IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

&

THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN

MONDAY, THE 31ST DAY OF JULY 2023 / 9TH SRAVANA, 1945

WP(CRL.) NO. 314 OF 2023

SC.No 246/2014 OF I ADDITIONAL SESSIONS COURT, ERNAKULAM

PETITIONER:

SANDHYA
AGED 44 YEARS, W/O JOSHI,
AANJILIVELLIL HOSE, CHEMPU P.O, VAIKOM,
KOTTAYAM DISTRICT, PIN – 686 608

BY ADVS.
P.MOHAMED SABAH
LIBIN STANLEY
SAIPOOJA
SADIK ISMAYIL
R.GAYATHRI
M.MAHIN HAMZA
ALWIN JOSEPH

RESPONDENTS:

1 THE SECRETARY,
HOME DEPARTMENT, STATE OF KERALA, SECRETARIAT,
THIRUVANATHAPURAM, PIN – 695 001

2 DIRECTOR GENERAL OF PRISONS AND CORRECTIONAL SERVICES,
PRISONS HEADQUARTERS, POOJAPPURA,
THIRUVANANTHAPURAM, PIN – 695 012

3 THE SUPERINTENDENT
CENTRAL PRISON , VIYYUR,
THRISSUR DISTRICT, PIN – 680 010

4 THE STATION HOUSE OFFICER
VAIKOM POLICE STATION, KOTTAYAM DISTRICT, PIN – 686 141

BY ADVS.
ASOK M.CHERIAN, ADDL. ADVOCATE GENERAL
SRI. SAIGI JACOB PALATTY-SR. GP

THIS WRIT PETITION (CRIMINAL) HAVING COME UP FOR ADMISSION ON 20.06.2023, THE COURT ON 31.07.2023 DELIVERED THE FOLLOWING:

[C.R.]

ALEXANDER THOMAS & C.JAYACHANDRAN, JJ.

W.P.(Crl)No.314 of 2023

Dated this the 31st day of July, 2023

JUDGMENT

C.Jayachandran, J.

We are called upon to answer the following intriguing questions in this writ petition:-

1. **Whether a convict prisoner can seek interim suspension of sentence for short-term requirements like disease, marriage etc under Section 389 of the Code of Criminal Procedure, instead of seeking leave/parole under the Kerala Prisons and Correctional Services (Management) Act, 2010 ('the Prisons Act' for short) and the Rules framed thereunder (herein after referred to as 'the Prisons Rules')?**
2. **Whether parole/leave can be sought for as a matter of right, in the light of the provisions of the Prisons Act and Rules? Whether the judgment in Noushad.A v. State of Kerala [2023 (3) KLT 24] recognise such a right?**

2. The Writ Petitioner challenges non-grant of parole/leave to her husband by name 'Seethappan', a convicted prisoner undergoing sentence in the Central Prison, Viyyur pursuant to the judgment of conviction in S.C.No.246/2014 on the files of the first Additional Sessions Court, Ernakulam, *inter alia* for offence under Section 302 of the Indian Penal Code. Leave/Parole is refused for reason of adverse police report, albeit probation report being favourable.

3. Petitioner relies on S.78 of the Prisons Act and Rule 397 of the Prisons Rules. The petitioner maintains that her husband is entitled to be released on ordinary leave for a period of 60 days in a calendar year under Rule 397. A recent judgment of a learned Single Judge of this Court in Noushad.A v. State of Kerala [2023 (3) KLT 24], was strongly relied upon to contend that leave in terms of Rule 397 is a right in itself and upon satisfaction of the

conditions stipulated in Rule 397, the discretion to grant leave must be exercised in favour of the convict, which right, however, is negated in the case of petitioner's husband, on an apparently jejune ground of threat to peace and tranquility. Per contra, learned Public Prosecutor submitted that, fulfillment of conditions in Rule 397 only enables the convict to seek leave, the grant of which would essentially be discretionary, subject to such other parameters stipulated in Rule 397, as also, Section 78 of the Prisons Act. This impels us to address initially, the second question as to whether Rule 397 confers an absolute or vested right of leave; or merely stipulates the eligibility criteria for grant of leave in terms of S.78 of the Prison Rules, for which, a scan of the relevant Rules and the binding precedents are necessary.

4. <u>The Scheme of the Act and Rules, in so far as it pertains to leave/parole</u>:-

S.73, falling under Chapter XVI, of the Prisons Act deals with 'release on parole'. The specific grounds are:

(a) serious illness or death of any member of the prisoner's family or of any of his nearest relatives; or

(b) any other sufficient cause.

The language employed is "the State Government may". Besides, the release is subject to 'such conditions as may be prescribed' and also for 'such period as it may deem necessary'. No emphasis is required as regards the clear discretion, statutorily afforded to the Government.

5. S.78 deals with 'leave'. S.78(1) provides that leave may be granted to well behaved, eligible, convicted prisoners. Again the language employed is 'may'. The objective is better rehabilitation and re-socialization, as an incentive for good behaviour and responsiveness to correction. Pertinently, the

leave is to be granted in such manner and subject to such conditions as may be prescribed. S.78(3) stipulates that the kind of leave and matters related thereto shall be such as may be prescribed.

