

VERDICTUM.IN

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE BECHU KURIAN THOMAS

TUESDAY, THE 4TH DAY OF APRIL 2023 / 14TH CHAITHRA, 1945

WP(CRL.) NO. 74 OF 2023

AGAINST SC 55/2012 OF ADDITIONAL SESSIONS COURT - II,

THIRUVANANTHAPURAM

PETITIONER:

NOUSHAD.A
AGED 37 YEARS, S/O. ASHARAF,
NASEER MANZIL,
SNEHA RESIDENCE ASSOCIATION LINE,
8TH STONE, KARAKULAM P.O,
THIRUVANANTHAPURAM, PIN - 695564

BY ADVS.
SMT.V.VIJITHA
SRI.R.ROHITH

RESPONDENTS:

- 1 STATE OF KERALA
REPRESENTED BY SECRETARY,
DEPARTMENT OF HOME AFFAIRS, SECRETARIAT,
THIRUVANANTHAPURAM, PIN - 695001
- 2 KERALA PRISON AND CORRECTIONAL SERVICES
REPRESENTED BY THE DIRECTOR GENERAL OF PRISON AND
CORRECTIONAL SERVICES, DEPARTMENT OF PRISON,
POOJAPURA, THIRUVANANTHAPURAM, PIN - 695012
- 3 THE SUPERINTENDENT
CENTRAL PRISON AND CORRECTIONAL HOME,
POOJAPPURA, THIRUVANANTHAPURAM, PIN - 695012
- 4 JAIL ADVISORY BOARD
CENTRAL PRISON, POOJAPURA,
THIRUVANANTHAPURAM,
REPRESENTED BY ITS CHAIRMAN, PIN - 695012
- 5 STATION HOUSE OFFICER
POOJAPPURA POLICE STATION,
POOJAPPURA MAIN ROAD,

THIRUVANANTHAPURAM,
KERALA, PIN - 695012

*6 AMAL NISHAM
AGED 42 YEARS, WIFE OF MOHAMMED NISHAM,
RESIDING AT FLAT 1073,
SOBHA CITY, PUZHAKKAL - 680553,
THRISSUR

*(ADDL.R6 IS IMPEADED AS PER ORDER DATED
23/02/2023 IN IA 1/23 IN W.P. (CRL.) NO.74/2023

BY ADVS.
SMT.SREEJA V., PUBLIC PROSECUTOR
SMT.ASWINI SANKAR R.S.
SRI.K.RAMAKUMAR (SR.)
SRI.T.RAMPRASAD UNNI
SRI.S.M.PRASANTH

THIS WRIT PETITION (CRIMINAL) HAVING COME UP FOR
ADMISSION ON 21.03.2023, ALONG WITH WP(CrI.)No.246/2023,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE BECHU KURIAN THOMAS

TUESDAY, THE 4TH DAY OF APRIL 2023 / 14TH CHAITHRA, 1945

WP(CRL.) NO. 246 OF 2023

AGAINST SC 55/2012 OF ADDITIONAL SESSIONS COURT - II,

THIRUVANANTHAPURAM

PETITIONER:

NAZEER. A
AGED 41 YEARS, S/O. ASHARAF,
NASEER MANZIL,
SNEHA RESIDENCE ASSOCIATION LINE,
8TH STONE, KARAKULAM PO,
THIRUVANANTHAPURAM 695564,

CONVICT NO.7575 WHO IS PRESENTLY LODGED IN THE
CENTRAL PRISON AND CORRECTIONAL HOME,
THIRUVANANTHAPURAM 695012

BY ADVS.
SMT.V.VIJITHA
SRI.R.ROHITH

RESPONDENTS:

