

(2014) 11 BOM CK 0131

In the Bombay High Court

Case No : Criminal Writ Petition No. 220 of 2014

Raju

APPELLANT

Vs

D.I.G., Prisons (E)(R) and Others

RESPONDENT

Date of Decision : 07-11-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 21
Penal Code, 1860 (IPC) — Section 302, 392, 393, 394, 395
Prisons Act, 1894 — Section 59

Citation : (2015) ALLMR(Cri) 1834 : (2015) CriLJ 1151

Hon'ble Judges : C.V. Bhadang, J;B.P. Dharmadhikari, J

Bench : Division Bench

Advocate : S.H. Bhatia, H.N. Jaipurkar, Mir Nagman Ali, P.P. Chobe, Smita Singalkar, M.M. Kalar, S.B. Saikhede, Geeta R. Tiwari, Advocates for the Appellant; B.H. Dangre, PP, C.S. Kaptan, Senior Advocate, A.S. Fulzele, N. Tripathi, D.B. Patel and S.S. Jachak, APP, Advocates for the Respondent

Judgement

C.V. Bhadang, J.—Rule. Rule made returnable forthwith. The writ petitions are heard finally with consent of the parties. Raju alias Rajabhau Bhagwantrao Wankhede is a convict undergoing sentence of life imprisonment for the offence punishable under Section 302 of the Indian Penal Code in Central Prison at Amravati. He had sent an application seeking furlough for meeting his family members, which was rejected by the respondent No. 1 on 14.2.2014 inter alia on the ground that on earlier occasion, when the petitioner was released on parole/furlough, he had overstayed the leave and on some of these occasions, he was even required to be arrested and brought back to the prison. Raju Wankhede has challenged this order in Criminal Writ Petition No. 220/2014. That petition is registered on the basis of a letter sent by the said prisoner, in which, we had appointed Ms. S.H. Bhatia to espouse the cause of the petitioner. That petition was amended on 17.4.2014 introducing a challenge to Rule 4(10) of the Prisons (Bombay Furlough and Parole) Rules, 1959 (1959 Rules for short) being ultra vires on account of violation of fundamental rights. In that view of the matter, by

an order dated 21.4.2014, notice was issued to the learned Advocate General and we had appointed Shri C.S. Kaptan, the learned Senior Counsel, to act as amicus curiae. In other petitions, except Criminal Writ Petition No. 567/2014 (Roshan Harichandra Mhaisekar v. D.I.G. (Prisons) (E)(R), Nagpur and one), the petitioners, who are convicts, are challenging the refusal of furlough leave by the Competent Authority. The furlough is refused on a similar ground, namely the petitioners overstaying the leave previously and on some of such occasions, they having been required to be arrested and brought back to the prison. In Criminal Writ Petition No. 567/2014, although the application is rejected on a similar ground of overstay, it appears that the petitioner was not required to be arrested. In other words, in that case, the petitioner Roshan Harichandra Mhaisekar had surrendered on his own accord, without intervention of the police machinery.

2. We have heard the learned counsels appearing for the petitioners in all these petitions. We have also heard Shri C.S. Kaptan, the learned Senior Counsel appointed to assist the court.

3. It is submitted on behalf of the petitioners that Rule 4(10) of the "Rules", acts to the detriment of the prisoners, although the prisoner may be prevented from circumstances beyond his own control from reporting back to the prison, within time. It is submitted that Rule 4(10) of the Rules has the effect of creating two classes of prisoners namely those who although had overstayed, surrender on their own accord and the ones, who are required to be arrested and brought back. It is submitted that at times a person who is required to be arrested might have overstayed for a lesser period, than the prisoner who surrenders on his own accord. However, in the former case, the petitioner would be denied the benefit of furlough. It is submitted that this results into invidious classification, which has no connection with the object sought to be achieved and thus is violative of Article 14 of the Constitution of India. It is also submitted that this results into deprivation of personal liberty, except according to procedure established by law, which is violative of Article 21 of the Constitution of India.

4. The learned APPs appearing for the respondents have submitted that the impugned rule cannot be interpreted to mean that it results into such two classes being formed so as to sustain the challenge under Article 14 or Article 21 of the Constitution of India. The learned amicus curiae has also supported the submissions made on behalf of the respondents. Both the parties have also placed reliance on certain decisions, to which, we propose to make a reference in the later part of the judgment.