6. S.79 speaks of escort visit for prisoners who are not eligible for the required kind of leave, to visit relatives etc. under escort, on such circumstances as prescribed in the Rules.

7. S.99 provides the powers of the Government to make rules. S.99(2)(xxxiii) deals with the power to make rules regarding the manner in which leave may be granted under S.78(1). S.99(2)(xxxiv) provides for the rule making power as regards the various kinds of leave and matters related thereto under S.78(3).

8. Now coming to the Prisons Rules, Rule 397 speaks of two types of leave namely, ordinary and emergent leave.

8(a). Ordinary leave:-

As per Rule 397(a), those prisoners who are well behaved, and convicted for a period of one year and more, are eligible for ordinary leave for a period of one-third of the total term of punishment or two years, whichever is less. Rule 397(b)–on which heavy reliance is placed by the petitioner–stipulates that a convict is entitled to ordinary leave for 60 days in a calendar year, subject to such further restrictions stipulated in the said rule. Rule 397(h) mandates a report by the Sub Inspector of Police concerned containing the details of previous bad behaviour, if any, of the convict while availing leave earlier, the possibility of the convict absconding and also indicating whether his release would be adverse to maintenance of peace, especially the safety and security of the convict or of others. Regarding the conduct of the convict in the jail, his previous history and details of the leave already availed, the Jail Superintendent has to forward a

report. Besides, the Probationary Officer has to prefer a report indicating his family and social background and also about his social acceptance during the period of leave. Rule 399 contemplates a review committee to review cases, where leave was denied for reason of adverse police report.

8(b). <u>Emergent Leave</u>:-

Rule 400 speaks of emergent leave on the contingency of the death of the prisoner's father, mother, son and other relatives specified in Rule 400(i), as also, for the marriage of the son, daughter and such other relatives specified in R.400(ii). Besides, a prisoner is eligible for emergent leave, where the convict's residential house is destroyed partly or fully. Rule 401 provides for extension of emergent leave, subject to a maximum of 45 days. Rule 404 provides for an appellate remedy, if ordinary or emergent leave sought for is refused. Rule 415 speaks of the entitlement and modalities for providing escort visit.

9. Having referred to the various provisions of the Prisons Act and Rules, we are of the view that, Rule 397 does not envisage an absolute entitlement for leave to the convict. True that, it speaks of the eligibility of 60 days leave in a calendar year. However, R.397 has to be read, not in isolation, but in conjunction with and subservient to S.78 of the Prisons Act, which stipulates that leave may be granted to well behaved, eligible, convicted prisoners. A conjoint reading of both the provisions would only indicate that what has been stipulated in Rule 397 is only the eligibility criteria for grant of leave to a convicted prisoner; and not an absolute entitlement, in itself, for such leave. In other words, even in a case where a convicted prisoner satisfies the eligibility conditions, the authority is well-nigh entitled to refuse leave, of course for weighty and lofty reasons. For example, if there exists a real threat of a potential breach of peace

and tranquility in the locality, or to the safety and security of the prisoner himself as envisaged in sub-rule (h) to Rule 397, the authority can refuse leave. The same is the case for a convicted prisoner with a high proclivity or propensity to commit crimes. An interpretation otherwise, construing Rule 397 as an absolute entitlement for leave, would amount to the Rules assuming paramountcy over the Act, which is incomprehensible. Here, we repeat to take note that the Prison Rules, including Rule 397, has been made only in accord with the powers granted under S.99 of the Act to make rules, especially under sub-sections (xxxiii) and (xxxiv) to S.99(2) of the Act. Therefore, simultaneous with holding that there is no absolute right vested with a convicted prisoner to avail leave, we also make it clear that an application for leave of a prisoner, who is eligible in terms of Rule 397, shall not be dismissed in an arbitrary or capricious manner. Such dismissal, if any, should necessarily be for cogent reasons.

10. With the above initial analysis based on the Act and Rules, we may now refer to the following precedents, which depicts the characteristic features of parole and leave/furlough, besides authoritatively pronouncing whether parole/leave is an absolute/vested right of the prisoner:

In Poonam Lata v. M.L.Wadhawan [1987(3) SCC 347] the Honourable Supreme Court held thus:

> ***'8. ---------- Parole has become an integral part of the English and American systems of criminal justice intertwined with the evolution of changing attitudes of the society towards crime and criminals. As a consequence of the introduction of parole into the penal system, all fixed-term sentences of imprisonment of above 18 months are subject to release on licence, that is, parole after a third of the period of sentence has been served. In those countries, parole is taken as an act of grace and not as a matter of right and the convict prisoner***

