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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 28.05.2019

CORAM :

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

WP(MD)No.12488 of 2019

Rahmath Nisha ... Petitioner

Vs.

1.The Additional Director General of Prison,
O/o the Additional Director General of Prison,
No-1, Gandhi Erwin Road,
Egmore, Chennai-08.

2.The Superintendent of Prison,
Central Prison, Palayamkottai,
Tirunelveli.

3.The Additional Superintendent of Police,
Special Investigation Division,
Crime Branch CID, Madurai,
(Crime No.1 of 2013 of CBCID, Tirunelveli) ... Respondents

PRAYER : Writ Petition is filed under Article 226 of the Constitution of India, to issue a Writ of Mandamus, to direct the respondents 1 and 2 to grant 10 days leave to the petitioner's brother namely Mohamed Shalin son of Kajah Mohaideen aged about 39 who is confined at Palayamkottai Central Prison, Tirunelveli as a remand prisoner (R.P.No.2829) in order to visit his wife by considering her representation dated 23.05.2019.

For Petitioner : Mr.S.M.A.Jinnah

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For Respondents : Mr.Anandraj,
Additional Public Prosecutor

ORDER

The writ petitioner's brother Mohamed Shalin is confined at Palayamkottai Central Prison, Tirunelveli as a remand prisoner. Claiming that his wife is seriously ill, he filed Crl MP No.182 of 2019 before the Special Court under the National Investigation Agency Act, 2008 (Sessions Court for Exclusive Trial of Bomb Blast Cases), Chennai at Poonamallee, Chennai – 56 seeking permission to be with his wife. The Special Court allowed the said petition on 14.05.2019. Pursuant to the order passed by the court, the said Mohamed Shalin was taken to his house. But, by then, his wife had been shifted to Rosemary Mission Hospitals & Research Centre, Vannarpettai, Tirunelveli. The escort police took the stand that Mohamed Shalin had been permitted to visit his house only and that therefore he cannot be taken to Rosemary Mission Hospitals and Research Centre where his wife had been admitted. Since the purpose of filing the petition before the said Special Court was not effectuated and there is an acute urgency in the matter, this writ

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petition has been filed.

2.The learned counsel appearing for the writ petitioner made a mention yesterday that a special sitting will have to be constituted for taking up the matter. This Court acceded to the said request and message was sent to the learned Additional Public Prosecutor to be ready with instructions so that the matter can be finally disposed of. Today, when the matter was taken up for hearing, the learned Additional Public Prosecutor even though was ready with instructions submitted that he may require time to file a detailed counter affidavit.

3.The learned Additional Public Prosecutor submitted that this writ petition is not maintainable for more reasons than one. This writ petition has not been filed by the prisoner concerned or his wife. Secondly, a life convict only will be entitled to what is known as furlough or parole. A remand prisoner can go out of prison where he is confined only after obtaining bail from the jurisdictional criminal court. In this case, the said Mohamed Shalin was remanded to custody by the learned Additional CMM, Bangalore. He was confined

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in Parapana Agrahara Prison, Bangalore. He was transferred to Palayamkottai Central Prison to face trial in S.C No.163 of 2014 on the file of the Chief Judicial Magistrate, Nagercoil. He has since been acquitted in the said case and he is likely to be send back to Parapana Agrahara Prison, Bangalore very shortly. The learned Additional Public Prosecutor also expressed his apprehension that there is a possibility of escaping by the prisoner. The cases in which he has been accused are having national security implications and are grave in nature. The prosecution alleged that the prisoner is a terrorist who has supplied bombs and ammunitions to Jihadi terrorists. He therefore wanted this Court to dismiss this writ petition.

4.No doubt, the objections raised by the learned Additional Public Prosecutor are weighty and formidable. Before I test them on the anvil of the constitutional rights of the prisoner, I have to observe that the order dated 14.05.2019 passed by the Special Court, Chennai was in fact complied with by the police. They did not challenge the same before the High Court. The Special Court was

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satisfied that the medical condition of the prisoner's wife was rather grave and on humanitarian grounds, permitted him to be with his wife for a day at his house. But, in the meanwhile, the prisoner's wife was shifted from the residence to hospital. The filing of this writ petition was necessitated only by this development. I therefore see no ground to take a different view.

5.Mohamed Shalin is no doubt a prisoner but he is a person too. He is entitled to certain fundamental rights even while in custody (vide (2016) 3 SCC 1 (Inhuman Conditions in 1382 Prisons, In Re). Article 21 of the Constitution of India proclaims that no person shall be deprived of his life or personal liberty except according to procedure established by law. To borrow the words of Justice Kirby uttered in an entirely different context, this Article is uncompromising in its generality of application. It embraces every individual. Its applicability is not confined only to citizens or good people. Prisoners, murderers and even traitors are entitled to the right that it declares.

