

(2012) 11 BOM CK 0124

In the Bombay High Court

Case No : Criminal Writ Petition No. 389 of 2012

Bhima

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 30-11-2012

Acts Referred:

Citation : (2013) 3 ABR 588 : (2013) ALLMR(Cri) 904 : (2013) 2 BomCR(Cri) 820

Hon'ble Judges : Sunil P. Deshmukh, J;A.H. Joshi, J

Bench : Division Bench

Advocate : Bharati Gunjal, for the Appellant; V.A. Shinde, learned , Assistant Public Prosecutor for State, for the Respondent

Judgement

A.H. Joshi, J.—This petition was heard from time to time. Various directions were issued and various affidavits have been filed by different officers. Information on various points is placed on record. This petition can be disposed of finally as pleadings are complete in all respects. Rule. Rule is made returnable forthwith and is heard by consent.

2. Perused the record.

3. History of previous petitions is as narrated in paras to follow.

4. Cri. Writ Petition No. 613 of 2010

(a) Petitioner had approached this Court by filing criminal writ petition No. 613/2010. He had prayed for writ of mandamus. He had claimed that he be transferred to Open Prison from Closed Prison.

(b) Petitioner had claimed that he had overstayed while on furlough for 126 days between 4-11-2007 to 9-3-2008, when he was arrested and was brought back.

(c) The overstay was because he was suffering from severe pain and un-healed burn injuries. He had suffered the burns while he was on furlough and he was

taking treatment while at home. His failure to report in Open Prison was due to reasons which were beyond his control.

(d) He was served with a notice of show cause dated 25-5-2008. By said notice, he was called to show cause against punishment towards jail offence of overstaying furlough for 126 days.

(e) Documents which were placed on record by the petitioner to show that his overstay was on account of his reason of being injured and actually under treatment and confined to bed.

(f) The petition was opposed by placing on record copy of order passed by Deputy Inspector General (Prisons) Aurangabad dated 20-8-2008. The order dated 20-8-2008 disclosed that thereby the decision of Superintendent (Open Prison) Paithan dated 9-3-2008, committing/transferring the petitioner to Closed Prison was confirmed. Copy of the order dated 20-8-2008 is seen on record of said petition as Exh. R-1, page 56 of paper book of writ petition no. 613/2010.

(g) It is evident from order dtd. 20-08-2008 that it was passed on account of overstay between 4-11-2007 to 9-3-2008.

(h) Petitioner amended the writ petition and challenged the order dated 20-08-2008.

(i) This Court dismissed the petition by order dated 17-2-2011. This Court held that the order impugned was passed after giving to the petitioner an opportunity of hearing.

(j) It is obvious that the order to which this Court has referred as "order impugned" was the order at Exh. R-1 page 56 of the said paper book which is order dated 20-8-2008 for which prayer 17-B-1 was made.

5. Cri. Writ Petition No. 647 of 2011

(a) While the petitioner was serving sentence in Closed Prison and was served with order confirming his committal to Closed Prison dt. 9-3-2008.

(b) Thereafter he had furnished a representation to the Director General of Prisons, M.S. Pune.

(c) During pendency of Cri.W.P. No. 613/2010 the petitioner was served on 12-7-2010 an intimation dated 30th June/1st July 2010, by which he was informed that his request for transfer to Open Prison has been rejected.

(d) Though Cri.W.P. No. 613/2010 was pending the communication dated 30th June/1st July 2010 was not brought to the notice of the petitioner's advocate by the petitioner, or even by the prison authorities.

(e) In these premises, petitioner filed another criminal writ petition no. 647/2011 and prayed for the relief against the order passed by the respondent no. 2 i.e. The Director General of Prisons and communicated the petitioner by intimation

dated 30th June/1st July 2010. Copy of said intimation was placed on record as Exh. E, page no. 18 of Cri.W.P. No. 647/2011.

(f) Thus, the second writ petition no. 647/2011 was filed for challenging the order passed by Director General of Prisons on 30th June/1st July 2010.

(g) The ground raised in the said petition urged during hearing, inter alia, was that the Director General of Prisons was under obligation to apply mind to the cause of overstay by the petitioner, however it was not done.