- 1 STATE OF KERALA
DEPARTMENT OF HOME AFFAIRS,
REPRESENTED BY THE HOME SECRETARY,
SECRETARIAT,
THIRUVANANTHAPURAM, PIN - 695001
- 2 KERALA PRISON AND CORRECTIONAL SERVICES
REPRESENTED BY THE DIRECTOR GENERAL,
DEPARTMENT OF PRISON, POOJAPURA,
THIRUVANANTHAPURAM, PIN - 695012
- 3 THE SUPERINTENDENT
CENTRAL PRISON AND CORRECTIONAL HOME,
POOJAPPURA,

THIRUVANANTHAPURAM, PIN - 695012

- 4 JAIL ADVISORY BOARD
CENTRAL PRISON , POOJAPURA,
THIRUVANANTHAPURAM , PIN - 695012
REPRESENTED BY ITS CHAIRMAN,
- 5 STATION HOUSE OFFICER
POOJAPPURA POLICE STATION,
POOJAPPURA MAIN ROAD, THIRUVANANTHAPURAM,
KERALA, PIN - 685012
- *6 AMAL NISHAM
AGED 42 YEARS, WIFE OF MOHAMMED NISHAM,
RESIDING AT FLAT 1073,
SOBHA CITY, PUZHAKKAL - 680553,
THRISSUR

*(ADDL.R6 IMPEADED AS PER ORDER DATED 10/03/2023
IN IA 1/2023 IN W.P. (CRL.) 246/2023

BY ADVS.
SMT.ASWINI SANKAR R.S.
SRI.S.M.PRASANTH
SRI.T.H.ARAVIND

SMT.SREEJA V., PUBLIC PROSECUTOR
SRI.K.RAMKUMAR (SR.) FOR ADDLN.R6

THIS WRIT PETITION (CRIMINAL) HAVING COME UP FOR
ADMISSION ON 21.03.2023, ALONG WITH WP(CrI.).74/2023, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

"C . R . "

BECHU KURIAN THOMAS, J.

W.P.(CrI.) No.74 & 246 of 2023

Dated this the 4th day of April, 2023

JUDGMENT

These two writ petitions are filed by brothers seeking similar reliefs. W.P.(CrI.) No.74 of 2023 is filed by Sri.Noushad seeking grant of ordinary leave for his brother, who is convict No.7575, lodged in the Central Prison, Thiruvananthapuram, while W.P(CrI.) No.246 of 2023 is filed by the said convict himself, seeking grant of ordinary leave to him and a declaration that he is entitled to parole

2. The facts stated in the second writ petition, i.e., W.P.(CrI.) No.246 of 2023 would suffice and is briefly mentioned as follows: Petitioner is life convict No.7575 who has been released on ordinary leave on 16 occasions earlier and had never violated any of the conditions of leave.

2.1. According to the petitioner, at the instance of one Sri.Muhammed Nisham, who is convict No.2322 (hereinafter referred to as 'Nisham' for short), he is being denied leave. After petitioner was

purposely injured at the behest of Sri. Nisham, the learned Sessions Judge intervened and directed a crime to be registered. Thereafter, crime No.858 of 2022 was registered under sections 324 and 34 of the Indian Penal Code, 1860 (for short 'IPC').

2.2. Petitioner alleged that after he complained about Nisham, things started taking an ugly turn. Though a crime was registered against the petitioner at the behest of Nisham, both were referred as false. Despite such a reference, the Jail Superintendent refused to grant leave to the petitioner. Until petitioner raised a complaint against Nisham, there was never any adverse report or remark against him and he was always released on leave as per law. However, after the complaint was raised, petitioner faced a hostile attitude inside the prison since Nisham is extremely influential, both politically and financially.

2.3. When petitioner's brother filed W.P.(CrI.) No.74 of 2023, this Court had, on 13.02.2023, taking note of the contentions advanced, directed the Superintendent of the Jail to file a counter affidavit. Interestingly, thereafter, an application was filed by the wife of Nisham to implead her in the writ petition and raised an objection about the maintainability of the writ petition filed by the brother of the petitioner. Thus the convict himself preferred W.P.(CrI.) No.246 of 2023.

