

**(2023) 05 BOM CK 0040**

**In the Bombay High Court**

**Case No :** Criminal Writ Petition No. 1561 Of 2022

Niyaz

APPELLANT

Vs

State Of Maharashtra And Others

RESPONDENT

**Date of Decision :** 03-05-2023

**Acts Referred:**

Prisons (Bombay Furlough And Parole) Rules, 1959 — Rule 4(4), 4(13)  
Terrorist And Disruptive Activities (Prevention) Act, 1987 — Section 3(3)  
Indian Penal Code, 1860 — Section 120B, 302

**Citation :** (2023) 05 BOM CK 0040

**Hon'ble Judges :** Mangesh S. Patil, J; Abhay S. Waghware, J

**Bench :** Division Bench

**Advocate :** Rupesh A. Jaiswal, G. O. Wattamwar

**Final Decision :** Dismissed

## Judgement

Abhay S. Waghware, J

1. Rule. Rule made returnable forthwith.
2. With the consent of parties, matter is heard finally at the state of admission.
3. By virtue of above captioned criminal writ petition, a life convict for the offence under Section 3(3) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (for short "TADA Act") and Section 120-B of Indian Penal Code (IPC), is taking exception to the order dated 01-08-2022 and 06-10-2022 passed by the respondent- State authorities, thereby refusing parole leave sought by the petitioner.
4. The petitioner has set up a case that he was convicted on 01-06-2007. He has spent more than 29 years of incarceration and including remission he has undergone 34 years 6 months of imprisonment.

According to him, vide application dated 13-11-2007, he applied for parole leave on the ground of ailment of his 70 years old mother. Alongwith said application,

he had annexed copy of medical papers. According to him, processing was done and at initial stage, the Assistant Commissioner of Police of Kurla Division also issued favourable report dated 18-12-2017. However, vide the impugned order dated 01-08-2022 respondent no.1 authority has rejected the said application. Learned Advocate took us through the grounds on which application was rejected.

5. Feeling aggrieved by the rejection of his application on said grounds, petitioner is knocking doors of this Court for following main relief as prayed in the prayer clause :

"A) By appropriate Writ, direction or order in like nature to allow the Petition, and quash and set aside order dated 1.08.2022 and 6.10.2022 passed by Respondent no.1 and Respondent no.3 respectively and thereby directing the Respondent no.2 to release Petitioner on Parole Leave."

6. We have heard learned Advocate for the petitioner and learned APP for the respondents-State at length.

7. The principal grounds pressed into service for challenging the impugned orders could be summarized as under :

I) Firstly respondent authorities failed to comprehend and appreciate very scope, object and purpose of the parole and furlough leave.

II) Secondly the genuine purpose of medial ailment of his 70 years old mother has been lost sight of and not considered.

III) Thirdly applications of similarly situated co-accused were time and again granted by various orders by the Principal Seat, Nagpur Bench, this Bench and the observations of the Hon Apex Court in the case of Asfaq vs. State of Rajasthan and Others [(2017) 15 SCC 55] .

IV) Fourthly authorities failed to consider the previous conduct of the petitioner and the fact that, on the previous occasions he never breached any parole and furlough rules and conditions.

8. Per contra, learned APP invited our attention to the rules framed under The Prisons (Bombay Furlough and Parole) Rules, 1959 as well as reports of Police authorities. He too invited our attention to the orders passed by Principal Bench, Nagpur Bench and this Bench in the case of Bashir Ahmed Usman Gani Khairulla v. State of Maharashtra and others (Criminal Writ Petition No.1119 of 2019 decided on 11-04-2019) as well as in the case of Zeeshan Abdul Mallik Khot v. State of Maharashtra and others (Criminal Writ Petition No.399 of 2021 decided on 17-09-2021, Smt.Rubina Suleman vs. State of Maharashtra (Criminal Writ Petition 4017 of 2016, decided by Principal Seat on 22-12-2016) and Kishor @ Prakash Lalsed Sadmek vs. Deputy Inspector General of Prison (East Region) Nagpur & Anr. (Criminal Writ Petition 1023 of 2017, decided by Nagpur Seat on 01-03-2018). He laid heavy emphasis on the statutory bar incorporated in the amended Rules. For the above reasons, he submits that no fault or infirmity

could be found in the impugned orders under challenge and he prays for dismissal of the petition.

9. Admittedly petitioner herein is a convict under the TADA Act. He is lodged at Aurangabad Central Jail and is suffering life imprisonment, in consequence to the judgment and order of conviction dated 06-06-2007. He seems to have applied for parole leave mainly on the ground of ailment of his 70 years old aged mother who, according to him, is suffering from Tuberculosis (T.B.). He has also annexed medical papers to that extent alongwith his application.

