

(1998) 06 GUJ CK 0005

In the Gujarat High Court

Case No : Special Criminal Application No. 1159 of 1992

Kishor Kanji Patel

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 15-06-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 98
Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 392
Gujarat High Court Rules, 1993 — Rule 186
Penal Code, 1860 (IPC) — Section 302
Prisons (Bombay Furlough and Parole) Rules, 1959 — Rule 18(1)

Citation : (1998) CriLJ 4355 : (2000) GLR 25

Hon'ble Judges : N.N. Mathur, J

Bench : Single Bench

Advocate : Jayashree C. Bhatt, for the Appellant; Public Prosecutor, for the Respondent

Judgement

N.N. Mathur, J.—This Special Criminal Application under Article 226 of the Constitution of India has been placed before me by the order of the Hon'ble Chief Justice as there is difference of opinion between K.J. Vaidya, J and J.M. Panchal, J.

2. On 26-6-92, the petitioner-Kishore Kanji Patel filed this Special Criminal Application seeking directions to release him on parole leave for a period of one month under the provisions of Prisons (Bombay Furlough & Parole) Rules. 1959 (hereinafter referred to as "the Rules of 1959").

2-A. The petitioner has been convicted for offence u/s 302 of IPC and sentenced to imprisonment for life by judgment dated 20-5-1983 passed by the Addl. Sessions Judge, Gondal at Rajkot which has been confirmed by this Court in appeal. At the relevant time, he was undergoing" life sentence in the Central Jail, Sabarmati. His application for parole was rejected by the impugned order dated 17-6-1992 passed by the Inspector General (Prison), Ahmedabad. The petitioner

sought parole for a period of 30 days on the alleged ground of sickness of his wife -- Pushpaben. In support of the said ground, the petitioner produced a medical certificate to the effect that she was suffering from bronchial asthma. It appears that the matter first came up for admission before the Division Bench on 29-6-1992. The Court directed the Police Inspector of the concerned area to record the statement of the doctor who issued the medical certificate in question and submit a report on the enquiry made by him on the line suggested by this Court in the decision rendered in the case of Ala Ramji Vs. The State of Gujarat and Others, . The matter was adjourned to 7-7-1992. On the said date, the Addl. Public Prosecutor submitted remark-sheet. It revealed from the remark-sheet that when the petitioner was released on parole for 15 days on the earlier occasion, he did not surrender in time and remained absconding for a period of 1411 days. He was arrested by the police and sent to jail. It also revealed that during this period, the petitioner was found involved in several criminal cases including the one namely; Unja State Bank of India dacoity case. Still, he was released on parole on 2-3-1990 and thereafter, for the period from 15-5-1990 to 25-5-1990, by the order of the State Government on the ground of partition of family property. Noticing these facts, the Court directed the Addl. Public Prosecutor to apprise the Court under what provisions of law, the State Government exercised the power to order release of the petitioner on parole? The case was adjourned to 13-7-1997. On 14-7-1997, Mr. M.G. Chauhan, under Secretary, Home Department filed affidavit stating inter alia, that at no point of time, the Government exercised power under Rule 18(1) of the Rules of 1959 for the release of the petitioner on parole. It was also stated that the Government also did not recommend to the I.G. (Prison) to grant parole or furlough to the petitioner considering the facts and circumstances. Since the affidavit did not satisfy the Court, the public prosecutor was directed to produce the concerned file, a perusal of the file, the Court noticed that the first round of parole leave started when Pushpaben, wife of the petitioner- Kishore Kanji submitted application dated nil to the then Home Minister praying for release of her husband on parole on the ground that his presence was necessary during partition of family property. The Court noticed an endorsement on the margin of the application showing that the same was received by the department on 19-2-90 along with certificate dated 2-1-90 issued by the Sarpanch, Chordi Gram Panchayat. Without collecting the necessary information, particularly with respect to his conduct in jail, the Hon"ble Minister directed the Addl. Secretary, Home Department on the same day, to grant parole to the present petitioner on special ground. The Court noticed the endorsement on the file "given parole for 15 days as ordered by the Minister". The Court also noticed that the endorsement is neither signed by the concerned Minister, nor by the Addl. Chief Secretary. However, a wireless message was sent to the I.G. (Prison), Ahmedabad conveying the decision of the Government to release the petitioner on parole for a period of 15 days. The I.G. (Prisons), by wireless message dated 22-2-1990 requested for reconsideration of the decision inviting the glaring facts that the petitioner enjoyed 5 times parole in all for 1435 days including 1141 days"