2.4. According to the petitioner, on the date when a counter affidavit was directed to be filed in W.P.(CrI.) No.74 of 2023, the third respondent,

by a malafide act, initiated a false proceeding for an incident alleged to have occurred on 11.02.2023 and hastily issued an order cancelling 30 days remission earned by the petitioner and that he came to know about the order and the disciplinary proceedings only when a statement was filed before this Court. Curiously, the allegation is that petitioner supplied a beedi to another convict by the name of Venugopal. Petitioner alleges that he is being subjected to severe atrocities, arbitrary treatment and prejudicial proceedings only because of the influence wielded by Nisham. Petitioner asserts that he has a legal right to be considered for ordinary leave, and he is being victimised inside the prison.

3. In the counter affidavits filed separately by the third and sixth respondents it is admitted that the crimes registered against the petitioner and Nisham were both referred as false after investigation. It is further stated that on 11.02.2023, a convict was found smoking beedi and after an enquiry petitioner was found to have supplied the beedis. Hence a punishment of forfeiture of 30 days remission was imposed as per proceedings dated 13.02.2023 under section 82D of Kerala Prisons and Correctional Services (Management) Act, 2010 (for short 'the Act'). It is further alleged that as per Rule 397 of the Kerala Prisons and Correctional Services (Management) Rules, 2014 (for short 'the Rules'), leave can be granted only to well-behaved, eligible and convicted prisoners. In view of the punishment imposed, petitioner cannot be treated as a well-behaved

prisoner for considering him to be granted leave. The sixth respondent questioned the maintainability of the writ petition apart from objecting to the jurisdiction to issue a writ of mandamus and asserting that leave being a discretionary relief, falls purely within the realm of executive decision and discretion.

4. I have heard the arguments of Sri.R.Rohith, the learned counsel for the petitioners, Smt. Sreeja V., the learned Public Prosecutor and Sri. K. Ramkumar, learned Senior Counsel appearing for the additional 6th respondent.

5. The grant of ordinary leave is essentially an executive function and the concept of parole and leave to a convict came into the legal system of India after the Supreme Court issued orders for the release of prisoners on humanitarian considerations. Release of prisoners for temporary periods is part of the reformatory process and provides an opportunity for the prisoner to transform himself into a useful citizen. Parole or leave has been held to be a measure of grant of partial liberty, though such a release does not change the status of the prisoner. Reference to the decisions in **Poonam Lata v. M.L.Wadhawan and Others** [(1987) 3 SCC 347] and **State of Gujarat and Another v. Narayan @ Narayan Sai @ Mota Bhagwan Asaram @ Asumal Harpalani** (AIR 2021 SC 5096) are apposite in this context.

6. Under the Act, parole is defined in section 2(xxxi) as the system of

releasing prisoners temporarily for such period by following such procedures and conditions as may be prescribed. Section 73 of the Act deals with parole while section 78 of the Act deals with leave. Parole is granted in cases of serious illness or death of family members or relatives and even for other sufficient causes. Leave is granted to convicted prisoners who are well-behaved and eligible. Rule 397 of the Rules states that a prisoner is eligible to two types of leaves - ordinary and extraordinary. The provision states that a convict is eligible for 60 days of leave every year and at one stretch the leave should not be less than 15 days and not more than 30 days provided the police report and probationary officers report being favourable. Leave can be denied only if the convict has been regarded as dangerous and those who have committed serious jail offences like assault or riot or escape from prison and abetment of those offences.

7. Admittedly, petitioner, who is Convict No.7575, had been granted leave regularly from 2015 onwards. No complaint of any nature has been raised during the period while he was on leave or parole. Petitioner had been returning back to prison after the leave too. In fact, he enjoyed covid special parole in 2020 and 2021 respectively. Even during those times, there has not been any cause for concern or complaint against the petitioner.