(h) It was urged and reiterated that as the overstay for 126 days was on account of the reasons beyond his control, the decision of the Superintendent Open Prison, Paithan for transferring the petitioner to the Closed Prison and the order passed by Dy. Inspector General Prisons as well as of Additional Director General of Police, confirming the order passed by the Superintendent Open Prison were liable to be set aside. The petitioner had prayed that he be sent to Open Prison.

(i) During hearing of writ petition no. 647/2011 it had transpired that the Additional Director General Prisons had not passed any order whatsoever by adjudicating on the fact of the matter; as to the veracity of the claim of the petitioner that he was rendered incapable to report to prison due to injuries etc.

(j) Therefore, this Court decided the writ petition and passed an order on 15-11-2011 directing that the factual aspects brought into controversy by the petitioner while passing the impugned order, be re-examined etc.

(k) The operative text of the judgment and order passed in Cri.W.P. No. 647/2011 reads as follows:-

(A) The petitioner's application, a copy whereof is at page 13, be treated as representation, as if undecided.

(B) The petitioner be given opportunity to represent against the grounds due to which the concession to be committed in the open prison, is being denied, by serving upon him the grounds. Thereupon the petitioner's eligibility for transfer to open prison be decided within 60 days from today.

(C) The decision be communicated to the petitioner.

(D) The learned APP is directed to communicate this order to the competent authority.

PRESENT WRIT PETITION

6. It appears that Petitioner's case was considered afresh after the order was passed in Writ Petition No. 647/2011 on 15-11-2011.

Fresh order dated 11-4-2012 purportedly passed by the Deputy Inspector General is served on the petitioner. Copy whereof is placed on record as Exh. C, at page no. 14. It is disclosed in said order that petitioner's representation, in relation to which, this Court had given directions to decide in Cri.W.P. No.

647/2011, was decided. It is further disclosed that:-

(a) It was reported by Dy. Inspector General Prisons Aurangabad that the petitioner had overstayed furlough for 68 days and was brought back upon arresting.

(b) That the Honourable High Court had directed that petitioner's case be reconsidered for transfer to Open Prison.

(c) Dy. Inspector General (Prisons) Aurangabad has not favourably recommended petitioner's case for re-transfer to Open Prison.

(d) Petitioner's earlier writ petition no. 613/2010 was already dismissed by Hon"ble High Court.

(e) In Writ Petition No. 647/2011, Honourable High Court has directed by order dated 15-11-2031 that petitioner's application for re-transfer to Open Prison be re-considered.

(f) Since petitioner had overstayed furlough for 68 days and was produced upon arrest and therefore his case can not be considered as a fit case for his re-transfer to Open Prison.

7. In present writ petition, petitioner had raised a plea that the Dy. Inspector General (Prisons), who had passed said order, does not have power to pass an order in the matter of transfer of prisoner to Open Prison etc. Consequently, this Court gave certain directions. Thereafter, fresh affidavit has been filed. Alongwith additional affidavit, a copy of the order passed by Additional Director General (Prisons), apparently dated 5-4-2012, is placed on record at page no. 42 and 43 of paper book.

8. It is seen that order at page no. 14 Exh. C to the petition is sheer replication of order passed by Additional Director General of Prisons. Entire text of order dated 5-4-2012 passed by Dy. Inspector General Prisons (Headquarter) Pune is word by word copy of the order dtd. 11-4-2012 passed by Addl. Director General Prisons Pune.

9. This Court was therefore required to proceed against the factual backdrop that Exh. "C" is just a communication and whatever scrutiny that has to be done is of order passed by Additional Director General (Prisons) passed on 5-4-2012, seen at page no. 42 and 43.

10. During oral submissions, learned advocate for the petitioner had advanced the submissions, which are in nutshell as follows:-

(a) The order passed by the Additional Director General of Prisons suffers from the defects mainly:-

(i) He has not dealt with the matter for which a direction was given i.e. justifiability of the reasons of petitioner's overstaying leave upto 126 days offered by him in his representation.

(ii) The reason on which the order is passed is about 68 days overstay. Explanation, if any, offered by petitioner in that regard is not considered by the Additional Director General of Prisons and any decision thereon is not rendered by him.