may be released on condition that he abides by the promise. It is a provisional release from confinement but is deemed to be a part of the imprisonment. Release on parole is a wing of the reformative process and is expected to provide opportunity to the prisoner to transform himself into a useful citizen. Parole is thus a grant of partial liberty or lessening of restrictions to a convict prisoner, but release on parole does not change the status of the prisoner. Rules are framed providing supervision by parole authorities of the convicts released on parole and in case of failure to perform the promise, the convict released on parole is directed to surrender to custody. (See The Oxford Companion to Law, edited by Walker, 1980 edn., p.931; Black's Law Dictionary, 5th edn., p.1006; Jowitt's Dictionary of English Law, 2nd edn., Vol. 2, p.1320; Kenny's Outlines of Criminal Law, 17th edn., pp.574-76; The English Sentencing System by Sir Rupert Cross at pp.31-34, 87 et. seq.; American Jurisprudence, 2nd edn., Vol. 59, pp.53-61; Corpus Juris Secundum, Vol. 67; Probation

and Parole, Legal and Social Dimensions by Louis P. Carney.) It follows from these authorities that parole is the release of a very long term prisoner from a penal or correctional institution after he has served a part of his sentence under the continuous custody of the State and under conditions that permit his incarceration in the event of misbehaviour.'

11. Parole is defined in Black's Law Dictionary – Sixth Edition – thus:

"Release from Jail, prison or other confinement after actually serving part of sentence. conditional release from imprisonment which entitles parolee to serve remainder of his term outside confines of an institution, if he satisfactorily complies with all terms and conditions provided in parole order."

12. In Dadu @ Tulsidas v. State of Maharashtra [2000(8) SCC 437], the constitutional validity of S.32-A of the Narcotic Drugs and Psychotropic

Substances Act 1985 was under challenge. After referring to the essential characteristics of parole in paragraph nos.6 and 7, as also to Poonam Lata supra, the Honourable Supreme Court concluded thus in paragraph no.11.

> ***'It is thus clear that parole did not amount to the suspension, remission or commutation of sentences which could be withheld under the garb of Section 32-A of the Act. Notwithstanding the provisions of the offending Section, a convict is entitled to parole, subject, however, to the conditions governing the grant of it under the statute, if any, or the Jail Manual or the Government Instructions. The Writ Petition No.169 of 1999 apparently appears to be misconceived and filed in a hurry without approaching the appropriate authority for the grant of relief in accordance with jail manual applicable in the matter.'***

13. A detailed discussion as to the distinction between a parole and furlough, as to the necessity of

having liberal rules with respect to parole, but also simultaneously referring to the discretion component vested with the statutory authority, underscoring the situations where a request for parole/furlough should be refused, is contained in Asfaq v. State of Rajasthan and Others [2017(15) SCC 55]. The relevant findings are as follows:

> ***"16. This Court, through various pronouncements, has laid down the differences between parole and furlough, few of which are as under:***
>
> ***(i) Both parole and furlough are conditional release.***
>
> ***(ii) xxx***
>
> ***(iii) xxx***
>
> ***(iv) xxx***
>
> ***(v) For parole, specific reason is required, whereas furlough is meant for breaking the monotony of imprisonment.***
>
> ***(vi) The term of imprisonment is not included in the computation of the term of***

parole, whereas it is vice versa in furlough.

(vii) xxx

(viii) <u>Since furlough is not granted for any particular reason, it can be denied in the interest of the society.</u>

{See State of Maharashtra v. Suresh Pandurang Darvakar and State of Haryana v. Mohinder Singh}.

17. From the aforesaid discussion, it follows that amongst the various grounds on which parole can be granted, the most important ground, which stands out, is that a prisoner should be allowed to maintain family and social ties. For this purpose, he has to come out for some time so that he is able to maintain his family and social contact. …..... When we recognise reformation as one of the objectives, it provides justification for letting of even the life convicts for short periods, on parole, in order to afford opportunities to such convicts not only to solve their personal and family problems but also to maintain their links with the

society. Another objective which this theory underlines is that even such convicts have right to breathe fresh air, albeit for (sic short) periods. These gestures on the part of the State, along with other measures, go a long way for redemption and rehabilitation of such prisoners. They are ultimately aimed for the good of the society and, therefore, are in public interest.

18. The provisions of parole and furlough, thus, provide for a humanistic approach towards those lodged in jails.

….....

19. Having noted the aforesaid public purpose in granting parole or furlough, ingrained in the reformation theory of sentencing, other competing public interest has also to be kept in mind while deciding as to whether in a particular case parole or furlough is to be granted or not. This public interest also demands that those who are habitual offenders and may have the tendency to commit the crime again after their release on parole or have the tendency to become a threat to the law and

order of the society, should not be released on parole. ..... Therefore, while deciding as to whether a particular prisoner deserves to be released on parole or not, the aforesaid aspects have also to be kept in mind. To put it tersely, the authorities are supposed to address the question as to whether the convict is such a person who has the tendency to commit such a crime or he is showing tendency to reform himself to become a good citizen.

20. Thus, not all people in prison are appropriate for grant of furlough or parole. Obviously, society must isolate those who show patterns of preying upon victims. ….....