5. The Prisons (Bombay Furlough and Parole) Rules, 1959 are framed by the Government, in exercise of the powers conferred by clauses (5) and (28) of section 59 of the Prisons Act, 1894 ("Act" for short). Rule 4 thereof, in particular sets out the circumstances when the prisoner shall not be granted furlough, which reads as under:

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

(1) Habitual prisoners.

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

(3) Prisoners convicted of offence under the Bombay Prohibition Act, 1949.

(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) Prisoners who, in the opinion of the Superintendent of the prison show a tendency towards crime.

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

(7) Prisoners confined in the Ratnagiri Special Prison (other than prisoners transferred to that prison for jail services).

(8) Prisoners convicted of offences of violence against person or property committed for political motives, unless the prior consent of the State Government to such release is obtained.

(9) A prisoner or class of prisoners in whose case the State Government has directed that the prisoner shall not be released or that the case should be referred to it for orders.

(10) Prisoners who have at any time escaped or attempted to escape from lawful custody or have defaulted in any way in surrendering themselves at the appropriate time after release on parole or furlough."

6. We are presently concerned with Rule 4(10) of the 1959 Rules. Rule 4(10) fell for consideration of a Full Bench of the Gujarat High Court in the case of Bhikhabhai Devshi Vs. State of Gujarat and Others, . Although there was no specific challenge as to the constitutional validity of the Rule, involved before the Full Bench, the question was about the interpretation of Rule 4(10) of the 1959 Rules and, as to whether, the word "shall" as used therein, is mandatory in the context of the provision of the Rule 4(10) and more particularly its later part and whether the word "shall" can be construed as "may" so as to enable the prison authority to consider the request for furlough of a prisoner who has surrendered late after release on furlough or parole. The Full Bench, after considering the provision of Rule 4(10) in depth and taking a survey of the various decisions holding the field, came to the conclusion that, in the context of later part of Rule 4(10), the word "shall" will have to be read as "may" and directory. The following observations in Para 35 are to the point.

"35. In view of the aforesaid discussion, it is clear that in the context of latter

part of R. 4(10) of the word "shall" will have to be read as "may" and directory. The prison authorities cannot reject as ineligible the request of due furlough of the prisoners who have surrendered late in past. The authorities have the power and duty to consider grant or refusal of such furlough due to the prisoners, having regard to the facts and circumstances of the case including the fact that the prisoner had surrendered late in past. That would be one of the relevant factors to be taken into account. Another relevant factor to be taken into account will be the view taken regarding the gravity of the offence while imposing punishment under S. 48A of the Act read with R. 128 of the Jail Manual."

7. The said decision of the Full Bench has been referred to in various subsequent decisions of this court including *Bharat alias Velji Govindji Panchal alias Lohar v. State of Maharashtra and others* (Criminal Writ Petition No. 1624/2004) decided on 2.5.2006. This court has held that the word "shall" as used in Rule 4(10) will have to be read as "may" and directory. It has been further held that Rule 4(10) cannot be construed as a total and automatic prohibition on grant of furlough to a defaulting and punished prisoner. The prison authorities cannot automatically reject as ineligible the request of due furlough of the prisoners who have surrendered late in past. The authorities have the power and duty to consider grant or refusal of such furlough due to the prisoners, having regard to the facts and circumstances of the case including the fact that the prisoner had surrendered late in past. It has been held that these would be some of the relevant factors to be taken into account.

8. In *Ramchandra Raghu Naik Vs. State of Maharashtra*, again the question was, whether furlough can be refused in view of overstay by the prisoners. In that case, the prisoner had overstayed for a period of 93 days and on another occasion for 604 days and even thereafter was required to be arrested for the purpose of bringing him back to the prison. It was held that such a person does not deserve any leniency. As regards Rule 4(10), is concerned, the Division Bench has clarified that this is not to say that even in the case of such person, the authorities cannot exercise their discretion. That, however, would depend on facts of each case. For example, in a case where the prisoner is compelled to overstay on account of some serious illness, either of himself or his family member or some other justifiable cause. The Division Bench has further held that the overstay without any justification and without any reason can hardly be condoned and no unwarranted leniency can be shown to such a person applying under Rule 4(10) of the 1959 Rules. The Division Bench in the case *Ramchandra Raghu Naik (supra)* has referred to the Full Bench decision in the case of *Bhikhabhai Devshi Vs. State of Gujarat and Others*, .