absconding period. During the said period, he indulged himself in a number of cases including the Unja Bank robbery case. However, the State Government by wireless communication dated 1-3-1990 directed the I.G. (Prison), to release the petitioner on parole. The Home Secretary also directed the I.G. (Prison) on phone to release the petitioner on parole. Still the I.G. (Prison), by wireless message dated 3-3-1990, again requested the State Government to reconsider its decision, as release of the petitioner will be hazardous. On the second request of the I.G. (Prison), the Government took a decision not to release the petitioner on parole. The things did not stop here and the second round of parole came to be initiated by Pushpaben when she made an oral representation to the Minister concerned for release of her husband-petitioner on parole repeating the same ground i.e. requirement of presence of the petitioner while distribution of family property. The concerned Hon'ble Minister recommended that the petitioner-Kishore Kanji Patel be released on parole on the ground that if there were any difficulties, he may be released with police escort. The Court noticed that on the left hand side of the margin the date given is 8-3-90. The concerned Secretary has noted "please put up the papers on 12-3-1990." The Court also noticed that the Home Department, by communication dated 16-3-1990, directed the IG (Prison) to release the petitioner on parole for 15 days. However, as the petitioner was involved in dacoity case, while he was on parole, he had simultaneously filed an application for bail before the Addl. Sessions Judge, Mehsana, who granted him bail. The said order was challenged by the State Government before this Court. The High Court, initially stayed the order releasing the petitioner on bail. On hearing the parties, by order dated 8-3-1990, the High Court set aside the order of the Addl. Sessions Judge, Mehsana granting regular bail to the petitioner. However, the Court directed to release the petitioner on temporary bail for a period of 10 days. In view of this, the Secretary (Home), under Communication dated 11-4-1990, recalled the order of parole and directed the IG (Prison), to release the petitioner on bail as directed by the High Court.

3. K.J. Vaidya, J. by oral judgment dated 14-7-97, considering the various provisions of Rules of 1959, came to the conclusion that the Minister or the Secretary is not competent authority to direct release of a prisoner on parole. The learned Judge, further held that even if the power vests in the Minister or Secretary, the power cannot be exercised arbitrarily without making preliminary enquiries regarding the truthfulness and genuineness of the ground pleaded for parole. On facts, the learned Judge arrived at the conclusion that the petitioner does not deserve to be released on parole as to show mercy on him will be uncharitable to the society and permitting him to commit further crime prejudicial to the social justice. The learned Judge severely criticised the Hon'ble Minister for abusing the power in a most arbitrary and illegal manner. The learned Judge further stated that the Court was not aware whether the arbitrariness and illegality noticed in the instant case is merely a tip of the iceberg or not. the learned Judge also severely criticised the Addl. Chief Secretary describing such officers as spineless and indiscreet. In view of this, the learned

Judge thought it desirable to direct the Home department to place on the floor of the Legislative Assembly in its every session particulars of the prisoners released on parole and/or furlough so as to provide necessary opportunity to its Members as well as press and the citizen thereby, the method and manner in which the power to release the prisoner on parole/furlough came to be exercised. The learned Judge also enumerated the items which can be specifically mentioned from the statements of facts to be placed before the legislative assembly. In the opinion of the learned Judge, it is only on the basis of such record, the members of the Legislative Assembly and the public can have an opportunity to know whether the powers of parole/furlough are exercised legally or not. The learned Judge also expressed that the said information in his view is absolute and inalienable right of each and every citizen. The learned judge further felt desirable if the observations made in the judgment are usefully incorporated by making special provision about the same in the Prisons (Bombay Furlough & Parole) Rules, 1959. While rejecting the Special Criminal Application the learned Judge directed the Registrar to immediately forward a copy of the judgment to the Chief Minister of State of Gujarat, the Chief Secretary and the Secretary, Legal Department, State of Gujarat.

