

(2012) 12 BOM CK 0076

In the Bombay High Court

Case No : Criminal Writ Petition No's. 1081, 2773 of 2012

Aarif @ Baba Ayub Salar

APPELLANT

Vs

Shri N.C. Khadage and Others

RESPONDENT

Date of Decision : 21-12-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 107, 111, 2

Citation : (2013) ALLMR(Cri) 868

Hon'ble Judges : S.S. Shinde, J;A.S. Oka, J

Bench : Division Bench

Advocate : U.N. Tripathi, in W.P. No. 1081/2012 and Mr. Shrishail Sakhare, in W.P. No. 2773/2012, for the Appellant; K.V. Saste, Assistant Public Prosecutor for State, for the Respondent

Final Decision : Allowed

Judgement

1. The Criminal Writ petition no. 1081 of 2012 is received through jail. In Criminal Writ Petition no. 2773 of 2012, the learned counsel appearing for the same petitioner has stated that he is not pressing the petition and he wants to withdraw the petition. The petitioner in Criminal Writ Petition no. 1081 of 2012 was released on furlough under the Prisons (Bombay Furlough and Parole) Rules 1959 (hereinafter referred to as the said Rules). The period of furlough leave was from 27th July 2011 to 9th August 2011. While releasing the petitioner on furlough, personal bond in accordance with Rules 7 and 2 of the said Rules in the sum of Rs. 15,000/- was taken from the petitioner. Cash surety of Rs. 15,000/- was taken from the petitioner and accordingly a bond giving cash surety in format "C" was got executed from the petitioner. An order was passed on 20th July 2012 by the Deputy Inspector General of Prisons, Western Zone, Pune, holding that the petitioner has committed breach of Sub-Rule 2 of Rule 10 of the said Rules in as much as while the petitioner was on furlough, a non cognizable offence has been registered against him, at Vijapur Naka police station, Solapur. It appears that on the basis of the said non cognizable offence registered against

the petitioner, proceedings u/s 107 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the said Code) were initiated. It appears that on conclusion of the said proceedings, a bond for good behaviour in accordance with section 107 of the said Code was taken from the petitioner. By order dated 20th July 2012, cash security amount of Rs. 15,000/- has been ordered to be forfeited. The challenge in this petition is to the order dated 20th July 2012 by which the security amount of Rs. 15,000/- was forfeited. There is also a challenge to the validity of Rule 10 of the said Rules. There is also a challenge to the proceedings u/s 107 of the said Code.

2. The first submission of the learned counsel for the petitioner is that Rule 10 of the said Rules which provides for conditions of release incorporates certain conditions which virtually defeat the very object of granting furlough leave. He submitted that mere registration of an offence is no ground to come to the conclusion that there is a breach of conditions incorporated in Sub-Rule 2 of Rule 10 of the said Rules. He urged that on the basis of the non cognizable offence registered against the petitioner, security deposit of Rs. 15,000/- was forfeited and only on the basis of the registration of non cognizable offence, proceedings u/s 107 of the said Code were initiated. The bond was taken from the petitioner in the proceeding u/s 107 of the said Code. He submitted that thus the petitioner has been penalised for the same alleged act on two occasions. He submitted that even the proceedings initiated u/s 107 of the said Code is bad in law.

3. The learned A.P.P for State submitted that Sub-Rule 2 of Rule 10 has been enacted to ensure good behaviour on the part of the prisoner who has been released on furlough. He urged that the commission of any act or omission constituting an offence amounts to mis-behaviour. He submitted that the bond and security is taken for ensuring good behaviour and therefore, if the petitioner indulges in any act or omission which shows that his behaviour was not good, the authority is entitled to forfeit the cash security deposit of Rs. 15,000/-.

4. We have given careful consideration to the submissions. Under Sub-Rule (1) of Rule 3, a provision is made for releasing the prisoner on furlough for a period of two weeks at a time for every year or every two years of actual imprisonment undergone depending upon the extent of imprisonment imposed upon the prisoner. It is well settled that the object of release of the prisoner on furlough is of reformation of the prisoner.

5. Rule 10 of the said Rules reads thus:

The Sanctioning Authority shall grant furlough to a prisoner subject to his executing a personal bond or giving cash security in Form C appended to these rules and also subject to a surety executing a bond in Form A appended to these rules, if so required. The release may further be subject to all or any of the following conditions:-

(1).....