21. …..... It is for this reason that in introducing such reforms, the authorities cannot be oblivious of the obligation to the society to render it immune from those who are prone to criminal tendencies and have proved their susceptibility to indulge in criminal activities by being found guilty (by a Court) of having perpetrated a criminal act. One of the discernible

purposes of imposing the penalty of imprisonment is to render the society immune from the criminal for a specified period. It is, therefore, understandable that while meting out humane treatment to the convicts, care has to be taken to ensure that kindness to the convicts does not result in cruelty to the society. Naturally enough, the authorities would be anxious to ensure that the convict who is released on furlough does not seize the opportunity to commit another crime when he is at large for the time-being under the furlough leave granted to him by way of a measure of penal reform.'

[underlined by us for emphasis]

14. Recently in Home Secretary, Prison and others v. H.Nilofer Nisha [2020 (14) SCC 161] the Hon'ble Supreme Court, while examining the scope of issuance of a writ of habeas corpus in the matter of grant of remission or parole, held categorically that remission/parole is not a vested right. The relevant findings are as under:

> ***"26. We would also like to point out that the grant of remission or parole is not a right vested with the prisoner. It is a privilege available to the prisoner on fulfilling certain conditions. This is a discretionary power which has to be exercised by the authorities conferred with such powers under the relevant rules/regulations. The court cannot exercise these powers though once the powers are exercised, the Court may hold that the exercise of powers is not in accordance with rules."***

15. The Hon'ble Supreme Court also deprecated the practice of High Courts issuing orders directing release of the petitioner without resorting to the statutory scheme of procedures contemplated in the relevant Act and Rules for grant of parole/leave. We extract the relevant paragraphs in this regard here below:

> ***"32. <u>We are clearly of the view that the Court itself cannot examine the eligibility of the detenu to be granted</u>***

release under the Scheme at this stage. *There are various factors, enumerated above, which have to be considered by the committees. The report of the Probation Officer is only one of them. After that, the District Committee has to make a recommendation and finally it is the State Level Committee which takes a final call on the matter.* ***We are clearly of the view that the High Court erred in directing the release of the detenu forthwith without first directing the competent authority to take a decision in the matter. Merely because a practice has been followed in the Madras High Court of issuing such type of writs for a long time cannot clothe these orders with legality if the orders are without jurisdiction.*** *Past practice or the fact that the State has not challenged some of the orders is not sufficient to hold that these orders are legal.*

33. In case, as pointed out above, a petition is filed without any decision(s) of the State Level Committee in terms of Para 5(I) of the G.O. in question, ***the***

Court should direct the committee/authority concerned to take decision within a reasonable period. Obviously, too much time cannot be given because the liberty of a person is at stake. ***This order would be more in the nature of a writ of mandamus directing the State to perform its duty under the Scheme.*** ***The authorities must pass a reasoned order in case they refuse to grant benefit under the Scheme. Once a reasoned order is passed then obviously the detenu has a right to challenge that order but that again would not be a writ of habeas corpus but would be more in the nature of a writ of certiorari. In such cases, where reasoned orders have been passed the High Court may call for the record of the case, examine the same and after examining the same in the context of the parameters of the Scheme decide whether the order rejecting the prayer for premature release is justified or not. If it comes to the conclusion that the order is not a proper order then obviously it can direct the release of***

> ***the prisoner by giving him the benefit of the Scheme.*** *There may be cases where the State may not pass any order on the representation of the petitioner for releasing him in terms of GO (Ms) No. 64 dated 1-2-2018 despite the orders of the Court.* ***If no orders have been passed and there is no explanation for the delay then the Court would be justified in again calling for the record of the case and examining the same in terms of the policy and then passing the orders.***"
>
> **(underlined by us for emphasis)**

16. The precise question as to whether furlough leave is to be granted as a matter of right again fell for consideration before the Hon'ble Supreme Court in State of Gujarat and another v. Narayan alias Narayan Sai [2021 SCC Online SC 949]. One specific contention urged, as could be seen from paragraph No.6 of the judgment, was that release on furlough leave is to be granted as a matter of right, which contention was accepted by the High Court concerned, holding that

under Prisons (Bombay Furlough and Parole) Rules, the prisoner is entitled for furlough leave once every year. This was assailed inter alia on the ground that furlough can be denied if it is not in the interest of the society as held in Asfaq (supra). So also, furlough can be refused where there are concerns of public peace and tranquility as held in State of Maharashtra v. Suresh Pandurang Darvakar [2006 (4) SCC 776]. Rule 17 of Prisons (Bombay Furlough and Parole) Rules was also pressed into service to contend that the Rules do not confer a legal right on the prisoner to claim release on furlough. On an analysis of the rival contentions, the Hon'ble Supreme Court, after referring to the relevant Rules, upheld the challenge holding that release on furlough is only a discretionary remedy and not an absolute right. Rule 3 of the Bombay Furlough and Parole Rules provides for grant of furlough to prisoners depending upon the extent of punishment/imprisonment. Separate periods of furlough leave are stipulated in Rule 3.

