

(2012) 07 BOM CK 0049
In the Bombay High Court
Case No : Criminal W.P. No. 1311 of 2012

Kamal M. Kanojiya

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 19-07-2012

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Penal Code, 1860 (IPC) — Section 302, 392, 393, 394
Prisons Act, 1894 — Section 28, 3, 59(1), 59(5)

Citation : (2013) ALLMR(Cri) 983 : (2013) CriLJ 114

Hon'ble Judges : V.M. Kanade, J; P.D. Kode, J

Bench : Division Bench

Advocate : Harjeet Kaur, for the Appellant; M.M. Deshmukh, APP, for the Respondent

Final Decision : Dismissed

Judgement

P.D. Kode, J.—By the present petition under Articles 226, 227 of the Constitution of India, the petitioner presently lodged at Nasik Road Central Prison has assailed the rejection of his prayer for furlough by furlough sanctioning authority-respondent No. 4 and dismissal by respondent No. 3 of the appeal preferred by him against the said order of rejection. The petitioner-resident of Thana Mohanlalganj, Lucknow, Uttar Pradesh was convicted by Addl. Sessions Judge, City Sessions Court, Sewree, Mumbai on 25th November, 2008 for commission of offence under Sections 302, 392, 450 of the Indian Penal Code and sentenced to suffer punishment as under:--

The petitioner while preferring the petition in addition to the prayer of issuing writ, order or direction quashing and setting aside the order of rejection of furlough by respondent No. 4 vide order dated 31.5.2001 and dismissal of his appeal by Appellate Authority-respondent No. 3 vide order dated 25-10-2011 and directing the respondent to release him on furlough leave: had also prayed at prayer (a) for declaring Maharashtra Circular No. PARCOT-1008/CR-605/

Prison-3 dated 17.9.2011 and Circular No. 7720/2010 dated 30.9.2011 as unconstitutional, ultra vires and invalid. However, upon the learned A.P.P. pointing out that condition No. 6 of furnishing local surety for prisoner, resident of other State mentioned in the circular dated 16.12.2008 bearing No. PARCOT-1008/P.C.605 is already modified by the Government as per the direction given on 29th November, 2010 by Nagpur Bench of this Court in Criminal Petition No. 576 of 2010 to the extent of now such a prisoner requiring to furnish local surety only from the place at which he would be availing parole or furlough leave by issuing said circular dated 17.9.2011; the learned counsel for the petitioner fairly stated that she is not pressing the prayer (a) of the petition. Hence, the petition is considered for the remaining prayers made by the petitioner.

2. The learned counsel for the petitioner urged that the petitioner was constrained to file Writ Petition No. 3034 of 2009 due to respondent No. 4 having not responded to the 1st application for furlough preferred by the petitioner on 2.2.2009. She submitted that in view of the order passed in said petition, ultimately respondent No. 4/sanctioning authority vide order dated 19.12.2009 allowed the prayer of petitioner for furlough for period of three weeks with certain conditions inclusive of furnishing P.R. Bond in sum of Rs. 25,000/- and solvent surety in the like amount of the relative of petitioner from Maharashtra State and so also from his own State. Thereafter, upon an application for reduction of the amount of surety and for permitting petitioner to furnish surety from native place, the said sanctioning authority only reduced the amount of surety to the tune of Rs. 15,000/- but did not waive the condition of furnishing the local surety from the State of Maharashtra. It is urged that due to such oppressive condition of furnishing local surety the petitioner could not avail the said furlough leave sanctioned and resultantly the said order of sanctioning furlough leave lapsed.

3. Learned counsel urged that 2nd application for furlough preferred the petitioner on 21st June, 2010 was rejected by respondent No. 4 vide order dated 18.2.2011 on the count of receipt of adverse reports dated 27.1.2011 from the D.I.G. Lucknow, Uttar Pradesh and from District Magistrate at Exhibit "C" Colly. Inter alia to the effect that if the petitioner is released on furlough leave he will not surrender back and since wife of the petitioner has solemnized second marriage there is no financial burden on the petitioner and in the event of release of the petitioner on furlough leave, the same will be harmful to people of village.

4. She urged that the application for temporary bail for a period of six months thereafter preferred by the petitioner was rejected by this Court with leave to the petitioner to apply for furlough leave or parole and direction that in the event of the petitioner making such application the same should be decided within a period of two months.

