (17) of the judgment of the Apex Court are quoted hereunder for ready reference:

"15. The limits within which the executive Government can function under the Indian Constitution can be ascertained without much difficulty by reference to the form of the executive which our Constitution has set up. Our Constitution, though federal in its structure, is modelled on the British parliamentary system where the executive is deemed to have the primary responsibility for the formulation of governmental policy and its transmission into law though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State. The Governor occupies the position of the head of the executive in the State but it is virtually the Council of Ministers in each State that carries on the executive Government. In the Indian Constitution, therefore, we have the same system of parliamentary executive as in England and the Council of Ministers consisting, as it does, of the members of the legislature is, like the British



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Cabinet, "a hyphen which joins, a buckle which fastens the legislative part of the State to the executive part". [Rai Sahib Ram Jawaya Kapur v. State of Punjab, (1955) 2 SCR 225].

16. Under the Cabinet system of Government as embodied in our Constitution the Governor is the constitutional or formal head of the State and he exercises all his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers, save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion. Wherever the Constitution requires the satisfaction of the President or the Governor for the exercise of any power or function by the President or the Governor, as the case may be, as for example in Articles 123, 213, 311(2) proviso (c), 317, 352(1), 356 and 360, the satisfaction required by the Constitution is not the personal satisfaction of the President or of the Governor but is the satisfaction of the President or of the Governor in the constitutional sense under the Cabinet system of Government. It is the satisfaction of the Council of Ministers on whose aid and advice the President or the Governor



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generally exercises all his powers and functions. [Samsher Singh v. State of Punjab, (1974) 2 SCC 831].

17. Even though the Governor may be authorised to exercise some functions, under different provisions of the Constitution, the same are required to be exercised only on the basis of the aid and advice tendered to him under Article 163, unless the Governor has been expressly authorised, by or under a constitutional provision, to discharge the function concerned, in his own discretion.” [Nabam Rebia and Bamang Felix v. Deputy Speaker, Arunachal Pradesh Legislative Assembly, (2016) 8 SCC 1].”

40. It needs to be noted that following the judgment in the case of **Samsher Singh v. State of Punjab, (1974) 2 SCC 831**, subsequently, the Apex Court in **Maru Ram**, supra, held that the Governor is but a shorthand expression for the State Government. Following the said proposition, the Apex Court in **A.G.Perarivalan**, supra, held that the advice of the State Cabinet is binding on the Governor and no provision under the Constitution has been pointed



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out nor any satisfactory response tendered as to the source of the Governor's power to refer a recommendation made by the State Cabinet to the President of India.

41. In the light of the aforesaid, we hold that if the matter does not fall under Article 72 of the Constitution of India, the Governor is bound by the recommendation of the Council of Ministers, though his formal authorisation would be required, as otherwise observed by the Apex Court in the case of **Maru Ram**, supra.

42. The discussion aforesaid has been made in the light of the recent judgment of the Apex Court in the case of **A.G.Perarivalan**, supra, referred by learned counsel for the petitioner, otherwise insofar as the case on hand is concerned, we have already held that the writ petition is not maintainable in the light of the detailed judgment of a Division Bench of this Court in H.C.P.No.2881 of 2019 dismissed by order dated 11.3.2020, wherein all the issues, as raised herein, were dealt with and decided. A litigant cannot come



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out with repeated writ petitions for one and the same cause. Rather, if the petitioner was aggrieved by the earlier judgment, she could have preferred an appeal before the Apex Court.

43. In view of the above, we hold the present writ petition to be not maintainable after the dismissal of the earlier three petitions on the same issue, especially the last petition, being H.C.P.No.2881 of 2019, decided on 11.3.2020.

44. The prayer for release of the petitioner by the government on its own pursuant to the recommendation of the Council of Ministers cannot thus be directed. The release cannot be directed even by the court in the absence of the acceptance of the resolution by the Governor of the State. The recommendation of the Council of Ministers has otherwise been sent to the President of India. The development aforesaid is during the pendency of the writ petition. Thus, for the reasons aforesaid, the directions sought by the petitioner cannot be given by the court, as it otherwise does not have power similar to what the Apex Court has under Article 142 of



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the Constitution of India.
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45. For the foregoing reasons, the writ petition is dismissed as not maintainable. There will be no order as to costs. Consequently, W.M.P. No.SR28812 of 2022 is dismissed.

(M.N.B., CJ.) (N.M., J.)
17.06.2022

Index : Yes
sasi

To:

- 1.The Secretary to Government,
State of Tamil Nadu,
Home, Prohibition and Excise Department,
Secretariat, Chennai - 600 009.
- 2.The Superintendent of Prison,
Special Prison for Women,
Vellore.



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THE HON'BLE CHIEF JUSTICE
AND
N.MALA,J.

(sasi)

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17.06.2022