6.The expression "life" has been interpreted in *Maneka* and

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other cases as much more than mere physical existence. A prisoner is also entitled to the expansive interpretation of the term "life" occurring in Article 21 to the extent the context permits. Incarceration or conviction does not reduce the 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 the obligation of the prison authorities to protect the human rights of the prisoners (vide (2016) 10 SCC 17).

7.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)]. Rule 58 of the said Rule reads as under :

सत्यमेव जयते

"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

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other means; and

(b)By receiving visits.

2.Where conjugal visits are allowed, this right shall be applied without discrimination, and women prisoners shall be able to exercise this right on an equal basis with men. Procedures shall be in place and premises shall be made available to ensure fair and equal access with due regard to safety and dignity."

8.In fact, Chapter XXVII of the Tamil Nadu Prison Rules, 1983 contains provisions regarding interviews and communications with the prisoners. Therefore, the prisoner in question is certainly having a right to communicate with his wife. If his wife had not become immobile, she would certainly be entitled to visit him at the prison itself. She is now in the ICU ward. Merely because the wife of the prisoner is in hospital, his right to contact and communicate with her cannot be extinguished. There is a saying that if the mountain will not come to Mohamed, Mohamed must come to the mountain. If the spouse of the prisoner is unable to visit the prison, the authorities must facilitate a visit by the prisoner. Of course, such occasions will

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be few and far between. But, it is necessary to recognize the existence of such a right. As observed by a legal scholar, this should not be seen as a prisoner's privilege. It must be viewed more as the spousal right of the prisoner's wife.

9.It may be relevant to note here that the Punjab and Haryana High Court in the decision reported in ***2015 CRL L.J 2282 (Jasvir Singh and another vs. State of Punjab)*** held that the right to procreation survives incarceration and that such a right is traceable and squarely falls within the ambit of Article 21 of our Constitution. "Right to Life" and "Personal Liberty" guaranteed under Article 21 of the Constitution include the right of convicts or jail inmates to have conjugal visits. The exercise of these rights are to be regulated by procedure established by law, and are the sole prerogative of the State. This decision was followed in Arun vs. State of Haryana and others in CWP No.3311 of 2019 (O&M).

10.The learned Additional Public Prosecutor at this stage contended that the meeting between the prisoners and his wife can take place only in the presence of the escort police. I am afraid that I cannot sustain this contention. In case after case rendered in the

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recent times, it had been recognized that dignity is an inseparable facet of human personality. It has been recognized as an important aspect of the right to life under Article 21 of the Constitution. It has been identified as a human right (vide para 139 in the decision reported in (2018) 10 SCC 1 (Navtej Singh Johar vs. Union of India). Dignity is the core value of life and personal liberty which infuses every stage of human existence. Human dignity is an essential element of a meaningful existence. The right to a dignified life existence is central to the pursuit of a meaningful existence. Dignity ensures the sanctity of life. The right to privacy has now been recognized as a fundamental right in K.S.Puttaswamy case (2017) 10 SCC 1).

11.Section 122 of the Indian Evidence Act, 1872 treats the communication between spouses during marriage as privileged. I am therefore of the view that Rule 531 of Tamil Nadu Prison Rules, 1983 which states that every interview with a convicted prisoner shall take place in the presence of an experienced prison officer will have to be read down as inapplicable during meetings between spouses.

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Rule 531 of the Tamil Nadu Prison Rules reads as under :

> "531.Interview to take place in the presence of a Prison Officer/Intelligence Officer :-
>
> 1.Every interview with a convicted prisoner shall take place in the presence of an experienced prison officer, who shall be responsible that no irregularity occurs and who shall be so placed as to be able to see and hear what passes and to prevent any article being passed between the parties. The Lady Deputy Superintendent, the Matron, the Assistant Matron or a female warder shall be present at interviews of female prisoners.
>
> 2.Every interview with any fundamentalist, terrorist or militant prisoner including a remand prisoner or under-trial prisoner or prisoner detained under various Acts shall take place in the presence of any Special Investigation Team/Intelligence Officer along with an experienced Prison Officer, who shall be responsible that no irregularity occurs and who shall be so placed as to be able to see and hear as to what information passes, and to prevent any article being passed between the parties."

12.The learned Additional Public Prosecutor would draw my attention to Rule 531 (2). This Rule which was introduced in the year

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2000 will have to be read down in view of the recent rulings of the Hon'ble Supreme Court as set out earlier. Unless it is so read down, the right to dignity inhering in the prisoner and his spouse would certainly be infringed.

