

(2019) 03 BOM CK 0054
In the Bombay High Court
Case No : Criminal Writ Petition No. 237 Of 2019

Atmaram

APPELLANT

Vs

State Of Maharashtra And Ors

RESPONDENT

Date of Decision : 20-03-2019

Acts Referred:

Indian Penal Code, 1860 — Section 376, 376(G)

Prisons Act, 1894 — Section 59

Prisons (Bombay Furlough And Parolr) Rules) 1959 — Rule 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17

Citation : (2019) 03 BOM CK 0054

Hon'ble Judges : T. V. Nalawade, J; Mangesh S. Patil, J

Bench : Division Bench

Advocate : Bharati B. Gunjal, M.M. Nerlikar

Final Decision : Dismissed

Judgement

T. V. Nalawade, J

1. The petition is filed for relief of quashing of communication of the Deputy Inspector General, Central Prison, Aurangabad dated 15th December, 2018 by which the application made for furlough leave is rejected and relief is claimed of further direction to release the Petitioner on furlough leave.

2. Both the sides are heard.

3. The Petitioner is kept in Central Jail for undergoing the sentence given to him in Sessions Case No.50 of 2012, which is decided by the learned Additional Sessions Judge, Ambajogai, for the offence punishable under Section 376(G) of the Indian Penal Code and few sections of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act and he is sentenced to suffer imprisonment for life.

4. The Petitioner filed application for furlough leave through the Superintendent of Central Prison, Aurangabad on 12th April, 2018. As per the procedure, the

matter was processed. It is the contention of the Petitioner that he had offered surety of his father-in-law and necessary documents in that regard were also supplied. According to him, persons of village Dhakanwadi, Tahsil Kaij had no objection for his release on furlough leave and he was to stay in this village. It is contended that inspite of this circumstance, his application was rejected on 23rd July, 2018 as he was kept in jail for conviction for the offence punishable under Section 376(G), rape.

5. It is the case of the Petitioner that to challenge the aforesaid order, he had filed Criminal Writ Petition No.1459 of 2018 and in that petition when the defence was taken by the Respondent, State that as per the Government Resolution dated 16th April, 2018, such convict is not entitled to get furlough leave, the Court had held that as the application was filed on 12th April, 2018, the subsequent Government Resolution could not have been used against him. It is contended that when the aforesaid order was quashed and set aside and the matter was remanded back, the application came to be rejected on same ground on 15th December, 2018 and so he is required to file present proceeding.

6. It was submitted for the State that the furlough leave is not available as a matter of right to any convict and the State Government is entitled to prepare scheme in this regard. It was submitted that in accordance with the power given to the State, Government Resolution dated 16th April, 2018 was issued and not only under this Government Resolution, but under previous Government Resolutions also like Government Resolution dated 26th August, 2016, the persons who are convicted for the offence of rape were not to be released on furlough leave and so it cannot be said that the Petitioner was entitled to get furlough leave.

7. The learned counsel for Petitioner took this Court through the order made by this Court in the past in favour of Petitioner in Criminal Writ Petition No.1459 of 2018 and she placed reliance on other orders and some reported cases as under:

a). Civil Appeal No.10464 of 2017, arising out of SLP (C) No.16803 of 2017, (Asfaq Vs. State of Rajasthan and others) decided by Supreme Court on 11th September, 2017.

b). Criminal Writ Petition No.2027 of 2017, (Altaf Ali Mushtaq Ali Sayed Vs. The State of Maharashtra and others) decided at Principal Seat of this Court on 21st June, 2017.

c). Criminal Writ Petition No.446 of 2018, (Mohammad Moin S/o Faridullah Qureshi Vs. The State of Maharashtra and others) decided on 4th July, 2018, by Aurangabad Bench of this Court.

d). Criminal Writ Petition No.709 of 2018, (Damodhar s/o. Pratapram Jangid Vs. The State of Maharashtra and others) decided on 31st July, 2018, by Aurangabad Bench of this Court.

8. In view of the rival contentions, the following points need to be decided in the

present matter:

(i). Whether due to circumstance that prior to the date of notification of 16th April, 2018, the application for furlough leave was made by the Petitioner, he is entitled to get the furlough leave.

(ii). Whether due to circumstance like in the past when on the same ground furlough leave was rejected, this Court had set aside that order and had directed the authority to reconsider the matter, the authority could have rejected the application by giving similar reasons.

9. On point (i), the learned APP submitted that in view of the procedure given for grant of furlough leave and as the furlough leave is like remission in sentence, it is not possible to say that the furlough leave gives a legal right to a prisoner. The learned APP submitted that to ascertain whether furlough leave can be granted to a particular prisoner, the authority needs to consider the relevant circumstances and for that the matter is required to be processed as provided in the Rules. He submitted that in view of these circumstances, it cannot be said that the date of notification is relevant if the application of the prisoner was pending on the date of notification. The learned APP submitted that in addition to that, there are more circumstances like even prior to the year 2018, there were notifications showing that the furlough leave could not have been granted to a prisoner, who was sentenced for the offence of rape.