(iii) An effort/attempt is made by the Addl. Director General of Police to by-pass and brush aside the object, spirit and express terms with which direction was given to him by this Court.

(iv) Addl. Deputy General Prisons has not understood the exact direction given by this Court in Cri.W.P. No. 647/2011.

(v) Additional Director General (Prisons) was directed to test the fact of the matter and legality of order passed by Deputy Inspector General Prisons, Aurangabad. He has failed to discharge the duty of adjudication assigned to him by judgment of this Court.

(b) There are number of prisoners who have overstayed the leave. Those are divided in following categories:-

(i) Those who have overstayed furlough/parole and reported voluntarily.

(ii) Those who have overstayed and brought upon arrest, though the duration of their overstay till the date of arrest is numerically lesser than their respective days of overstay as compared to the overstay by the prisoners who were either not chosen for arrest or were actually not arrested or they have reached the prison before warrant of arrest could reach them.

(iii) In these premises, the transfer of prisoners to Closed Prison is now left to the sweet will of the Officers from the Prison Department or Officers or personnel from the Police force.

(iv) The officers choose to arrest somebody and do not choose to arrest the remaining, would decide the fate of prisoners' concessions, and not the rule of Law.

(v) The arrest is delayed sheerly due to coincidence in some cases, and deliberately in many cases.

(vi) Petitioner is discriminated against the prisoners who have stayed outside the prison for durations longer than petitioner's overstay but had reported before arrest, and are kept/retained in Open Prison.

(vii) These prisoners/persons constitute a favoured class since they were successful in avoiding the arrest or efforts to arrest them were not made.

(viii) There is no explanation as to why the petitioner was arrested after 68 days or 126 days as the case be and why many others, who had overstayed for longer duration, were not arrested.

11. The plea of discrimination raised by the petitioner was startling. It was

necessary to know the fact of the matter. This Court, therefore, directed the Jail Authorities to produce the data in the form of Chart showing the names and days pertaining to the prisoners who have overstayed and in relation to whom, certain action such as to send them to Closed Prison or for any other punishment, is taken.

12. The chart as directed is produced and is taken on record.

13. We have perused the chart. Analysis of said chart shows that there are 7 prisoners who were/are serving the sentence in Open Prison, including the petitioner who have overstayed the furlough or parole for more than 68 days.

14. We have considered the figure of 68 days as a benchmark because the impugned order contains a statement that petitioner had overstayed leave for 68 days and he was arrested and brought back to jail and he was committed to Closed Prison. The figure 68 days is mentioned in the order at Exh. "C" as well order dated 11-4-2012 at Exh. R3. It is not shown as to how the figure 126 days shown in shown cause notice became 68.

15. The extract from chart which is furnished by the prison authorities, which discloses the data as regards these 6 persons/prisoners is as follows:-

16. Six prisoners shown in foregoing para had reported in the prison before they could be arrested.

17. Though the order passed by Additional Director General of Prisons refers to delayed reporting by 68 days, the show cause notice as well as the order contained a specific mention that the petitioner had overstayed and was arrested after 126 days. The information about the prisoners who have overstayed discloses that there is one prisoner in the list quoted in paragraph no. 16, where the prisoner concerned was at large unauthorizedly for 143 days. Thereafter, he had reported without arrest because no orders for arrest were made or he was successful in evading the arrest.

18. This voluntariness in appearance after 143 days could be dubious as well, however in the judgment of the jail authorities, it relieves him from the liability of being sent to Closed Prison. The said dubious voluntariness earns the reward of being retained in Open Prison than being sent to the Closed Prison and hard labour apart from forced seclusion. For him, the punishment of forfeiture of remission is adequate punishment.

19. At this stage, we had orally directed learned APP to take instructions and explain circumstances, if any:-

Do reasons exist for which petitioner was chosen for arrest after overstay for 68 days or 126 days as the case be, and as to why others having large duration (number of days) of overstay were not chosen for arrest or were not arrested.