13.Rule 529 states that the place of interview will be at or near the main gate. I am of the view that the prison authorities will have to make an exception in the case of spousal meetings. When a prisoner meets his wife, he may like to hold her hands. His emotions are bound to find a physical expression. While private prison cottages may be a distant prospect, the privacy and dignity of the prisoners should be scrupulously protected. Conversations between prisoner and his spouse should be unmonitored. Of course, not only the prisoner but also the spouse shall be carefully searched before and after the interview. The prison authorities are obliged to facilitate the meetings between the prisoner and his wife in a reasonably private setting. In fact, in the decision reported in (2017) 10 SCC 658 (Inhuman Conditions in 1382 Prisons, In re), the Hon'ble Supreme Court held as follows :

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"34.Adverting to the Nelson Mandela Rules, the learned Attorney General 2 also expressed the view that State Governments have several development priorities and while they will certainly look after the interests of prisoners, there are other issues that might require greater attention and greater financial commitment. While this may be so, we are clearly of the view that Article 21 of the Constitution cannot be put on the back burner and as mentioned in the Mandela Rules even prisoners are entitled to live a life of dignity. Therefore, no State Government can shirk its duties and responsibilities for providing better facilities to prisoners. If a State Government is unable to do so, it should be far more circumspect in arresting and detaining persons, particularly under-trial prisoners who constitute the vast majority of those in judicial custody. The State Governments and the prosecution do not have to oppose every bail application nor do they have to ask for the remand of every suspect pending investigation. If the fundamental right to life and liberty postulated by Article 21 of the Constitution is to be given its true meaning, the Central Government and the State Governments must accept reality and not proceed on the basis that prisoners can be treated as chattel."

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14.At this stage, I have to necessarily refer to the concurring Judgment of his Lordship Mr.Justice Sanjay Kishan Kaul, J. in K.S.Puttaswamy (2017) 10 SCC 1 case. His Lordship held as under :

> *"639.The right to privacy as already observed is not absolute. The right to privacy as falling in part III of the Constitution may, depending on its variable facts, vest in one part or the other, and would thus be subject to the restrictions of exercise of that particular fundamental right. National security would thus be an obvious restriction, so would the provisos to different fundamental rights, dependent on where the right to privacy would arise. The Public interest element would be another aspect.*
>
> *640.It would be useful to turn to The European Union Regulation of 2016. Restrictions of the right to privacy may be justifiable in the following circumstances subject to the principle of proportionality:*
>
> *(a) Other fundamental rights: The right to privacy must be considered in relation to its function in society and be balanced against other fundamental rights.*
>
> *(b) Legitimate national security interest*
>
> *(c) Public interest including scientific or historical research purposes or statistical purposes*

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(d) Criminal Offences: the need of the competent authorities for prevention investigation, prosecution of criminal offences including safeguards against threat to public security;

(e) The unidentifiable data: the information does not relate to identifiedor identifiable natural person but remains anonymous. The European Union Regulation of 2016 refers to 'pseudonymisation' which means the processing of personal data in such a manner that the personal data can no longer be attributed to a specific data subject without the use of additional information, provided that such additional information is kept separately and is subject to technical and organisational measures to ensure that the personal data are not attributed to an identified or identifiable natural person;

(f) The tax etc: the regulatory framework of tax and working of financial institutions, markets may require disclosure of private information. But then this would not entitle the disclosure of the information to all and sundry and there should be data protection Rules according to the objectives of the processing. There may however, be processing which is compatible for the purposes for which it is initially collected."

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15.I had embarked on this exercise as that alone would address the privacy concerns of the prisoner Mohamed Shalin when he meets his wife. I am not granting bail or parole or furlough to Mr.Mohamed Shalin as that would be beyond my jurisdiction. As I recognise the prisoner's right to visit his wife who is critically ill, I am only directing the prison authorities to take Mohamed Shalin under escort to his wife to Rosemary Mission Hospitals and Research Centre, Vannarpettai, Tirunelveli or wherever she is so that the prisoner can be with his wife between 10.00 A.M to 05.00 P.M tomorrow ie., 29.05.2019. The cost of the escort shall be borne by the State Government. The conditions imposed by the Special Court under the National Investigation Agency Act, 2008 (Sessions Court for Exclusive Trial of Bomb Blast Cases), Chennai at Poonamallee, Chennai – 56 while allowing the Crl.M.P.No.182 of 2019 will be adhered to. During the said meeting, close blood relatives of the prisoner alone shall be present. The escort police shall respect the privacy of the prisoner and his wife.

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16.This writ petition stands allowed accordingly. No costs.

28.05.2019

Index : Yes / No
Internet : Yes / No
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To

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O/o the Additional Director General of Prison,
No-1, Gandhi Erwin Road, Egmore, Chennai-08.

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G.R.SWAMINATHAN, J.

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