9. The question in the present petition is as to the validity of Rule 4(10) of the 1959 Rules, when tested on the touch stone of Article 14/Article 21 of the Constitution of India.

10. Shri Ali, the learned counsel for the petitioners, has placed reliance on two decisions of the Hon"ble Supreme Court in *Commissioner of Income Tax, Madras*

Vs. Andhra Chamber of Commerce and Others, and Sunil Batra Vs. Delhi Administration and Others etc., in order to contend that even a prisoner has the fundamental right under Article 21 of the Constitution of India. It is submitted that incarceration in jail cannot exclude the application of the guarantee as contained in Article 21.

11. In the case of Sunil Batra Vs. Delhi Administration and Others etc., , it has been inter alia held that a prisoner does not shed his basic constitutional rights at the prison gate and where the rights of the prisoner either under the constitution or other law are violated the writ power of the court can and should run to his rescue. In the case of Rakesh Kaushik Vs. B.L. Vig, Superintendent, Central Jail, New Delhi and Another, , the Hon"ble Supreme Court held that a court sentence does not deprive the prisoner of his fundamental rights. The court posed a pertinent question, as to whether, a prison term in Tihar Jail is a post-graduate course in crime?. It was held that the fundamental rights did not forsake prisoners, and that the penological purpose of sentence was, importantly reformatory, even though deterrent too.

12. In the case of Charles Sobraj Vs. Supdt. Central Jail, Tihar, New Delhi, , the Hon"ble Apex Court has held as under:

"Imprisonment does not spell farewell to fundamental rights although, by a realistic reappraisal, courts will refuse to recognise the full panoply of Part III enjoyed by a free citizen."

13. Thus, it is plain that the application of Article 21 and the availability of fundamental right thereunder, cannot be wholly excluded in the matter of prisoners serving sentence on conviction. The question is, whether the application of Rule 4(10) of 1959 Rules, has the effect of taking away the liberty of such a prisoner without authority of law, which is prohibited under Article 21 of the Constitution of India. At this stage, it may not be out of place to mention that a prisoner serves a sentence, which is imposed on a trial, which is conducted in accordance with law, Rule 4(10) of 1959 Rules only governs the matter of grant or refusal of a furlough. The grant or refusal of parole and furlough is governed by the rules which are framed in exercise of powers conferred under the Prisons Act and the Rules are statutory in nature. Thus, Rule 4(10) which is statutory in nature, only governs, one of the circumstances in which furlough cannot be granted.

14. As noticed earlier, the Full Bench of Gujarat High Court in the Case of Bhikhabhai Devshi Vs. State of Gujarat and Others, has held that the later part of Rule 4 (10) namely, "where the prisoner has defaulted in any way in surrendering himself at the appropriate time after release on parole or furlough", the word "shall" as used in the opening part of Rule 4 has been held to be directory. It has been held that it should be read as "may". This view has also found favour with the Division Bench in Criminal Writ Petition No. 1624/2004 (Bharat alias Velji Govindji Panchal alias Lohar v. The State of Maharashtra and

others). Even in the case of Ramchandra Naik (supra), this court has held that the question would depend on facts of each case and where the petitioner can justify the overstay on account of the circumstances which may be beyond his control such as where the prisoner is compelled to overstay on account of some serious ailment or illness, either of himself or his family member, or for some other justifiable cause, certainly an exception can be made. It can thus be seen that this court had time and again held that Rule 4(10) cannot be read to mean as imposing absolute fetters on the powers of the competent authority to release the prisoner on furlough particular when the case of such a prisoner falls within the later part of Rule 4(10) of the 1959 Rules.