Rule 4 stipulates the categories of prisoners to whom furlough leave shall not be granted. The Hon'ble Supreme Court interpreted the Rules to find that Rule 3 only provides the eligibility criteria for grant of furlough to prisoners, whereas Rule 4 imposes limitations. The absence of an absolute right in the matter of grant of furlough was found, interpreting the expression "may be released". Rule 17 was also relied upon to hold that grant of release on furlough is a discretionary remedy (see paragraph No.17 of the judgment in Narayan supra). The dictum of the Hon'ble Supreme Court in Suresh Pandurang supra holding that release on furlough cannot be an absolute right and that same can be denied in the interest of the society was also relied upon. Finally, the Hon'ble Supreme Court formulated the principles governing furlough and parole thus in paragraph No.24 of the judgment in Narayan supra:-

> ***"24.The principles may be formulated in broad, general terms bearing in mind the***

caveat that the governing rules for parole and furlough have to be applied in each context. The principles are thus:

(i) Furlough and parole envisage a short-term temporary release from custody;

(ii) While parole is granted for the prisoner to meet a specific exigency, furlough may be granted after a stipulated number of years have been served without any reason;

(iii) The grant of furlough is to break the monotony of imprisonment and to enable the convict to maintain continuity with family life and integration with society;

(iv) Although furlough can be claimed without a reason, the prisoner does not have an absolute legal right to claim furlough;

(v) The grant of furlough must be balanced against the public interest and can be refused to certain categories of prisoners.”

[underlined by us for emphasis]

17. We notice that the Prisons Act or Rules neither employ the term 'parole' nor 'furlough'. However, the underlying principles emerging from the above referred binding precedents would only reiterate our finding based on the interpretation the Prisons Act and Rules, that grant of parole/leave cannot be an absolute/vested right in the hands of the prisoner. Instead, it is circumscribed by the stipulations in Section 73 in the matter of parole and Section 78, read with Rule 397, in the matter of leave. We repeat to note that both under Sections 73 and 78, the language employed is "may". Rule 397(1) of the Prisons Rules is comparable to Rule(4) of Prisons (Bombay Furlough and Parole) Rules dealt with in Narayan (supra).

18. Coming to Noushad (supra), on which heavy reliance was placed by the learned counsel for the petitioner, we notice that the learned Single Judge has not held that grant of leave in terms of Rule

397, read with Section 78 of the Act, is an absolute/vested right. The learned Single Judge only held in paragraph No.17 that, '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'. Firstly, we notice that even as per the above finding, the question of exercise of discretion in favour of the prisoner arise only if the conditions for leave as prescribed in the statute are satisfied. This direction takes within its sweep the specific conditions contemplated in Section 73 in the matter of release on parole and the purpose behind Section 78, read with Rule 397, in the matter of release on leave. We reiterate that what has been laid down in sub-rules (a),(b),(c), etc. of Rule 397, only constitutes the eligibility of the prisoner to seek leave, the grant of which will be discretionary, taking into account the various parameters, including those stipulated in sub-rule (l) to Rule 397. This,

of course, includes public interest, as also, the grounds of public peace and tranquility, interest of the society, etc. As held by a Constitution Bench of the Hon'ble Supreme Court in Sunil Faulchand Shah v. Union of India [(2000) 3 SCC 409], when individual liberty comes into conflict with the interest of the security of the State or public order, then the liberty of the individual must give way to the larger interest of the nation. We chose to clarify Noushad (supra) only in the context of the argument advanced by the learned counsel, purportedly based on interpretation of Noushad (supra), that the period of leave as envisaged in Rule 397 is an absolute right which vests with the prisoner, which contention, we prefer to refuse.

19. For the sake of completion, we need to refer to two other Bench decisions of the Patna and Madras High Courts respectively. The precise issue, which we are dealing with in this judgment, fell for

consideration before a Division Bench of the Patna High Court in *Chandra Sekhar Bharti v. State of Bihar* [2014 CriLJ 2953]. As could be seen from paragraph no.1 of the judgment, the Division Bench *inter alia* considered two questions. The first is whether a convict can seek temporary suspension of sentence under section 389, Cr.P.C., when his main application seeking suspension of sentence under Section 389 is pending consideration. The second question, is once the main application under Section 389, Cr.P.C is dismissed, whether a convict can seek temporary suspension under Section 389, Cr.P.C, so as to enable him to perform some religious rites or ceremonies or to receive proper medical treatment etc.

20. After examining the genesis and scope of Section 389, Cr.P.C in the light of certain authoritative pronouncements, the Division Bench in paragraph 58 initially observed that interim, temporary or provisional suspension of sentence is not explicit in

Section 389(1), Cr.P.C. However, the Division Bench found that for a just and proper appreciation of an application for suspension of sentence under Section 389, Cr.P.C, the entire records may have to be called for, besides affording opportunity of being heard to the Public Prosecutor as mandated by the first proviso to Section 389(1). Thus, according to the Division Bench, if a situation warrants an immediate order for suspension of sentence, like the death of the father of the convict, marriage ceremony of his daughter etc., the High Court can draw power from Section 389, Cr.P.C to pass interim orders, suspending the sentence and enabling the release of convict on bail. In arriving at that conclusion, the Division Bench relied upon the doctrine of implied power to do a certain thing, in the absence of which, the thing, the performance of which power has been granted, could not be done properly and meaningfully. In other words, an express grant of statutory power, carries with it, by necessary implication, the

authority to use all reasonable means to make less grant effective. Applying the doctrine, the Division Bench concluded in paragraph 80 of the judgment that in order to avoid hardship to the appellant/convict, the court can grant suspension of sentence temporarily and allow the convict to be released on bail, until a final decision is taken in the main application under Section 389 of Cr.P.C.

