

(1988) 03 BOM CK 0047

In the Bombay High Court

Case No : Criminal Writ Petition No. 1001 of 1987

Guntabai Balu Barade

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 09-03-1988

Acts Referred:

Bombay Borstal School Act, 1929 — Section 12, 12(1)
Constitution of India, 1950 — Article 226

Citation : (1988) 2 BomCR 663

Hon'ble Judges : V.S. Kotwal, J; V.P. Tipnis, J

Bench : Division Bench

Advocate : P.S. Patankar, for the Appellant; J.A. Barday, Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

V.P. Tipnis, J.—Guntabai Balu Barade has filed this petition for a writ of habeas-corpus or any other appropriate direction to produce her husband Balu Chander Barade detained at Yeravada Central Prison, Pune, and that his arrest and detention be declared illegal and he be set at liberty.

2. It appears that the husband of the petitioner, Balu Barade, was charged and tried before the learned Judicial Magistrate, First Class, Sinnar, for having committed offences u/s 457 read with section 380 of the Indian Penal Code in about 15 cases and u/s 461 read with section 380 of the Indian Penal Code in 3 cases and u/s 379 of the Indian Penal Code in one case. He pleaded guilty in all these cases and the learned Judicial Magistrate, First Class, Sinnar accepted his plea of guilt and convicted said Balu for those offences. However, instead of sending said Balu to jail for suffering imprisonment the learned Magistrate was pleased to pass an order u/s 6(b) of the Bombay Borstal Schools Act, 1929, by his judgement and order dated 9th of July, 1976. The learned Magistrate observed in the order that the offender is not less than 16 years nor more than 21 years of age, and that by reason of his criminal habits and tendencies and

association with person of bad character it is expedient that he should be subject to detention for a period of 3 years and with such instructions and discipline as appears most conducive to his reformation. The learned Magistrate further ordered that in lieu of sentence to jail, the offender is sentenced to be detained in Borstal School for a period of 3 years. Accordingly in pursuance of this order of the learned Magistrate dated 9th of July, 1976, said Balu, the offender, was sent to the Borstal School of Kolhapur. It appears that while he was in the said school, after about 8-9 months, when he was working in Padmala Garden, Kolhapur, he escaped and did not return till he was arrested after about 10 years at Nasik by police on or about 12th of April, 1987, it is the contention of the petitioner that the petitioner-wife and her husband, the said offender Balu, belong to Bhil Community which is a Scheduled Tribe, and said Balu escaped from the Borstal School only because he got the information that his father had expired. It is further contended by the petitioner that after the escape in 1977, Balu started working as agricultural labourer and fisherman till about 1979. Thereafter he purchased an agricultural land and started independent cultivation. In or about 1979 Balu married the petitioner and they have got 4 children, the eldest daughter by name Lata is studying in 2nd standard, son by name Gotiram aged 6 years is studying in the 1st standard and the rest of the two children are very young. Said Balu also purchased some land in the name of the petitioner, his wife. The petition further avers that since then the petitioner and her husband, said Balu, were staying in the said land and cultivating the same. Balu thereafter is never involved in any crime or even suspected of any crime. The petitioner contended that there is a complete reformation and Balu is completely settled in life with wife, children, house and a family land and is working in the said land and leading a life of a law abiding citizen. Balu presently is about 28 to 30 years of age.

3. As stated earlier, Balu was arrested on 12th April, 1987 by police at Nasik. He was sent to the Yeravada Central Prison, Pune, on 15th of April, 1977 as he had attained the age of 28 years. Soon after his arrest said Balu preferred Criminal Application No. 1312 of 1987 to this Court. In the said application it was prayed that the arrest of the petitioner Balu on 12th of April, 1987 be declared illegal and the petitioner be released and during the pendency of the said petition, the petitioner be released on bail. The said petition was heard by the learned Single Judge of this Court and by order dated 9th of July, 1987 the said criminal application was summarily rejected.

4. The petitioner, who is the wife of said Balu, has filed the present petition in September 1987 by contending that the arrest and detention of her husband is completely illegal and the said detention also in contravention of Article 19(1)(d) and (e) of the Constitution of India. The present petition also prays for a writ of habeas-corpus and also an order for declaration that the arrest and detention of said Balu is illegal and he should be set at liberty.