4. The said judgment dated 14-7-1992 was placed before J.M. Panchal, J. on 7-9-1992. Panchal, J. having read the judgment prepared by K.J. Vaidya, J. agreed with the final order that the petition deserves to be dismissed. However, Panchal, J. expressed his disagreement with respect to the question raised in the first para of the judgment. In the opinion of Panchal, J. the question was not required to be considered and decided in this petition. In the opinion of Panchal, J. the issue raised is academic in nature and the settled practice is not to decide such issues in a petition under Article 226 of the Constitution of India. Panchal, J. expressed that it was not necessary to embark upon examination of the circumstances in which the Government thought it fit to direct the Inspector General of Prisons to release the petitioner on parole or to decide whether the Government has power under the Rules to do so. Panchal, J. after referring various decisions of the Supreme Court i.e. R.S. Nayak Vs. A.R. Antulay, and Sanjeev Coke Manufacturing Company Vs. Bharat Coking Coal Limited and Another, quoted the observations of the Supreme Court from the case of Kehar Singh and Others Vs. State (Delhi Administration), as follows:

This Court has frequently emphasized that the decision of the Court should be confined to the narrow points directly raised before it. There should not be any exposition of the law at large and outside the range of facts of the case, There should not be even obiter observations in regard. to questions not directly involved in the case." Panchal, J. also expressed his disagreement in castigating the alleged acts of commission and omissions of the then Addl. Chief Secretary and two Ministers. In the opinion of Panchal, J, the Court would not be justified in making observations against them without giving any opportunity of explaining their acts which are felt to be arbitrary and illegal. Reference is made to the judgment of the Supreme Court reported in S.K. Viswambaran Vs. E. Koyakunju

and Others, . It is not indispute that no notice was issued either to the then Addl. Chief Secretary or the concerned Hon"ble Ministers. Panchal, J. also disagreed with the direction to the Home Department to place on the floor of the Legislative Assembly in its every sessions particulars of the prisoners released on parole and or furlough by the Government so as to provide necessary opportunity to its members as well as the press and the citizens thereby to challenge the action of the Government if necessary.

5. The Joint Registrar, High Court of Gujarat made a submission before the Hon"ble the Acting Chief Justice stating that K.J. Vidya, J. formulated a question in para 1 of the judgment and made certain observations in respect of the manner in which the directions were given by the Minister and the Additional Chief Secretary for releasing the prisoner on parole. However, JM Panchal, J. in separate concurring judgment, did not agree with K.J. Vaidya, J. on the question referred in para 1. For convenience, the said para 1 is reproduced as under :-

Whether a Minister and/or for that purpose any other howsoever highly placed public servant under him, as he might be, has any power to order and/or to recommend even to release from the jail a convicted prisoner on parole, particularly when neither of them are "the competent authorities" so named under the relevant Prisons Act, 1948 and/or the Prisons (Bombay Furlough & Parole) Rules, 1959 made thereunder, as empowered to exercise the said powers? Further assuming that either of them had some such powers then even, whether they were justified in directing their subordinate authorities to release the convicted prisoner on parole without complying with the due procedure laid down in the said rules? These two, in short, are the fundamental questions touching when the most valued and basic culture of the supremacy of the "Rule of law" under the Constitution, which we feel privileged and obliged too, to deal with and decide as the apparent ominous clouds of the abuse and excess of powers are often found to have been looming large over the horizons, storming the public-interest and threatening the very survival of the existence of our cherished system of the "Rule of law".

The Joint Registrar referred to Section 392 of the Criminal Procedure Code and submitted that as there is difference of opinion between the two Judges, the matter may be directed to be placed before another Judge. This is how the matter has come to me.

6. Let me first locate and fix as to what exactly, I am required to do. As a third Judge, I understand, I have been asked to express opinion on the point or points on which both the learned Judges have differed. This takes me to a moot procedural question, as to whether the present reference is competent in absence of point of difference formulated by the differing Judges. At the outset, it must be pointed out that Section 392 of the Cr.P.C. as referred by the Joint Registrar is not attracted in the present case. Provisions of Section 392 is attracted in cases of criminal appeal heard by a Division Bench. The present application is a Special Criminal Application under Article 226 of the Constitution.

The relevant provision therefore, is Rule 186 of the Gujarat High Court Rules, 1993 which provides that in the case of difference of opinion between the Judges composing the Division Bench, the point of difference shall be decided in accordance with the procedure referred u/s 98 of the Civil Procedure Code. Sub-clause (iii) of Section 98 of the Rules reads as follows :

Nothing in this section shall be deemed to be altered or otherwise affect any provision of the Letters Patent of any High Court.