(2) that the said prisoner shall be of good behaviour and shall not commit any offence punishable by or under any law in force in India.

Sub-Rule 2 of Rule 10 provides that as a condition imposed for being released on furlough, the prisoner shall maintain good behaviour and shall not commit any offence punishable by or under any law in force in India. Bond to be executed by surety and personal bond to be executed by the prisoner is for ensuring that the prisoner observes and abides by conditions imposed in the order of release on furlough or parole. Even the cash security taken from the prisoner is with the same object.

6. The Rules do not specifically prescribe any procedure to be followed for forfeiture of the bond or for forfeiture of the cash security. The action of forfeiture adversely affects the rights of a prisoner. It is, therefore, obvious that before taking action of forfeiture of cash security, Competent Authority will have to follow the principles of natural justice.

7. Sub-Rule 2 of Rule 10 consists of two parts. The first part is the condition of maintaining good behaviour. The second part provides that while on furlough leave, the prisoner shall not commit any offence.

8. Whether the prisoner has committed a breach of condition of maintaining good behaviour or not depends on facts and circumstances of each case. As far as second part Sub-Rule 2 is concerned, the prisoner can be said to have committed breach thereof when he commits any offence punishable by or under any law in force in India. The said Rules do not define the word offence. Under the clause (n) of section 2 of the Code of Criminal Procedure, 1973, the offence means any act or omission made punishable by any law for the time being in force. An offence takes place when the person is guilty of committing any act which is made punishable in law for the time being in force. Only if it is proved that the person has committed any act or omission punishable by any law for the time being in force it can be said that he has committed an offence. Emphasis in second part of Sub-Rule 2 of Rule 10 is on a prisoner committing any offence. Thus, it follows that merely because an offence has been registered against the prisoner, it cannot be said that he has committed an offence punishable by or under any law in force in India. Mere registration of an offence against the prisoner during the period on which he is released on furlough will not amount to breach of second part of Sub-Rule 2 of Rule 10, in as much as the prisoner can be said to have committed any offence when commission of offence is proved in the Court of law. An act or omission on the basis of which offence is registered may or may not constitute a breach of first part Sub-Rule 2 of maintaining good behaviour depending upon the facts and circumstances of each case.

9. Now coming back to the impugned order dated 20th July 2012, we may note here that the order does not specifically record as to which part of Sub-Rule 2 of Rule 10 has been breached by the petitioner. It merely records that there is violation of Sub-Rule 2 of Rule 10. In the impugned order, the concerned

Authority ought to have set out as to whether there is violation of the first part regarding maintaining good behaviour or there is a violation of second part of Sub-Rule 2 of Rule 10. Impugned order is vague and therefore, deserves to be set aside. It is not clear whether any show cause notice was issued to the petitioner for the purposes of giving an opportunity to show cause as to why cash surety should not be forfeited. That is the second reason why order deserves to be set aside. Hence, it is not necessary to decide the wider issue of the challenge to the validity of the Rule.

10. As regards the proceedings u/s 107 of the said Code, we had called upon the learned A.P.P to produce the file of the proceedings. On perusal of the file we find that there is no specific order passed u/s 111 of the said Code by the learned Executive Magistrate which is a condition precedent for initiating action u/s 107 of the said Code. Without passing such order, a show cause notice was directly issued and served to the petitioner. As passing of an order u/s 111 is a condition precedent for initiation of action u/s 107 of the said Code, the proceeding will have to be quashed on the said ground. Hence, we pass the following order:-

- i) Writ Petition no. 2773 of 2012 is dismissed as withdrawn.
- ii) The order dated 20th July 2012 Exh. A to the petition passed by the Deputy Inspector General of Prisons, Western Zone, is hereby quashed and set aside.
- iii) It will be open for the concerned authority to take action of forfeiture of cash surety after following principles of natural justice by issuing show cause notice to the petitioner and by giving him an opportunity of being heard before passing the order.
- iv) The issue whether the petitioner has committed breach of Sub-Rule 2 of Rule 10 of the said Rules is kept open.
- v) The proceedings u/s 107 of the said Code initiated against the petitioner are hereby quashed and set aside. If any bonds have been got executed from the Petitioner, the same shall stand cancelled.
- vi) Writ petition no. 1081 of 2012 is allowed accordingly.