5. She urged that even the appeal preferred by the petitioner against the said

order dated 18.2.2011 passed by respondent No. 4 rejecting the said order of furlough was also dismissed by the appellate authority respondent No. 3 in view of Rule 4(2) and 4(4) of Maharashtra Prison Manual, 1999, Chapter XXXVII on the count that petitioner undergoing the sentence for offence u/s 392 of Indian Penal Code, police report and the report of District Magistrate are adverse and he is resident of other State.

6. The learned counsel further urged that thereafter the application submitted by petitioner through jail to this Court assailing rejection of his 2nd application for furlough leave by respondent No. 4 and appeal against the same by respondent No. 3 was treated as Writ Petition No. 3499 of 2011. The said writ petition was opposed by respondent No. 5 by filing an affidavit pointing out the Circular No. 7720/2010 dated 30.9.2011 issued by respondent No. 3; and Circular No. PARCOT/1008/CR/603/Prison-3 dated 17.9.2011 issued by Government of Maharashtra and on said basis contending that since the petitioner belong to other State and is desirous to avail furlough leave at any place either in Maharashtra State or in other State, then it was necessary to furnish local competent surety from the concerned place. In view of said circulars pointed, petitioner withdrew the said writ petition and preferred present petition challenging constitutional validity of the said circulars and for other reliefs.

7. The learned counsel for the petitioner thereafter submitted that though the prayer (a) of the petition is not pressed still the decision of this Court in the case of Subodh Prasad Urf Anil Chotu Jagdish Mahato Vs. The State of Maharashtra, and particularly the observations made in paragraph No. 11 therein to the following effect:--

11. On going through the Act of 1894 and the Statutory Rules framed by the State Government being Rules of 1959, there is no express provision which obligates the prisoner/convict from other States to offer local surety from Maharashtra. Such condition cannot be introduced by way of Government Circular. Moreso, when there is no express provision in the Act or for that matter the statutory Rules authorising the Executive to issue executive instructions to provide for additional conditions. Insofar as the surety is concerned, the Criminal Manual provides for verification of solvency of sureties.

in terms reveal that no insistence for furnishing such a surety can be made by issuing the circulars. It was urged though the furlough leave was sanctioned in 2008 to the petitioner, he could not avail the same due to imposition condition of furnishing local surety by issuing the circular. It is urged that the prayer for furlough made vide 2nd application is now negatived on the count of receipt of adverse police report and report of District Magistrate. It was urged that no such adverse report was received while accepting the prayer of furlough leave made vide 1st application. It was contended that thus now respondent No. 4 has arbitrarily denied furlough leave to the petitioner by giving different reason. It is urged that having due regard to the fact that furlough leave was initially granted to the petitioner the appellate authority ought not have upheld the

rejection order passed by respondent No. 4 on the 2nd application and on the contrary ought to have allowed the appeal preferred by the petitioner. It is thus contended that both the said orders, respectively passed by respondent No. 4 and respondent No. 3 cannot be legally sustained. It was also urged that passing of such a order has resulted in depriving the petitioner for last six years to meet his relatives and parents who are resident of Uttar Pradesh who are ready to receive the petitioner.

8. The learned counsel thus prayed for quashing and setting aside unsustainable orders arbitrarily passed by respondent Nos. 4 and 3 depriving the petitioner furlough leave and directing them to release petitioner on furlough leave, on terms and conditions in accordance with the law and rules made thereunder.

9. The aforesaid submissions were countered by learned A.P.P. by pointing out the reasons given in the order passed by respondent No. 4 and respondent No. 3 for rejecting the 2nd application for furlough leave made by the petitioner. It was urged that considering the said reasons which are duly supported by the material making out a case for rejection of furlough on the counts as prescribed under Rule 4(2) and 4(4) of the Prison Rules, no fault can be found with order of rejection made either by respondent No. 4 or dismissal of appeal by respondent No. 3. It was urged that though there is no quarrel with the propositions pointed out from the decision relied on behalf of the petitioner, the said decision is not at all useful to the petitioner as his prayer for furlough is rejected on altogether different ground. It was further contended that even the change made by the circular dated 17th September, 2011 regarding the place of which surety is to be furnished i.e. the change about the condition prescribed regarding the same in the earlier circular, already pointed by her is also self eloquent for not accepting the submission canvassed on behalf of the petitioner regarding earlier circular. It was urged that as the said subsequent circular being consistent with the provisions of Rule 6 of the Prisons (Bombay Furlough and Parole) Rules, 1959, no grievance regarding the same deserves to be entertained. The learned APP by contending that the other submissions canvassed on behalf of the petitioner being without any merit prayed for dismissal of the petition.