5. Before the admission of the petition, the respondent State of Maharashtra,

was directed to file an affidavit. The State of Maharashtra filed an affidavit of one Shri Kole, the Jailor, Borstal School, Kolhapur. The said affidavit mentions that after the arrest of the husband of the petitioner, said Balu, on 12th of April, 1987, he was sent to Yeravada Central Prison and report was made to the Inspector General of Prisons Pune, on 15th of April, 1987, pointing out that said Balu who had escaped on 2nd of April, 1977 from the Borstal School, Kolhapur, came to be arrested on 12th of April, 1987 and, therefore, the residue of Unexpired term be converted into imprisonment u/s 12(2) of the Bombay Borstal Schools Act. Inspector General of Prisons sent a letter dated 30th May, 1987 to the Secretary, Home Department, Mantralaya, Bombay asking for conversion of the detention of the said Balu into imprisonment u/s 12(1) of the Bombay Borstal Schools Act. Thereafter on 14th of September, 1987 the State of Maharashtra in the Home Department passed an order to the effect that the residue of the unexpired term of said Balu be converted into imprisonment and he be detained at Yeravada Central Prison, Pune. The State has contended that said Balu has not been detained in Borstal School as he was more than 21 years of age. However, in compliance with section 18 of the Bombay Borstals Schools Act, the Superintendent of Police, Nasik, arrested said Balu u/s 18 of the Bombay Borstal Schools Act and produced him at Borstal School at Kolhapur. However, as said Balu had completed 28 years of age he could not be detained in Borstal Schools as per the provisions of section 17 of the Act. The State has further specifically contended that inasmuch as earlier Criminal Application No. 1312 of 1987 filed by the said Balu himself was rejected summarily on 9th of July, 1987, the present petition is not maintainable at all.

6. After the said affidavit, to which the order dated 14th of September, 1987 was annexed, was filed by the State Government, the petitioner sought permission to amend the petition which was granted and Rule was issued in the petition.

7. By amendment the petitioner had challenged the legality and validity of order dated 14th September, 1987 passed by the State under provisions of section 12 of the Bombay Borstal Schools Act, 1929. It is contended that the said order is illegal and void as it is passed in breach of principles of natural justice as no notice is given to the petitioner, nor the petitioner is heard before passing the said order. It is further contended that the State ought to have considered the aspect of reformation contemplated by the Act and the order is passed without considering the aspect of reformation and is, therefore, mechanical and without application of mind. It is further contended that taking into consideration the fact that Balu is arrested after about 10 years and the further fact that in the meantime he has married, has settled in life property, has also four children and is leading a life of a law abiding citizen, it would be sheer mockery to send him back to jail. In view of these fact and in view of the provisions u/s 12 of the Bombay Borstal Schools Act, it is incumbent on the State before passing any order to take into consideration all relevant facts and pass proper order after application of mind. Failure to do so would be in breach of not only the provisions of Article 19(1)(d) and (e) of the Constitution of India but also the right to life

and liberty enshrined in Article 21 of the Constitution of India. By amendment a specific prayer is also incorporated in the petition to quash and set aside the order dated 14th of September, 1987 passed by the State Government u/s 12 of the Bombay Borstal Schools Act.

8. Shri Barday, the learned Government Pleader appearing for the State Government, contended that the petition ought not to be entertained as the earlier petition was summarily dismissed by this Court. It is not possible to accept this contention of the learned Government Pleader. The earlier petition was filed soon after the arrest of the petitioner on 12th of April, 1987. The only prayer was that the arrest of Balu be declared illegal and Balu be released. However, we find that in the present petition the subsequent order passed by the State of Maharashtra specifically u/s 12 of the Bombay Borstal Schools Act, is challenged as illegal and against the provisions of Articles 19 and 21 of the Constitution of India. As such we do not feel the dismissal of the earlier petition is in any way detrimental to the entertaining of the present petition which is specifically against the order which was passed subsequently.

9. Coming to the merits of the matter, it is essential to notice that u/s 3(a) of the Bombay Borstal Schools Act "Borstal School" means a place in which young offenders, whilst detained in pursuance of the Act, are given such industrial training and other instruction and are subjected to such disciplinary and moral influences as will conduce to their reformation and the prevention of crime. Provisions of section 6 of the Act make it clear that when it appears to the Court that the offender is not less than sixteen not more than 21 years of age, and that by reason of his criminal habits and tendencies or association with persons of bad character, it is expedient that he should be subject to detention for such term and under such instruction and discipline as appeared most conducive to his reformation, it shall be lawful for the Court to pass an order for the detention of the offender in a Borstal School. These provisions make it absolutely clear that the main object of sending the offender to the Borstal School is to achieve his reformation and to train him in such manner as to make it possible for him to settle in life and lead a life of a law abiding citizen. Provisions of section 14 also show that the Inspector General may, on the recommendations of Visiting Committee, at any time after the expiration of 6 months from the commencement of the detention of an offender in a Borstal School, if he is satisfied that there is a reasonable probability that the offender will abstain from crime and lead a useful and industrious life, discharge him from the Borstal School and grant him a written licence in the prescribed form and on the prescribed conditions permitting him to live under the supervision and authority of such government officer, secular institution, religious society or responsible person as may be approved by the Inspector General and willing to take charge of the offender. Provisions of section 12 with which we are directly concerned, are as follows :---

"12(1). Where an offender detained by a Court in a Borstal School escapes, or is

reported to the State Government by the Inspector General to be incorrigible or to exercise or to be likely to exercise a bad influence on the other inmates of the school, or to be more than twenty years of age, or is, in the opinion of the State Government, otherwise unsuitable for training in a Borstal School, the State Government may commute the unexpired residue of the term of detention of such term of imprisonment of either description as the State Government may determine, but in no case exceeding the shorter of the following two periods :---

(a) the unexpired residue of the term of detention, or

(b) the maximum period of imprisonment provided by law for the offence of which the offender was found guilty or the failure to give security, as the case may be, in consequence of which the offender was ordered to be detained in a Borstal School.