8. Admittedly, no crimes are pending against the petitioner after he

came into prison. Though the police report from the Inspector of Nedumangad Police Station mentions that there would be a law and order situation if petitioner is granted ordinary leave, except for a bald conclusion, no reasons have been stated to deny leave to the petitioner. The report also fails to stipulate how the law and order situation will be affected.

9. On the other hand, the Probation Officer attached to the Central Prison, Thiruvananthapuram had on 17.02.2023 reported that neither the relatives nor petitioner's neighbours had any negative opinion about him and that he is known to be a courteous person and even indulges in social work. It is also reported that though petitioner was granted leave on 10 occasions from 13.4.2017 and even special parole during covid times, he has not created any difficulty for any person. The Probation Officer further reported that his enquiry revealed that there were no negative views about the petitioner, and all had a good opinion of him. However, on 24.06.2022 since hot water fell on his legs and the petitioner complained about the said incident against Nisham, he and his wife started filing complaints against the petitioner. It is also reported that the 6th respondent had refused to communicate with the Probation Officer. Considering the entire circumstances, the Probation Officer, in his report dated 17-02-2023 (produced as one of the documents in Exhibit P7), recommended the grant of ordinary leave to the petitioner with the restriction that he shall not

leave Thiruvananthapuram District since the wife of Nisham resides in Thrissur. Thus the Probationary Officer's report is in favour of the petitioner.

10. Concededly, the only adverse episode against the petitioner is the incident that took place on 11-02-2023 when he is alleged to have supplied beedis to another convict. Due to the said incident, an order was issued on 13.02.2023, which is produced as Ext.P7, wherein the 3rd respondent imposed a punishment of deduction of 30 days of remission from the petitioner's entitlement. The convict who smoked the beedi is alleged to have been imposed with a lesser punishment of denial of canteen facilities for 15 days.

11. The learned Public Prosecutor made available the correspondence file No.CP-1(DS-D)-7575/2023(2)/CPTvm dated 13.02.2023. It is noticed from the file that there was an allegation about one Venugopal smoking beedi on 11.02.2023 near the hospital block and when he was questioned, he is alleged to have informed that the beedis were supplied by Convict No.7575-Sri.Nazeer. The file reveals that an enquiry was purported to have been conducted on 12-02-2023 by taking the statements of a few persons. Petitioner's statement is also seen recorded. He denied the allegation and even stated that the case filed on his behalf for obtaining parole is coming up in court on the next day (i.e.13-02-2023) and that the allegation against him is pursuant to some

conspiracy to prevent his parole.

12. Based on the alleged enquiry, on 12.02.2023, a report was allegedly submitted by the Deputy Superintendent of the Central Prison and on 13.02.2023 an order was issued, imposing a penalty on the petitioner deducting 30 days of remission. The file however does not reveal that copy of the report was ever served on the petitioner or that he was put to notice of the proposed punishment or even given an opportunity to defend the case against him. A show-cause notice prior to imposing punishment is also not seen issued nor is a copy of the report seen served on the petitioner. Violation of the principles of natural justice is glaringly evident in the proceedings resulting in the punishment.

13. Section 83 of the Act provides for the procedure for conducting enquiries for the award of punishment. The provision commands that the prisoner be informed of the offence alleged against him and be given a reasonable opportunity of being heard in his defence. Information about the offence serves a salutary purpose. Section 36(d) of the Act also mandates that every prisoner shall have the right of access to due process of law, including legal services and legal aid. Once the information is provided the prisoner must be given opportunities to defend his cause and even submit an explanation. Curiously, petitioner has not been given an opportunity to explain and the statutory rights of the petitioner have been trampled upon.

14. The basic requirement of the principles of audi alteram partem as evident from the above-mentioned statutory provisions requires a copy of the enquiry report at least to be served on the petitioner. As mentioned earlier, neither is there any evidence in the files to indicate that petitioner was ever served with a notice of the proceedings or even a copy of the enquiry report. Not even an opportunity to show cause against the proposal to impose the punishment was granted. Since the legal requirements, have been flouted completely and punishment imposed in haste, i.e. within two days of the incident, this Court is compelled to observe that the legal validity of the order dated 13.02.2023 in Ext.P7 is questionable. A purposeful attempt to create a negative incident against the petitioner seems to have been attempted by the 3rd respondent and others.