20. Learned APP has taken instructions and made oral statement in the Court as follows:-

(a) All those who were brought back to prison upon arrest are uniformly treated. All such persons were served with notice of show cause and after observing the procedure, they are committed to Closed Prison.

(b) Those who have voluntarily reported though late, are a class apart. They are punished for Jail offence by forfeiture etc. They are not left scotfree

(c) 6 persons identified by Court having overstay for duration longer than petitioner, had voluntarily appeared. They were not arrested. Therefore, they are not sent to Closed Prison.

(d) No reasons can be shown as to why some prisoners are punctually arrested and others have not been arrested.

21. It is not disclosed as to what were special circumstances where the petitioner, in particular, was arrested after 68 days or 126 days, while other prisoners could remain at large unauthorizedly and without arrest for a period between 71 to 143 days.

The choice and selection of the petitioner for arresting and production is, to us, an unsolved mystery and puzzle, which respondents have chosen to keep unresolved.

22. Thus, it emerges that those who remained at large, were not arrested because of favour or negligence of prison officers or Police Authorities. Those who are not belong to a class which could manoeuvre the desired result, and possibly even by unscrupulous means.

23. In either situation, when either jail authorities or police is active and someone is arrested, such prisoner suffers the result of losing the concession of remaining in the Open Prison while others are fortunate or manipulative against whom Jail Authorities or Police choose not to take any action.

24. Apart from the reasons and intentions, fact remains that the petitioner is discriminated and is met with a hostile treatment than against all those who have overstayed furlough/parole and are retained in Open Prison.

25. In our considered view, whether the discrimination is due to deliberate or malicious act or sheerly accidental, the result is certain. The violation of Constitutional guarantee of equality before Law and freedom from discrimination is done. The guarantee of fairness in executive action too is violated.

26. There is one more dimension to this case. This dimension is that in our view, the Additional General of Police has disregarded the directions contained in the order passed by us while deciding the petition, viz; W.P. No. 647/2011. We have quoted those directions in foregoing para no. 6(k). We have also quoted in paragraph no. 7 as to the attitude and focus with which the Additional Director General of Prisons has viewed the order passed by this Court in Cri.W.P. No. 647/2011.

27. This act of Additional Director General of Prisons shows the attitude of apathy towards prisoners as well as disrespect towards the orders passed by this Court.

28. On facts, the application of the writ petitioner, which was remitted for consideration by Additional Director General of Prisons, was:-

whether the order passed by Deputy Inspector General (Prisons) Aurangabad dated 20-8-2008 (ratifying the action of the Superintendent, Open Jail, Aurangabad, committing him to Open Prison) was passed on valid reasons and whether excuse offered by petitioner towards overstay between 4-11-2007 to 9-3-2008 was based on genuine grounds.

29. Instead of reading the order passed by this Court in right perspective, the Additional Director General of Prisons has considered the matter as if it was a case of reconsideration of application of petitioner for remittance to Open Prison.

30. The Additional Director General (Prisons) had duty to scrutinize the ground put forth by the petitioner. The Additional Director General of Police has shown total disregard towards the faith imposed in him by this Court while passing the order in assigning the matter to him while deciding writ petition no. 647/2011. He has simply relied upon the proposal and/or comments/recommendations furnished by the Deputy Inspector General Prisons, Aurangabad.

31. In our view, the net outcome of the way in which the prison authorities have behaved is to discriminate the petitioner from other similarly situated i.e. the overstaying prisoners, in the matter of treatment and this discrimination is not generated sheerly on account of a contingency or accident.

32. The differential and discriminatory treatment given to petitioner is not on account of any rational, or classification for reasons and grounds whatsoever duly disclosed and justifiable.

33. Ordinarily, whenever a prisoner reports late beyond a particular period and is not able to demonstrate and prove that his failure to report was on account of circumstances beyond his control, distinguishable from his sheer wish to stay outside, such insolent desire could be a ground to decide as to whether he should lose the concession available to him to remain in the Open Prison.

34. We are, therefore, of the considered view that the treatment given to the petitioner by sending him to Closed Prison for unauthorized stay of 68 or 126 days, as the case be, deserves to be quashed and set aside, being contrary to rule of fair play, good-conscious and reasonableness, being arbitrary and discriminatory too.

