

PEOPLE'S UNION FOR CIVIL LIBERTIES- TAMIL NADU AND PUDUCHERRY

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29th August, 2011

To

Ms. J. Jayalalithaa,
Hon'ble Chief Minister, Government of Tamil Nadu,
Fort St. George, Chennai 600009.

Sub.: Commutation power under Art.161 of the Constitution cannot be curtailed or limited by executive instruction of Government of India dated 5.03.1991 issued under Art.257(1).

Ref.: 1. CM's Statement in the TN State Legislature, today, 29.08.2011
2. PUCL commutation petition dated 19.08.2011 sent to CM and TN Governor seeking commutation of Perarivalan, Santhan & Murugan.

Respected Madam,

1. We learn that in the Legislative Assembly today you have stated that the State Government does not have the powers to commute or stop of the execution of Perarivalan, Santhan and Murugan if the President of India had rejected their earlier commutation petitions. In this context, reference has been made to a circular dated 5.03.1991 of the Home Ministry, GoI to the effect that once the President of India exercised power u/ Art.72, "it will not be open for the government of the state to seek to exercise similar powers under Art. 161 in respect of the same case".

2. We would like to respectfully submit that this interpretation may not be legally tenable and constitutionally valid for the following reasons.

Sovereign power u/Art.161 cannot be limited or fettered

3. We would like to stress that the power of the President to commute the death sentence under Art.72 or of the Governor under Art.161 are in the nature of constitutional powers which the Supreme Court of India has described as '**residuary sovereign power**'.

4. Generally exercise of power can be broadly traced to 3 sources:

1. Constitution
2. Statute
3. Executive

Constitutional powers cannot be curtailed by statutes or the executive directions or instructions. Statutory powers cannot be curtailed by executive instructions. In the present case, the power to commute under Art.161 is a constitutional power which cannot be curtailed even by a statute much less executive instructions.

5. Similarly, the powers to commute the death sentence under sections 54 IPC and 433 Cr.P.C are statutory powers conferred on the executive. Hence the executive instructions under Art. 257 will not apply to exercise of the powers under statute also.

6. In effect, we would like to submit, the executive instruction dated 5.03.1991 of the Home Ministry, GoI under Art.257(1) of the Constitution cannot override or curtail or limit exercise of residuary sovereign power of the Governor under Art.161 or the State Government u/s 54 IPC and 433 Cr.P.C to consider fresh commutation petitions.

7. Therefore we would like to submit that there is no constitutional bar on the powers of the State Government to both consider a fresh commutation petition by or on behalf of Perarivalan, Santhan and Murugan, and, as an interim measure to grant interim executive stay until final decision of the mercy petitions.

8. In our commutation petition dated 19.08.2011, we have elaboratively explained how in law repeated commutation petitions are permissible. We have also explained between para.16-20 of the petition as to why ***power of Governor to grant pardon or commutation is absolute, unfettered and not affected by rejection of earlier commutation petition by President.***

9. To summarize briefly, the Supreme Court has recognised the constitutional powers under articles 72 and 161 as the “sovereign power to grant pardon has been recognised in our Constitution in Articles 72 & 161” (*State (Govt. of NCT Delhi) v Premraj* (2003(7) SCC 121)) and that this power is absolute and unfettered and cannot be curtailed by statute. (*State of Punjab v Joginder Singh*, 1990 (2) SCC 661).

Constitution does not provide for hierarchy of constitutional powers of clemency: Power of Governor not subordinate to power of President

10. Under the Indian Constitution, certain powers are vested in the Central Government leaving certain powers to the State Governments to exercise autonomy in the spheres assigned to them. Thus the States are not mere delegates or agents of the Central Government. Both the Central and the State Governments draw their authority from the same source, the Constitution of India.

11. Art. 257 is in the chapter titled, “Administrative Relations” and must be read with Article 256. Art. 256 concerns giving executive directions or instructions by the union government with regard to laws made by Parliament. Art.257 covers giving of executive directions by the Union government in a situation of exercise of ‘executive power of the Union’.

12. We reiterate that the commutation power of the Governor under Art.161 is distinct and separate from the power of the President under Art.72. The constitution doesn’t envisage any hierarchy of powers between the President and the Governor. Executive instruction under Art.257(1) can only be in respect of executive power of the Union and not to situations in which the executive power of the state also exists. Thus the 1991 executive directions of the Home Ministry, GoI can in no way fetter, curtail or limit the power of the Governor under Art.161, which is absolute, unfettered which cannot be limited even by a statute, much less by any executive instruction.

13. We request you to refer paragraphs 13-15, 16-20 , 21-26 of the PUCL commutation petition dated 19.08.2011 in this regard.

SC reference to the directive u/ Art. 257(1) of 5.3.1991 in ‘Daya Singh v Union of India’.

14. It will be useful to consider that the Executive direction u/ Art. 257(1) of 1991 came for consideration by the Supreme Court in the case of '*Dayasingh vs Union of India*', (1991 (3) SCC 61) which involved a similar fact situation like in the present case of Perarivalan and others. The convict therein filed a mercy petition before the Government of Haryana after his mercy petition was dismissed by the President of India. The petition before the Governor was pending for more than two years. In the counter affidavit, the delay was explained by the Union of India stating that the Government of Haryana referred the matter to the President of India seeking clarification on the question as to whether the Governor could exercise the constitutional powers in a case where an earlier mercy application had been rejected by the President. The matter was referred to the Ministry of Law for advise which then ultimately gave the directive under Art. 257(1) of the Constitution to all the Chief Secretaries of all State Governments. It is this directive which has been referred to by the CM on the floor of Assembly today (29.8.2011).

15. It is pertinent here to point out that the Supreme Court held that the explanation given by the government was not reasonable and thereafter the Court proceeded to commute the sentence of death. In this context, it is therefore reasonable to infer that the SC did not consider valid the directive u/ Art.257(1) that the Governor has no power to entertain fresh mercy petition after it was rejected by the President, because if the Governor was without power, the pendency of the petition before the authority who had no powers cannot said to be a delay at all.

16. We therefore request Hon'ble Chief Minister to reconsider the State government's stand that they have no power to commute or to stay or to grant executive stay of execution. As we have pointed above, constitutionally, the 'executive instructions' dated, 5.03.1991 of the Home Ministry, GoI cannot curtail or limit the 'sovereign power' under Art.161 to consider fresh commutation petition and to grant interim executive stay during the time that the commutation petitions is pending final decision by your State government.

17. We once again reiterate that the government of Tamil Nadu should not only grant commutation of death sentences of Perarivalan, Santhan and Murugan but should also become the first state in India to abolish death penalty altogether from our statute books.

18. We request you to give us an appointment to personally explain the constitutional and legal grounds as to how the Tamil Nadu government can exercise its sovereign power to grant commutation of Perarivalan, Santhan and Murugan.

19. In view of the fact that the date of execution has been fixed for and that there is very little time available, we request you to personally intervene in this matter and do the needful.

Sincerely yours



Dr. V. Suresh
National Secretary, PUCL

Explanation Letter to CM on the statement made in the TN Assembly on Clemency powers