10. We have minutely examined the Notification dated 16-04-2018 issued by the respondent State authorities which is made a basis for rejection. Here both the sides have sought reliance on previous orders referred above. Resultantly, before advertng to the merits of the matter, we deem it fit to give a brief account and background of the previous orders passed by various Benches, which are now sought to be relied herein by both sides :

I) Judgment passed in Jafar s/o. Abdul Haq Shaikh v. The State of Maharashtra and Others (Criminal Writ Petition No.1293 of 2017) by Division Bench of this Court on 24-11-2017.

In this case, petitioner sought furlough leave. He was admittedly convicted for offence under Section 302 of Indian Penal Code in a bomb blast case. On minute scrutiny of the order passed by respondent authorities, it is seen that his application was rejected in the backdrop of provisions of Maharashtra Prison Manual 1979 Chapter-37 [Furlough and Parole] Rules, 4[4] and Government Resolution dated 26-08-2016, para 3[b][13] conveying that in view of the same, furlough cannot be granted. Similarly, ground of pendency of appeal in Hon'ble Apex Court questioning the conviction was raised.

In above writ petition, this Court observed that petitioner was not a convict of TADA. Secondly, he having not misused earlier liberty, and considering his past record as well as the aspect of his daughter was ready to stand surety, coupled with order dated 26.04.2017 passed by the Division Bench [Coram : B. P. Dharmadhikari & V. M. Deshpande, JJ.] in similar facts in Criminal Writ Petition No.196/2017 [Arun s/o Gulab Gawli & another v. State of Maharashtra & others] with Criminal Writ Petition No. 97/2017, and further holding that pendency of appeal was not a good ground and in view of order of Hon'ble Apex Court in the case of Asfaq (supra) petitioner was held to be entitled for furlough leave.

II) Order passed in Farooq Illiyas Motorwala v. State of Maharashtra and Others (Writ Petition No.4550 of 2018) by Division Bench of this Court at Principal Seat, on 29-10-2018.

In above writ petition before Principal Seat, petitioner therein had preferred application for grant of parole. The same was rejected by the respondent authorities. In this writ petition, by order dated 29-10-2018, after hearing both sides, the order of rejection was set aside and matter was remanded back to

respondent no.3 therein for fresh consideration in the light of decision of Hon'ble Apex Court in the case of Asfaq (supra) as well as decision of the Division Bench in the case of Bashir Ahmed Usman Gani Kairullah vs. The State of Maharashtra (Criminal Writ Petition No.3988 of 2017 decided on 07-08-2018) and Mohammad Moin Qureshi v. State of Maharashtra (Criminal Writ Petition No. 446/2018 decided on 04.07.2018)

III) Order passed in Criminal Writ Petition No.33 of 2019 (Mohammad Moin s/o. Faridullah Qureshi v. State of Maharashtra and Others ) with Criminal Writ Petition No.136 of 2019 (Niyaz Ahmed s/o. Iqbal Ahmed Shaikh vs. State of Maharashtra and Others) with Criminal Writ Petition No.137 of 2019 (Shaikh Ali s/o. Shaikh Umar vs. State of Maharashtra and Others) by Division Bench of this Court on 07-02-2019.

Thus it is noticed by us that, in above referred cases, inspite of rejection of applications for furlough by the respondents authorities in view of amended Rule 4(13), the above three writ petitions were allowed by this Bench precisely relying on the order passed by the Apex Court in the case of Mohammed Shamsudding v. The State of Rajasthan and Others, [Writ Petition (Criminal) No.235 of 2018] and observations of the Hon'ble Apex Court in the case of Asfaq (supra) were also taken into account.

IV) Here, before us learned APP has strongly opposed the relief by relying on orders passed in by the Division Bench of the Principal Seat in the cases of Bashir Ahmed Usman Gani Khairulla (supra) and Zeeshan Abdul Mallik Khot (supra) thereby rejecting petitions in the light of provisions laid down under amended Rule 4(13) of the Rules of 1959.

11. Here no doubt in the case of Jafar s/o. Abdul Haq Shaikh (supra) and Mohammad Moin s/o. Faridullah Qureshi (supra), this Bench did grant relief inspite of respondent authorities invoking amended Rules 4(4) and 4(13), however it is noticed that question as to what would be the effect of the statutory bar was not discussed and decided. On the contrary, in the case of Bashir Ahmed Usman Gani Khairulla's (supra) and Zeeshan Abdul Mallik Khot (supra), detailed discussion of previous orders was made. Consequently, it is emerging that since 2016, in the cases of Smt.Rubina Suleman (supra), Kishor @ Prakash Lalse Sadmek (supra) and thereafter in the cases of Bashir Ahmed Usman Gani Khairulla's (supra) and Zeeshan Abdul Mallik Khot (supra), consistent view has been taken about enforceability and applicability of the statutory bar incorporated by way of amendment. Needless to state, statutory bar being mandatory and having force of law, even in our considered opinion, it should prevail. Thus, in our considered opinion, rejection of application of the petitioner herein, on the grounds spelt out in the impugned orders, more particularly in the light of adverse Police report and the amended provision under Rule 4(13), cannot be faulted with.

12. The writ petition is dismissed.

13. Rule is discharged.