15. However, as rightly contended by the learned Senior Counsel Sri.K. Ramkumar, the power to release a person on parole is vested with the Government under section 73 of the Act. Though, petitioner is entitled for ordinary leave which is marginally different from parole, as the petitioner has not approached the competent authority earlier, a writ of mandamus cannot be issued since there is no request either for leave or parole and a corresponding refusal. Only when there is a failure to exercise discretion can a writ of mandamus be issued. Since the petitioner has not approached the statutory authority with a request for release on

parole or leave, there is no refusal. In the above circumstances, this Court cannot issue a direction or a writ of mandamus to grant parole to the petitioner.

16. Ext.P6 has not denied leave/parole to the petitioner and is hence not a restraint on considering such a grant. Therefore failure to challenge Ext.P6 is not detrimental to the petitioner. The contention regarding the practice of repeated writ petitions is also of no significance in the instant case since the two writ petitions are filed by two different persons. The reliefs claimed by the petitioner cannot be defeated on the technical ground that petitioner's brother had filed an earlier writ petition. The second writ petition was filed since the 6th respondent objected to the brother filing a writ petition for the petitioner.

17. In this context, it is relevant to observe that an eligible convict is entitled to be granted leave for 60 days in a year as per Rule 397 of the Rules read with section 78 of the Act. If the conditions for leave as prescribed in the statute are satisfied, the discretion to grant leave must be exercised in his favour as it will partake the character of a right itself. The concept of discretion has been explained to be something to be done according to the rules of reason and justice and not according to whims or fancies. Exercise of discretion cannot be arbitrary, fanciful or vague, but it must be legal and regular and must be exercised within the limits permissible by law. Discretion can never be a shield for acting in an

arbitrary, capricious or whimsical manner. What is expected of an authority vested with discretion are actions that are fair, reasonable and judicious. Therefore when an authority, vested with the power of discretion acts in an unreasonable manner, contrary to fairness, capriciously, whimsically and even contrary to statutory prescriptions, this Court cannot remain a mute spectator. When a writ court is satisfied that the right of its citizens, including that of a convict, has been violated in circumstances that are extraordinary, this Court can render assistance to the citizens to redress their grievances.

18. Though this court cannot, in the peculiar circumstances issue a writ of mandamus, petitioner has sought a declaration that he is entitled to leave. In view of the peculiar circumstances, as evident from the various instances narrated earlier, this court is satisfied that there has been an attempt to purposely deny leave to the petitioner by resorting to an unfair procedure. The action is, no doubt, to create an impression that petitioner is not a well-behaved person and in turn to deny leave to him. The procedure adopted is illegal. Further, the alleged offence does not fall within the category of offences delineated in Rule 397(iii) of the Rules to deny ordinary leave to the convict. Petitioner cannot thus be denied ordinary leave in the peculiar circumstances and he is entitled to such leave with a rider that he shall not move out of Thiruvananthapuram District.

W.P.(Crl.) Nos.75 & 246/23

-:16:-

19. In the above circumstances, it is declared that petitioner in W.P(Crl.) No.246 of 2023 is entitled to be released on ordinary leave with the condition that he shall not travel beyond the territory of Thiruvananthapuram District and also that the order dated 13-02-2023 No. CP-(DS-D) 7575/2023(1)/CPTVPPM shall not stand in the way of granting leave/parole to the petitioner if applied for. In view of the relief granted in W.P(Crl.) No.246 of 2023, the reliefs claimed in W.P(Crl.) No.74 of 2023 has become infructuous.

W.P(Crl.) No.246 of 2023 is therefore allowed in part and W.P(Crl.) No.74 of 2023 is closed.