21. We find unable to persuade ourselves to subscribe to the said view adopted by the Division Bench of the Patna High Court, for the solitary reason that the said judgment does not consider the availability, if any, of a statutory remedy/alternative provision to deal with the emergent situation identified by the Division Bench. As we have the Prisons Act and Rules applicable to the State of Kerala, it is not clear whether any such enabling statute was in vogue in the State of Patna at the relevant time. If a mechanism in the form of leave/parole to cater to such emergent

situation like the death of the father or the marriage of the daughter of the convict was in fact available as a statutory remedy, recourse to the doctrine of implied power cannot held to be proper.

22. The next decision we need to deal with is by a Division Bench of Madras High Court in *Saleema v. State & Ors.* [2021 CriLJ 1312]. There, the issue was the maintainability of a writ of *habeas corpus* for grant of ordinary leave to convict prisoners. In paragraph no.14, the Division Bench concluded that the High Court cannot step into the shoes of the executive and exercise jurisdiction offered on the authorities to grant emergent or ordinary leave. The power of judicial review under Article 226 is confined to examination of the decision making process and therefore, the court cannot assume the role of the decision maker. In paragraph no.16, the Divsion Bench relied upon the judgment of the Honourable Supreme Court in *Home Secretary (Prisons)*

v. H.Nilofer Nisha (supra) to support the above proposition. However, the learned counsel for the writ petitioner herein relies upon an incidental finding of the Division Bench in paragraph no.18, to contend that the power of interim suspension of sentence is traceable to Section 389, Cr.P.C. The relevant findings in paragraph 18 of Saleema (supra) is extracted here below:

> ***"18. An incidental question is whether an independent power is available to this Court under Art.226 of the Constitution of India to suspend the sentence of a convict prisoner by granting emergency or ordinary leave. As has been pointed out supra, the grant of emergency or ordinary leave amounts to a suspension of sentence in exercise of the executive power of the State. When the courts are in seizin of a case, the judicial power to suspend a sentence of imprisonment, etc. pending an appeal or revision can be traced to S.389, Cr.PC. ……."***

23. We notice that the above conclusion is arrived at without any serious deliberation of the powers available under Section 389, Cr.P.C, obviously for

the reason that the said question had not arisen for consideration in the facts before the Division Bench. Power under Section 389 was coined only to refuse the jurisdiction under Article 226 of the Constitution in the matter of granting emergent/ordinary leave. We are neither in a position to attorn the conclusion that the power under Article 226 is not available in the given subject matter, nor could we accede to the existence of such a power in Section 389, Cr.P.C. In fact, the refusal of power of judicial review under Article 226, after exercise of power by the statutory authorities at the first instance, is contrary to the findings of the Division Bench in the earlier paragraphs, relying upon of *Nilofer Nisha* (supra). Absence of due deliberation on the powers of Section 389, Cr.P.C in arriving at a conclusion that the power to grant interim suspension of sentence for the purpose of emergent leave etc., is traceable to Section 389 only impels us to construe the said observation as one, said by way.

24. In the light of the above discussion, we answer the second question framed in this writ petition in the negative.

25. Coming to the first question formulated, we need to notice the facts resulting in refusal of leave, though impliedly. On facts, we are, however, in agreement with the learned counsel for the petitioner that the adverse police report does not appeal to reason and logic. A perusal of the writ petition would indicate that the petitioner's husband was released on interim bail on as many as nine occasions as evidenced from Exts.P1 to P9. No untoward incident happened in any such occasion, where the petitioner's husband was so released. Nor was there any law and order situation or threat to public tranquility or peace on account of the presence of the petitioner in the locality, pursuant to his release. We therefore find that the adverse police report - suggesting threat to public peace and tranquility on release of

the petitioner's husband - is unsustainable and not liable to be acted upon. Pertinent in this context to notice that the Probation Report on all occasions, including the present one, was in favour of the prisoner. We, however, notice that no specific order has been passed by the 2nd respondent in the application preferred by the petitioner's husband seeking leave. Be that as it may.

26. The issue does not end there and the same is required to be viewed from a different angle. We notice that the petitioner's husband was sentenced to life imprisonment only on 03.06.2020; whereas he stood enlarged on leave in as many as nine occasions during a short span of 3 years, as evidenced from Exts.P1 to P9 orders. Nevertheless the petitioner's contention in the writ petition is as follows:-

> ***"(4)…….The convict had never been released on parole/leave ever since the date of his conviction for the***

> ***reason that adverse police reports were given by respondent No.4, despite being the fact that convict has no other criminal antecedents.....”***

27. Therefore, the specific claim of the petitioner is that her husband has not been granted leave/parole, although he stood enlarged on interim bail either under Section 389 or Section 482 of the Cr.P.C. It is in this context that we framed the first point to be answered in this Writ Petition as to whether a convict prisoner can seek interim suspension of sentence for short-term requirements like disease, marriage etc under Section 389 of the Code of Criminal Procedure.