15. Shri Kaptan, the learned Senior Counsel has placed reliance on a decision of this court in the case of Anil Laxman Jawade Vs. State of Maharashtra and Another, . In that case, on earlier occasion, the petitioner did not surrender on due date and was required to be arrested by the police. His request for release was rejected under Rule 4(10) of the 1959 Rules. The challenge was to the rejection of such a request. The principal submission which was canvassed before the Division Bench was that, when substantive punishment under the Prison Rules was already awarded by the Competent Authority to the petitioner for late surrender, the legal right to get furlough leave in future, cannot be taken away. This court on noticing the provisions of Rule 9 of the 1959 Rules, which entitles the prisoner to make a fresh application for furlough leave, after expiry of six months, from the date of rejection of his previous application, held that the conjoint reading of Rules 4 and 9 of the 1959 Rules would show that the authorities can consider such an application if made after an expiry of six months. This court found that on a harmonious interpretation of these two rules, although the Jail Authorities are entitled to reject the application for furlough leave on the ground of late surrender, the prisoner can always make a fresh application for furlough leave after six months and by necessary implication, authorities will have to consider the same, on its own merits.

16. It would be necessary to refer to the decision of the Division Bench of this Court in Criminal Writ Petition No. 1624/2004 (Bharat alias Velji Govindji Panchal alias Lohar v. The State of Maharashtra and Ors.) decided on 2.5.2006. That was a common judgment delivered in Criminal Writ Petition Nos. 1624/2004, 3019/2005 and 375/2006. On behalf of the respondents our attention is invited to the observations in paragraph No. 27 onwards in order to submit that this Court had found that the prisoners overstaying the period of furlough are of two types. Those who are stayed and are required to be brought back by use of police machinery and those who have overstayed but surrendered on their own accord. In paragraph No. 30 of the judgment this Court has observed that in respect of the prisoners belonging to the first category, namely, those who are required to be arrested and brought back to the prison, the prison authorities would be justified in rejecting their applications on that ground.

17. We find that the prisoners in two out of the three criminal writ petitions

which are decided by the common judgment, namely, in Writ Petition Nos. 1624/2004 and 375/2006 the prisoners were absconding and were required to be arrested while in Criminal Writ Petition No. 3019/2005 the prisoner had overstayed only for a period of 56 days and had himself surrendered. Insofar as the prisoner in Criminal Writ Petition No. 1624/2004 is concerned, he was absconding for more than 13 years and the police authorities were required to take strenuous efforts and were required to go to Rajasthan and ultimately he was arrested and brought back. In Criminal Writ Petition No. 375/2006, the prisoner was absconding for almost two years and reason given by him for not reporting was illness of his mother. This Court considered that the nature of the illness was not stated and no medical certificates were produced. This Court was found that his case was not genuine and had the police not been able to trace him, the petitioner therein would never have reported back on his own. It would be thus clear that although this Court had observed that the prisoners would fall into two categories on the basis of the fact that they were required to be arrested and those who surrendered on their own, in the later part of the judgment, the Division Bench did consider the individual circumstances in which the petitioners had overstayed. As noticed earlier, in one of the cases the period for which the petitioner had overstayed was to the extent of 13 years and in other case the reason shown was not found to be genuine. What we are trying to trace is that on consideration of the individual facts as obtaining, this Court found that the petitioners therein were not entitled to the grant of furlough.

18. It would be significant to note that the later part of Rule 4(10) of the 1959 Rules speaks of "the prisoners having defaulted in any way" in surrendering themselves at the appropriate time after release on parole or furlough. Thus, the Rule as it stands does not make a reference to as to whether the prisoner was required to be arrested or otherwise. As noticed earlier, this Court in various decisions has found that it would be for the authorities to consider all the attending circumstances and the fact that on earlier occasion the prisoner was required to be arrested would be one of such circumstance to be considered while deciding as to whether the prisoner would be disentitled to release on furlough under Rule 4(10) of the 1959 Rules. Thus, we find that in view of the Rule as it stands and the interpretation placed on the same, the same cannot be held to impinge upon the fundamental rights guaranteed under Article 14 or 21 of the Constitution of India. In that view of the matter, the challenge to the said provision will have to be negated. In view of the discussion as above, we find that the individual request made by the petitioners herein will have to be sent back to the competent authorities for consideration afresh in accordance with law. The applications made by the petitioners for grant of furlough shall accordingly stand revived before the competent authorities. The respondents/competent authorities shall take a decision on the same within a period of four weeks from today. The criminal writ petitions are disposed of accordingly. Rule is made absolute in the aforesaid terms.

The fees payable to the learned Counsel appointed for the petitioners are

quantified at Rs. 1500/- each.