10. A copy of notification dated 26th August, 2016 of Home Department is produced and it shows that the Rules were framed by name The Maharashtra Prisons (Bombay Furlough and Parole) (Amendment) Rules, 2016 by exercising powers conferred by clauses (5) and (28) of Section 59 of the Prisons Act, 1894. The Rules named as Rules of 1959 were amended and they came into force on the date of publication in official Gazette viz 26th August, 2016. These Rules show that amendment in Rule 4 of the aforesaid Rules was made. Rule 4 has classified the prisoners into two main classes. In one class, the prisoners who are not at all eligible to get furlough leave are mentioned and in the second class, the prisoners who are eligible to apply for furlough leave are mentioned. Even in the second class, in case of prisoners who are eligible to apply, they cannot get furlough leave as a matter of right. There is specific rule showing that these Rules are not giving legal right to the prisoners and further Rule 4 itself starts with condition as "whose annual conduct reports are good". In notification dated 26th August, 2016, there was sub-rule (13) showing that the prisoner sentenced for offence of rape or rape with murder was not eligible to get furlough leave.

11. The notification dated 16th April, 2018 superseded the aforesaid notification of 2016, but in sub-rule (12) of notification of the year 2018 also it is provided that the prisoner sentenced for the offence of rape or rape with murder is not eligible to get furlough leave. This rule further provides that a person sentenced for the offence of attempt of rape with murder is also not eligible to get furlough leave. This rule shows that only after suffering sentence of rape, if the prisoner is

behind bars for other offence like murder, his application can be considered for furlough leave. Thus, in the present matter on the date of application, the Petitioner was not eligible to get furlough leave as he was suffering the sentence for the offence of rape.

12. The scheme prepared by the Prisoners Rule of 1959 and particularly Rules 5 to 16 show that there is no vested right to the prisoner to get furlough leave. A person, who is held eligible under the Rules can be considered under Rule 4, but for that the time frame is given for processing the matter in Rule 8. Due to such scheme, it can be said that if during the pendency of application of the prisoner, there is amendment and if the offence for which the prisoner is sentenced is added as exception like present one, the amended provision can be used against him. Rule 17 of these Rules runs as under:

"17. No legal right to furlough:- Nothing in these rules shall be construed as conferring a legal right on a prisoner to claim release on furlough."

Thus, it is clear that the prisoner has no legal right to get furlough leave and even if he can be considered under the Rules, the procedure required needs to be followed for sanction of furlough leave.

13. A copy of order made by this Court in Criminal Writ Petition No.1459 of 2018 is produced. The order shows that notification of the year 2016 and also previous notifications were not shown to the said Bench. In view of that circumstance, the Bench held that as there was no notification preventing grant of furlough leave in favour of present Petitioner, the ground given for rejection was not proper. In the previous order made by the authority, it was mentioned that in view of the notification of the year 2018, the present Petitioner was not entitled to get furlough leave. In the new order made by the authority, notification of the year 2016 is now mentioned and so it cannot be said that for the same reasons the authority has rejected the application of the present Petitioner.

14. The learned APP submitted that this Court had opportunity to consider similar claim and in Criminal Writ Petition No.1008 of 2018 (Pundlik G. Gole Vs. The State of Maharashtra) decided on 25th April, 2018 at Principal Seat of this Court and it is held that a prisoner, who is sentenced for the offence punishable under Section 376 of the Indian Penal Code is not entitled to get furlough leave. A copy of the said order is on record and it shows that there was one more notification dated 1st December, 2015 showing that prisoner sentenced with imprisonment for the offence punishable under Section 376 of the Indian Penal Code is not entitled to get furlough leave. The case of the Supreme Court reported as AIR 2006 SC 2471, (State of Maharashtra Vs. Suresh Pandurang Darvakar) was referred by this Court for deciding the said matter. The Supreme Court had considered the aforesaid Rule 17 and had held that the prisoner has no absolute right to get furlough leave. In the case of Pundlik G. Gole (supra), this Court had made it clear that the date of application is a relevant date and not the date of conviction given to the prisoner for considering the Rules.

15. In the case reported as 2000 (3) SCC 392, (State of Haryana & Ors Vs. Mohinder Singh etc.), the Apex Court has laid down that special remission shall not apply to a prisoner convicted of a particular offence can be a relevant consideration for the State Government not to exercise the power of remission in that case. This case was also referred by the this Court while deciding the case of Pundlik G. Gole (supra). As furlough leave is a kind of remission, the observations of the Apex Court made in the case of State of Haryana &. Ors Vs. Mohinder Singh etc. (supra) can be used in the present matter also.

16. There is one more decision of the Apex Court given in Civil Appeal No.10464 of 2017, arising out of SLP (C) No.16803 of 2017, (Asfaq Vs. State of Rajasthan and others). In this case, the Apex Court has discussed the distinction between the parole and furlough lave and power of the State and Central Government in that regard is also discussed. This discussion shows that the prisoner has no legal right to get furlough leave. In view of the aforesaid position of law and as the State Government has taken the decision not to exercise the power, not to grant furlough leave to prisoner, who is sentenced for offence of rape, there is no possibility of interference in the order made by the authority. In the result, the petition stands dismissed.