10. Since the controversy in the petition pertains to grant of furlough we find it appropriate to examine the relevant provisions pertaining to the same found made in the Prisons Act, 1894 (hereinafter referred to as the Act for short). The reference to the Section 3 of the Act relating to the definitions of Act reveals furlough system being defined under sub-section (5A) as "furlough system" to mean in the system of releasing prisoners in a jail on furlough in accordance with the rules for the time being in force." Further reference to Section 59(1) of the Act reveals that thereunder the power is conferred upon the State Government to make the rules consistent with the provisions of the Act regarding the matters specified in 28 clauses of the said sub-section. The reference to clause No. 5 of the said sub-section reveals that under the same the said power is conferred to make the rules regarding "for the award of marks, the suspension, or remission

and consequent shortening of sentences, and the grant of release on parole or furlough and determining the conditions on which and the authority by which the sentences may be suspended or remitted and the prisoners may be released on parole or furlough."

11. The reference to The Prisons (Bombay Furlough and Parole) Rules, 1959 reveals the same are made by then Government of Bombay by exercising the powers conferred under Sections 59(5) and 28 of the Act. The reference to Rule 4 from the said rules reveals that the same stipulates the categories of the prisoners who shall not be considered for release on furlough. Since the order impugned in the present petition rejecting the application for furlough made by the petitioner by respondent No. 4 refers to Rule 4(2), 4(4), 4(6) while the order impugned in the present petition dismissing the appeal preferred by the petitioner against the said rejection refers to Rule 4(2) and 4(4), it appears proper to reproduce the relevant part of the said rule which runs as under:--

4. When prisoners shall not be granted: The following categories of prisoners shall not be considered for release on furlough:

1.

2. Prisoners convicted of offences under Sections 392 to 402 (both inclusive) of the Indian Penal Code.

3.

4. Prisoners whose release is not recommended in Greater Bombay by the Commissioner of Police and elsewhere by the District Magistrate, on the ground of public peace and tranquility.

5.

6. Prisoners whose conduct is, in the opinion of the Superintendent of the Prison, not satisfactory enough.

12. The bare glance at above recited Rule 2 makes it abundantly clear that prisoner convicted for commission of offence under Sections 392 to 402 of the Indian Penal Code is not entitled for grant of furlough. Similarly, above stated Rule 4 makes it clear that in event of on the ground of public peace and tranquility the police authority as prescribed in the said Rule not recommending release, the prisoner is not entitled for grant of furlough. On the said backdrop examining the order passed by respondent No. 4 rejecting the 2nd application for furlough it is crystal clear that the same was rejected as the petitioner is convicted for offence under Sections 392 and 394 and so also his release being not recommended by D.I.G., Lucknow and District Magistrate, Lucknow. The said order also reveals that non-recommendations of the said authorities is based upon the cogent reasons stated in the said report received to the effect of there being possibility of the prisoner repeating commission of an offence, there existing possibility of danger to the villagers in event of his release. Thus, as the

said rejection is squarely based upon the matter contained in Rule 4(2) and (4) of the Prisons (Bombay Furlough and Parole) Rules, 1959 we are unable to find any fault with the said rejection ordered by respondent No. 4.

13. Similarly, the perusal of the order passed by respondent No. 3 also reveals that the appeal preferred by the petitioner against the said rejection was dismissed for the same reasons i.e. under Rule 4(2) due to petitioner undergoing the sentence for conviction of offence u/s 392 of IPC and by sending adverse report DIG, Lucknow and District Magistrate, Lucknow having not recommended his release. Hence, as the said rejection is also based upon the relevant matters mentioned in the report also makes us difficult to find any fault with the order of dismissal of the said appeal.

14. We are also in an agreement with the submission of the learned APP that merely because prayer for furlough leave was erroneously accepted earlier by respondent No. 4 upon the 1st application made by the petitioner, probably due to not noticing that petitioner was convicted for offence under Sections 392, 394 the same cannot create any right in favour of the petitioner to avail furlough on said basis upon his second application. The same is obvious as though, to be released on furlough is an substantial right conferred upon the prisoner still the same is not an absolute right and the same has to be availed subject to the statutory provisions and rule made regarding the same. Needless to add that in event of the petitioner being found not entitled for furlough due to provisions of Rule 4 of Prisons (Bombay Furlough and Parole) Rules, 1959 then the respondents cannot be stopped from rejecting his second application only due to his earlier application being erroneously allowed. For all the aforesaid reasons, we do not find any merit in the petition and hence dismiss the same.