7. The High Court of Gujarat is governed by letters patent which also applies to parent High Court of Bombay and on bifurcation on 1-5-1960, the said Letters Patent continued to apply to the Gujarat High Court is successor High Court to the erstwhile High Court of Bombay. The Letters Patent are, therefore, the charter which would govern proceedings of the High Court and the procedures to be followed by it for deciding the matters falling within its jurisdiction. Clause 36 of the Letters Patent provides procedure of reference in the event of two Judges constituting the Bench have differed in opinion as to the decision to be given on any point. The Apex Court in *Reliance Industries Ltd. Vs. Pravinbhai Jasbhai Patel and others*, has held thus :-

Charter High Courts governed by the Letters Patent which were original Charter High Courts which were the successor High Courts like, Gujarat High Court, would be governed by the special procedure laid down by Clause 36 of Letters Patent.

Now to understand the procedure Clause 36 deserves to be noticed, which reads as follows:

36. Single Judges and Divisional Courts - And we do hereby declare that any function, which is hereby directed to be performed by the said High Court of Judicature at Bombay in the exercise of its original or appellate jurisdiction, may be performed by any Judge or any Division Court thereof, appointed or constituted for such purpose, in pursuance of section One hundred and eight of the Government of India Act, 1915 and if such Division Court is composed of two or more Judges and the Judges are divided in opinion as to the decision to be given on any point such point shall be decided according to the opinion of the majority of the Judges, if there shall be a majority, but if the Judges should be equally divided they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges, who have heard the case including those first heard it

On analysis of Clause 36, it emerges that when the Judges constituting the Division Bench are equally divided in opinion on any point then

(i) they shall state the point upon which they differ;

(ii) the case shall then be heard upon that point by one or more of the other Judges;

(iii) the point shall be decided according to the opinion of the majority of the Judges who have heard the case including those first heard it.

Thus, the scheme of Clause 36 is that, when the Judges are equally divided, they must state in clear terms the point on which they differ, instead of leaving to third Judge to search the point of difference, post the same and then express opinion. If the learned differing Judges sit together for formulating the point of difference, it will also give opportunity to narrow down the point of difference. After the point of difference is formulated, the matter shall be assigned to another or third Judge by the Chief Justice. The third Judge shall then hear the case on that point i.e. the point stated by the differing Judges and express his opinion on that point. For convenience, "that point" can be referred as point of reference. The case, thereafter again be placed before the same Bench which heard the matter first, i.e. the Bench which differed. The Bench shall decide the case according to the opinion of the majority. Thus the first requirement is the formulation of point of difference by the differing Judges. The third Judge can hear the case only on the point stated or formulated by the learned differing Judges. In case, the point is not stated by the differing Judges, there is no reference, as the third Judge has not been asked to hear the case on a specific point and express his opinion. Thus, in my view such a reference would be incompetent.

In the instant case, the differing Judges have not stated the point on which they have differed. It is of course true that in paragraph 1 of the judgment, K. J. Vaidya, J. has framed a question but Panchal, J. has disassociated himself by describing it as a judgment prepared by K.J. Vaidya, J. It will be appropriate to quote para I from the oral judgment of Panchal, J.—I have read the judgment prepared by my learned Senior Brother, a copy of which I received on or about 7th September, 1992. Though I agree with the final order that the petition deserves to be dismissed, I feel unable to agree with my learned Senior Brother that the questions raised in the first paragraph of his judgment deserve to be considered and decided in this petition. The reasons are as follows:

This clearly indicates that the question framed by K.J. Vaidya, J. was not an issue before the Division Bench when the Special Criminal Application was heard. In any case, there is a dispute on this factual aspect. A reading of the judgment of Panchal, J. shows that there is disagreement between the Hon"ble Judges with respect to the question raised in the first paragraph of the judgment. The learned Judges have also disagreed with respect to castigation of the alleged act and commissions and omissions of the then Addl. Chief Secretary and the two Ministers. There is also disagreement on the question with respect to giving direction to the effect that the Home Department should place before the Legislative Assembly in its every sessions, the particulars of prisoners released on parole and/or furlough. Admittedly, no points have been stated by the differing Judges. In absence of points formulated on which both the learned Judges have equally divided, in my view, the Reference is incompetent. The

question that whether such question can now be formulated is to be considered by the concerned Division Bench. Since one of the Hon"ble Judges K.J. Vaidya, J. has retired, whether the entire matter requires re-hearing is also a matter which requires to be considered by the Division Bench to which this matter is assigned by the Hon"ble Acting Chief Justice. The reference is accordingly returned being incompetent.

8. Let the matter be placed before the Acting Chief Justice for appropriate direction.