28. Section 389 of the Cr.P.C. comes under Chapter XXIX, which deals with appeals. While Section 374 deals with appeals from conviction, Section 377 provides for appeals by the State Government against the sentence. Section 378 of the Cr.P.C. provides for

appeal in case of acquittal. Section 386 contemplates the powers of the appellate court. Now, we come to Section 389, Cr.P.C., the relevant portion of which is extracted below:-

> ***"389. Suspension of sentence pending the appeal; release of appellant on bail.-(1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond."***

29. Section 389(2) confers on the High Court the same power as afforded to an Appellate Court. Having bestowed our anxious consideration to the language, purpose and purport of Section 389, we are of the firm opinion that what Section 389 contemplates is the suspension of sentence on the merits of the matter – of course not final, but prima facie - pending an appeal; and not for enabling release for

short-term requirements of the nature afore-refered. While suspending a sentence under Section 389, the judgment of conviction is not suspended ordinarily, except in exceptional circumstances; it is only the operation/execution of the sentence that stand suspended. [see Shyam Narain Pandey v. State of U.P. - (2014) 8 SCC 909]. We fail to see anything in Section 389, which indicates an interim or temporary suspension of sentence, followed by release of the convict on interim bail for grounds as those cited by the petitioner herein. The first proviso to Section 389 which mandates an opportunity to the Public Prosecutor to show cause against the release in case of death or imprisonment for life is a clear indication that Section 389 contemplates suspension of sentence on merits, pending appeal; and not an interim suspension for short-term requirements. The second concomitant of Section 389, which directs release of the convicted person on bail or on his bond, if he is in confinement, has to be understood

in a different parlance from that of the ordinary provisions for bail dealt with in Cr.P.C. Chapter XXXIII of the Code, which consists of Sections 436 to 450, pertains to grant of bail to "accused persons". Section 389 is the only provision we could see in the Code, which refers to grant of bail to a convicted person. [see in this regard Lala Jairam Das v. Emperor – (AIR 1945 PC 94)]. We also notice the difference in the legislative intention between grant of leave/parole and suspension of sentence. Leave/Parole is granted either to deal with a specific contingency pertaining to the prisoner or to facilitate rehabilitation with the society. Whereas, suspension of sentence under Section 389 has the object of keeping the order of sentence in abeyance after considering the prima facie sustainability of the conviction impugned, which intention is axiomatic from the mandate of recording reasons in writing and affording an opportunity to the Public Prosecutor to show cause against the release, in case of harsher

punishments.

30. We also find a cardinal distinction between the nature of release of a convict pursuant to suspension of sentence under Section 389, Cr.P.C on the one hand, and on the event of grant of relief/parole under the Prisons Act and Rules on the other hand. In the case of the former, per force of Section 389(4), the period during which the convict was released shall be excluded in computing the term, for which he is sentenced. However, in the case of latter, per force of Rule 408 of the Prisons Rules, the period of leave/parole will be treated as part of the term, for which the convict is sentenced. This distinction is also a clear pointer to the proposition that release of the convict for short-term requirements, be it under emergent or ordinary leave, is to be dealt with in accord with the Prisons Act and Rules and not under Section 389, Cr.P.C.

31. We therefore hold that the practice of interim suspension of sentence and release of the prisoner on interim bail under Section 389 for short-term requirements on the grounds of the nature relied on by the petitioner herein, is not sanctioned by law. Question No.1 formulated in this Writ Petition is answered thus.

32. In the light of the above deliberation, and especially in view of the dictum laid down in Nilofer Nisha (supra), we are of the firm view that for release of a convicted prisoner for short-term requirements, recourse should necessarily be made to the remedy of leave, emergent or ordinary as the case may be, under the Prisons Act and Rules. The convict will be at liberty to approach this Court under Article 226 of the Constitution either upon an order being passed in the request of the convict for leave, or in the event of inaction to pass such order within a reasonable time by the statutory authority. We may

also reserve the right of the convict to approach this Court under Article 226 in rare and exceptional circumstances, where recourse to the statutory remedy is not feasible; or in case, the fact situation is one for which the Prisons Act and Rules does not offer a remedy.

33. In this regard, we are not expressing any opinion on the question whether the prisoner can take recourse to Section 482, Cr.P.C. and we leave the said issue to be considered appropriately, when such question arises directly in a given factual situation.