(2) Such offender, may be confined in any prison within the State of Maharashtra by warrant under the hand of a Secretary to the State Government and effect shall be given to such warrant and the sentence of imprisonment passed upon such offender shall be executed in the same manner as if such person had been sentenced by a competent Court of Criminal jurisdiction."

10. Thus the provisions of section 12 clearly show that when an offender detained by a Court in a Borstal School escapes or when reported to the State Government by the Inspector General to be incorrigible or to exercise or likely to exercise bad influence, on the other inmates of the Schools or to be more than 20 years of age or is, in the opinion of the State Government, otherwise unsuitable for training in a Borstal School, the State Government can commute the unexpired residue of the term of detention of such term of imprisonment of either description as the State Government may determine. However, the said term can in no case exceed the shorter of the two periods, namely, the unexpired residue of the term of detention or the maximum period of imprisonment provided by law for the offence for which the offender was found guilty. It is clear that before any order u/s 12 can be passed by the State Government, the State Government must be satisfied regarding the existence of the facts mentioned therein. Secondly, the State Government must determine the term of imprisonment within the maximum laid down by the section depending on the facts and circumstances of the case. Clear discretion is vested with the State Government which can be exercised only upon application of mind to all the relevant facts and especially taking into consideration the avowed object of the Act, namely the reformation of the offender.

11. The impugned order, which is annexed to the affidavit-in-reply filed by the State, mentions that Balu Chander Barade was detained in the Borstal School for a period of 3 years by order of J.M.F.C., Sinnar. The order further says that Inspector General of Prisons, Maharashtra State, Pune, has informed the State Government that said Balu was detained from 14th of July, 1976 in the Borstal School at Kolhapur and on 2nd of April, 1977 while working in the garden he ran

away. Thereafter he was arrested on 12th of April, 1987 and on 14th April, 1987 he was sent to the Borstal School, Kolhapur, for completing the unexpired period of his detention in the said School. However, as the said person Balu has completed 28 years of age it would not be proper to keep him in the Borstal School, and therefore, the remainder of his unexpired period of detention, namely 2 years, 3 months and 6 days, should be committed in the term of detention of imprisonment of either description. The order further mentions that whereas the Government is of the opinion that the said person is unsuitable to be kept in the Borstal School, therefore, under the powers vested in it u/s 12 sub-section (1) of the Bombay Borstal School Act and all other powers, the Government of Maharashtra by the said order commutes the unexpired period of detention in Borstal School in respect of said Balu to the term of imprisonment and further orders that the said period shall begin from the date on which he was transferred to Yeravada Central Prison from Borstal School, Kolhapur. The said order is given in the name and by the order of the Governor of Maharashtra.

12. Apart from the fact that admittedly no notice was issued to the person affected by the order or no hearing was given to him, which right or requirement is seriously disputed by Mr. Barday, the Government Pleader, and which in the facts and circumstances of the case we do not think it necessary to decide, one fact is glaring that the order on the face of it does not reflect that anybody applied his mind to the aspect of the existence of the first requirement, and secondly also to the second and more important aspect as to the term of imprisonment which is to be imposed. It is clear to our mind that this discretion to determine the term has to be exercised by taking into consideration the avowed object of the Act, namely the reformation of the prisoner, as also the order relevant facts and circumstances of each case. As mentioned above, that Balu has married, he has about 4 children and that he is leading a life of a law abiding citizen by cultivation his land is not controverted at all. The State Government has also not filed any affidavit after the amendment of the petition. Now, if all these facts, which are not disputed, are taken into consideration, we strongly feel that even the State Government itself might not have passed the order of commuting the entire unexpired term to the term of imprisonment in jail.

13. Taking into consideration the peculiar facts and circumstances of the case, we feel that it would be extremely unjust and improper to send Balu to jail again. The order passed by the State Government on 14 of September, 1987 does not show application of mind. The affidavit-in-reply to the petition is filed by the jailor of Borstal School, Kolhapur. The order shows that the report and the recommendation of the Inspector General of Prisons is mechanically accepted by the State Government. The order u/s 12 of the Bombay Borstal School Act undoubtedly affects the liberty of the prisoner or the offender. It is an order with serious consequences and, therefore, it is needless to emphasise that the same must be passed by the proper authority after application of mind to all the facts and circumstances of the case. We are satisfied that the impugned order is passed without application of mind as required. If that is so, the order infringes

the right enshrined in Article 21 of the Constitution of India as it would amount to deprivation of personal liberty without following the procedure established by law. We are inclined to allow the petition only on this solitary ground.

14. Accordingly, the petition succeeds. The order dated 14th of September, 1987, Exhibit-A to the affidavit-in-reply to the petition, passed by the State Government is hereby quashed and set aside and it is ordered that said Balu (alias Walu) Chander Barade should be at once set free unless otherwise required. Rule absolute accordingly.