35. At this stage, learned APP has offered oral explanation as follows:-

68 days overstay is calculated after deducting the days of actual hospitalization from some incident of overstay of 126 days. Thus, this aspect will show due application of mind.

36. This explanation by learned APP amounts to an attempt to supplant reasons not found in the order. An order which has to be reasoned order, can not be justified by later on supplying reasons.

37. Therefore, we hold that the petitioner has been met with hostile and grossly discriminatory, as well arbitrary treatment.

38. The Additional Director General of Prisons was afforded with an opportunity to undo said discriminatory conduct of his sub-ordinates. The Additional Director General Police has chosen to disregard this opportunity and has blindly endorsed action of his sub-ordinates.

We, therefore, set aside order passed by Additional Director General of Prisons passed on 5-4-2012 Annexure R-2 at page no. 42 and 43 of paper book of W.P. No. 389/2012, as well order passed by Deputy Inspector General (Prisons) Aurangabad passed on 11-4-2012 and issue further directions as mentioned hereinafter.

39. We clarify that though we have set aside the order of committing the petitioner to Closed prison from Open Prison, this order shall not operate till 5-1-2013.

The Additional Director General (Prisons) Maharashtra shall call for the papers and take a decision as to whether and how:-

(a) Petitioner's case is different from the case of prisoners named in this order in the foregoing paragraph no. 16;

(b) If there exist any special reason for which the petitioner was required to be arrested in comparison to those who were not arrested;

(c) Whether other prisoners have reported late, had brought on record justifiable and convincing reasons and circumstances beyond the control of the Prisoner concerned whereby the prisoners concerned were "precluded and prevented" from reporting in jail on the due date and on each day of delay, due to which they deserve retention in Open Prison in contrast with the case of present petitioner.

40. We believe that an executive can err, but can also correct itself, once the executive action can be set right even by the executive. We wish that the Authorities would once again consider the petitioner's case on its own as well on comparative merit.

41. We further clarify that, if for any reason, the Additional Director General (Prisons) Maharashtra is not able to take a decision on or before 5-1-2013, the petitioner shall be liable to be committed to Open Prison forthwith and the Additional Director General (Prisons) may take the decision soon thereafter.

42. We have also noticed that prisoners undergoing conviction or who are under trial prisoners in serious offences too have overstayed for period more than one

year while availing parole. Instances of overstay and selective arrests are seen to be usual matters. In this situation, we consider it necessary that the Prison Authorities should devise a uniform pattern where such action of fortuitous arrest or fortuitous failure to arrest should not recur. A uniform pattern in this regard be devised and be adopted for sending directions or warrant of arrest for all those prisoners who have not reported after a fixed duration. A uniform method of follow up of execution of warrants should also be adopted.

43. It should also be seen that the fact that somebody is arrested alone in exclusion to many others, in isolation, should not be a ground of forfeiture of concession of continuation in Open Prison. We hope that appropriate decision be arrived at by the Director General of Prisons in consultation with the Government and sub-ordinate prison authorities. We hope and expect that such decision be arrived at within the period of 6 months at the most, and compliance be reported to this Court.

44. We direct the learned APP to communicate this order to Additional Director General Prisons and ensure its compliance.

45. The Director General of Prisons and Additional Director General of Prisons should take a note of this writ in the register and certify the writ in their own handwriting and forward it to this Court.

46. Considering that the petitioner was required to approach this Court repeatedly, present is a fit case where petitioner should be awarded costs.

47. We are constrained to impose costs in the background that not only petitioner has been met with an injustice, but also because the Additional Director of Prisons has totally disregarded the text and spirit of the orders passed by this Court in W.P. No. 647/2011. We have not issued a personal notice to the Officer concerned as we are not viewing towards his conduct as an act of willful dis-obedience tantamounting to contempt. The token costs shall be Rs. 2,500/-. This amount shall be payable by the Additional Director General of Prisons, who has passed impugned order dated 5-4-2012. Amount of costs be paid to the petitioner directly within 30 days and compliance be reported to this Court. We, make the Rule absolute in the terms of para nos. 39, 41, 42 and 48.