34. In the given facts, we observe that the release of the petitioner's husband on as many as nine occasions is not treated as leave under the Prisons Act. Such release, which exists seemingly as a different entity, is not traceable to a provision enabling release of a convicted prisoner, especially

when we have already held that Section 389 does not contemplate an interim suspension of sentence and release of the prisoner. We also notice that in many a situation where the petitioner's husband was released, the reason stated is something which squarely attracts the provisions of leave under Section 73 of the Act. The indiscreet exercise of a supposed power under Section 389 has led to a situation, where the petitioner could argue that her husband has not been granted leave/parole even on a single occasion, albeit the fact that the prisoner was released from the prison on several occasions. It requires to be observed in this context that the very purpose of leave under Section 78 of the Prisons Act, that is to say, better rehabilitation and re-socialisation of the prisoner, is amply served by such successive release of the prisoner. Enabling release under Section 389 for short-term requirements is neither statutory, nor conducive, besides being subversive and in disregard of the special provisions

of the Prisons Act and Rules.

35. We also notice the contention of the learned Public Prosecutor that repeated release of the petitioner who is a life convict, either on leave/parole or interim bail, will send a wrong message to the community at large, which expects the incarceration of a convict and therefore, that is a valid ground for refusal of the leave/parole sought for.

36. Taking into account the efflux of time from the last application for leave, we are not directing the the 2nd respondent to consider and pass orders on the same. Instead, we give liberty to the petitioner or the convict to prefer fresh application for leave as and when necessity arise. The same shall be decided by the 2nd respondent with all reasonable dispatch in the light of the legal principles discussed above. Needless to say that the Authority concerned will

take into account the provisions of Section 78, read with Rule 397 as interpreted in this judgment, regard being had to the purpose of leave as envisaged in Section 78. The submissions of the Prosecutor noted supra may also be duly examined by the parole/leave granting authority, when it takes a decision in the matter.

In the light of the above discussion, this Writ Petition fails and the same is dismissed, but with the above directions.

Sd/-
ALEXANDER THOMAS, JUDGE

Sd/-
C.JAYACHANDRAN, JUDGE

skj/ww

APPENDIX OF WP(CRL.) 314/2023

PETITIONER'S EXHIBITS

Exhibit P1	TRUE COPY OF THE ORDER DATED 09.04.2021 IN CRL MA NO.1/2021 IN CRL APPEAL NO.596/2020 ON THE FILE OF THIS COURT, GRANTING INTERIM BAIL TO THE CONVICT FOR A PERIOD OF ONE MONTH
Exhibit P2	TRUE COPY OF THE ORDER DATED 07.05.2021 IN CRL MA NO.3/2021 IN CRL APPEAL NO.596/2020 ON THE FILE OF THIS COURT, EXTENDING INTERIM BAIL GRANTED TO THE CONVICT BY EXHIBIT P1 ORDER FOR A PERIOD OF ONE MONTH
Exhibit P3	TRUE COPY OF THE ORDER DATED 12.08.2021 IN CRL MA NO.5/2021 IN CRL APPEAL NO.596/2020 ON THE FILE OF THIS COURT, GRANTING INTERIM BAIL TO THE CONVICT FOR A PERIOD OF ONE MONTH
Exhibit P4	TRUE COPY OF THE ORDER DATED 10.09.2021 IN CRL MA NO.6/2021 IN CRL APPEAL NO.596/2020 ON THE FILE OF THIS COURT, EXTENDING INTERIM BAIL GRANTED TO THE CONVICT BY EXHIBIT P3 ORDER FOR A PERIOD OF TWO WEEKS
Exhibit P5	TRUE COPY OF THE ORDER DATED 07.12.2021 IN CRL MA NO.8/2021 IN CRL APPEAL NO.596/2020 ON THE FILE OF THIS COURT, GRANTING INTERIM BAIL TO THE CONVICT FOR A PERIOD OF ONE WEEK
Exhibit P6	TRUE COPY OF THE ORDER DATED 13.12.2021 IN CRL MA NO.10/2021 IN CRL APPEAL NO.596/2020 ON THE FILE OF THIS COURT, EXTENDING INTERIM BAIL GRANTED TO THE CONVICT BY EXHIBIT P5 ORDER FOR A PERIOD OF ONE MONTH
Exhibit P7	TRUE COPY OF THE ORDER DATED 13.01.2022 IN CRL MA NO.1/2022 IN CRL APPEAL NO.596/2020 ON THE FILE OF THIS COURT, EXTENDING INTERIM BAIL GRANTED TO THE CONVICT BY EXHIBIT P6 ORDER FOR A FURTHER PERIOD OF TWO WEEKS

Exhibit P8	TRUE COPY OF THE ORDER DATED 23.11.2022 IN CRL MA NO.3/2022 IN CRL APPEAL NO.596/2020 ON THE FILE OF THIS COURT, GRANTING INTERIM BAIL TO THE CONVICT FOR A PERIOD OF TWO WEEKS
Exhibit P9	TRUE COPY OF THE ORDER DATED 05.12.2022 IN CRL MA NO.4/2022 IN CRL APPEAL NO.596/2020 ON THE FILE OF THIS COURT, EXTENDING INTERIM BAIL GRANTED TO THE CONVICT BY EXHIBIT P6 ORDER FOR A PERIOD OF THREE WEEKS
Exhibit P10	TRUE COPY OF THE JUDGEMENT DATED 03.03.2023 IN (WP (CRL) NO.1238/2022 PASSED BY THIS COURT