Sd/-

**BECHU KURIAN THOMAS
JUDGE**

vps

APPENDIX OF WP(CRL.) 74/2023

PETITIONER'S/S' EXHIBITS

- EXHIBIT P1 A TRUE COPY OF THE REPORT DATED
11.08.2022 ISSUED BY THE CHIEF MEDICAL
OFFICER, CENTRAL PRISON
- EXHIBIT P2 A TRUE COPY OF THE ORDER DATED
20.07.2022 IN CRIMINAL MP NO. 1795/2022
IN SC NO. 7/12 OF ADDITIONAL SESSION
COURT-VII, THIRUVANANTHAPURAM
- EXHIBIT P3 A TRUE COPY OF THE FIR IN CRIME
NO.858/2022 OF POOJAPPURA POLICE STATION
- EXHIBIT P4 A TRUE COPY OF THE FIR IN CRIME NO.
951/2022OF POOJAPPURA POLICE STATION
- EXHIBIT P5 A TRUE COPY OF THE REPLY DATED
23.12.2022 ISSUED BY THE 2ND RESPONDENT
TO THE MOTHER OF THE PETITIONER

RESPONDENT'S/S' ANNEXURES

- ANNEXTURE R3 (a) TRUE COPY OF THE PROBATION OFFICERS
REPORT
- ANNEXURE R3 (b) TRUE COPY OF THE POLICE REPORT
- ANNEXURE R3 (c) TRUE COPY OF THE ORDER OF DISCIPLINARY
ACTION TAKEN AGAINST CONVICT NO.7575
NAZEER
- ANNEXURE R3 (d) TRUE COPY OF THE REPORT OF MEDICAL
OFFICER
- EXHIBIT R6 (a) TRUE COPY OF COMPLAINT PRESENTED IN
AUGUST, 2022 BY THE ADDITIONAL 6TH
RESPONDENT BEFORE THE JUDICIAL FIRST
CLASS MAGISTRATE COURT-I, THRISSUR

APPENDIX OF WP (CRL.) 246/2023

PETITIONER'S/S' EXHIBITS

- EXHIBIT P1 A TRUE COPY OF THE REPORT DATED 11.08.2022 ISSUED BY THE CHIEF MEDICAL OFFICER, CENTRAL PRISON DETAILING THE TREATMENT GIVEN TO THE BROTHER OF THE PETITIONER
- EXHIBIT P2 A TRUE COPY OF THE ORDER DATED 20.07.2022 IN CRIMINAL MP NO. 1795/2022 IN SC NO. 07/2012
- EXHIBIT P3 A TRUE COPY OF THE FIR IN CRIME NO.858/2022 OF POOJAPPURA POLICE STATION DATED 02.08.2022
- EXHIBIT P4 A TRUE COPY OF THE FIR IN CRIME NO. 951/2022 OF POOJAPPURA POLICE STATION DATED 27.08.2022
- EXHIBIT P5 A TRUE COPY OF THE FIR IN CRIME NO.114/2023 OF POOJAPPURA POLICE STATION DATED 28.01.2023
- EXHIBIT P6 A TRUE COPY OF THE REPLY DATED 23.12.2022 ISSUED BY THE 2ND RESPONDENT TO THE MOTHER OF THE PETITIONER
- EXHIBIT P7 A TRUE COPY OF THE STATEMENT FILED BY PUBLIC PROSECUTOR THE DATED 23.02.2023 IN WP (CRL) .74/2023

RESPONDENT'S/S' EXHIBITS

- EXHIBIT R6 (a) TRUE COPY OF COMPLAINT DATED NIL IN AUGUST, 2022 FILED BY R6 BEFORE THE JUDICIAL MAGISTRATE OF FIRST CLASS, THRISSUR

W.P.(CrI.) Nos.75 & 246/23

-:19:-

EXHIBIT R3 (a)

TRUE COPY OF PROCEEDINGS NO. CP-(DS-D) 7575/2023 (1) CPTVM DATED 13-02-2023