
(2012) 06 RAJ CK 0012

In the Rajasthan High Court

Case No : CIVIL WRIT PETITION (PAROLE) No.2138 of 2011

Umesh Kumar Singh @ Munna Singh

APPELLANT

Vs

The State of Rajasthan and Others

RESPONDENT

Date of Decision : 15-06-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 374, 389, 389(1), 401, 401(6)
Penal Code, 1860 (IPC) — Section 302
Prisons Act, 1894 — Section 59

Citation : (2012) CriLJ 4218

Hon'ble Judges : Raghuvendra Singh Rathore, J; Meena V. Gomber, J

Bench : Division Bench

Advocate : Anshuman Saxena, Mr. Lakhan Singh Tomar and others, for the Appellant; G.S. Rathore, Javed Choudhary and Mr. Amit Punia, for the Respondent

Final Decision : Dismissed

Judgement

Justice Raghuvendra S. Rathore

1. All these writ petitions involve a similar issue and therefore they are being decided by this common order. The petitioners have filed these writ petitions to invoke the jurisdiction of this Court under Article 226 of the Constitution of India, challenging the order of the authorities concerned by which their applications for parole had been rejected. Therefore they have, in these writ petitions, prayed that they be granted parole by this Court. Another common feature of these petitions is that regular appeals have been filed u/s 374 Cr.P.C. before the High Court against the judgment passed by the learned trial court, whereby they have been convicted for the offence, inter alia, u/s 302 IPC and sentenced for life imprisonment, which are still pending. Further, they had filed applications for suspension of execution of sentence awarded to them during the pendency of the regular appeals before the High Court but the same have been dismissed.

2. An issue of general importance arises in these cases and therefore, we intend to deal with them elaborately. In cases of heinous offences punishable with death

or life imprisonment, appeals are filed before the Division Bench in the High Court. Application for suspension of sentence, during the pendency of the appeal, are also filed. But in some cases, after considering the application for suspension of execution of sentence on merits, High Court had declined the prayer and rejected such application. The appeal against the judgment of the learned trial court remains pending. It is often found that thereafter the accused is released from custody on parole. In State of Rajasthan, initial parole is granted for 20 days. Second parole is granted for 30 days and third parole is granted for 40 days. Thereafter, the accused applies for permanent parole. Broadly speaking, the eligibility for seeking parole is that the accused should have undergone 1/4th of imprisonment awarded to him; his conduct should be good in jail; no objection is sought from the officer of the Social Welfare Department and the Superintendent of Police of the area where the accused is to spend his period of parole. All these conditions, by enlarge, are not difficult to be fulfilled by a prisoner. An application for parole is filed before the jail authorities and the same is granted. However, in some cases, such application is rejected. On refusal of any of the applications for aforesaid paroles or permanent parole by the jail authorities, such orders are then challenged before the High Court, under its writ jurisdiction.

3. In State of Rajasthan, the rules for release on parole were framed in the year 1958. In exercise of the powers conferred by Section 401 (6) of the Code of Criminal Procedure, 1898 (Section 432 under Cr.P.C., 1973), the Government of Rajasthan had made the rules which were to be called as Rajasthan Prisoners Release on Parole Rules, 1958. These rules were not to apply to persons under sentence of imprisonment for an offence against any law relating to a matter to which the executive powers of Union of India extended. Such persons are to be governed by the central rules made by Ministry of Home Affairs, Government of India. Under Rule 1(c) of the Rules of 1958, it is provided that the Rules shall not apply to persons under a sentence of imprisonment for an offence against any law relating to a matter to which the executive power of Union of India extends. Such persons shall be governed by the Central Rules made in the Notification of the Government of India, Ministry of Home Affairs No.40/32/55-Judl.I dated 9th November, 1955.

In the cases of convict sentenced to imprisonment for the offence under NDPS Act or against any such law relating to a matter to which the executive powers of the Union of India extends, the Rules of 1958 would not apply and the Rules of 1955 framed by the Central Government are applicable for release on parole. Recently, a Division Bench of this Court in the case of Shambhu Dayal vs. State of Rajasthan & Ors. (12294/2011), decided on 22.03.2012, has answered a reference in the term that, "The Rajasthan Prisoners Release on Parole Rules, 1958 are not applicable in the cases where conviction is under NDPS Act and also where convict is sentenced to imprisonment to an offence against any law relating to a matter to which executive powers of Union extends and such cases have to be dealt with in accordance with the Rules of 1955 framed by the Central

Government, Ministry of Home Affairs, vide Notification dated 9th November, 1955 published in the Gazette of India on 19th November, 1955."

4. For the purpose of release of the prisoner on parole on first, second and third parole, revocation of orders of prisoners released on parole and other like matters under the rules is to be considered by District Parole Advisory Committee. The said committee consists of the District Magistrate (Chairman), Superintendent of Police, Superintendent/ Dy. Superintendent of Jail and the Probation Officer.

In case of release of those persons on parole whose cases do not fall within the purview of the District Parole Advisory Committee then it is to be decided by the Prisoners Parole Advisory Committee. The said committee decides as to release of those persons on parole in respect of whom the functions of the District Parole Advisory Committee has been assigned to the State Committee; revocation of orders of prisoners released on parole and other like matters arising under the rule which the State Committee is required to deal with. The Prisoners Parole Advisory Committee consists of (i) Inspector General of Prisons, Rajasthan (Chairman); (ii) Deputy Secretary to Government Home (Jail) Department; (iii) Deputy Inspector General of Prisoners (concerned zone); (iv) Prison Psychologist and (5) Chief Probation Officer.

5. Under Rule 3 of the Rules of 1958, a prisoner has to move an application for grant of parole in form-I and this is entered in the register. It is further provided that the Superintendent of Jail will put his remarks on the application and forward the same in original to the District Magistrate of the District in whose jurisdiction the prisoner wants to spend his parole. A copy is also to be sent to the Probation Officer if there is Probation Officer appointed and if felt necessary the Superintendent of Police and District Magistrate will consult him. They will give their remarks whether the convict should be released on parole or not. On the recommendations of the State Committee/ District Committee a prisoner can be released on parole on his furnishing personal bond and surety bonds. Rule 9 provides for the period of parole. A person who has completed, without remission one-fourth of his sentence, subject to good conduct in the jail may be released on first parole for 20 days, including the days of journey to home and back; for 30 days on second parole provided his behaviour has been good during the first parole and for 40 days on third parole provided his behaviour has been good during the second parole.

If during the third parole also, the prisoner has behaved well and his character has been exceedingly well and if the conduct of the prisoner has been such that he is not likely to relapse into crime, his case may be recommended to the State Government through the State Committee for permanent release on parole, on such conditions as deemed fit by the Superintendent Jail and the District Magistrate concerned. The condition to be imposed is that while on parole if the prisoner commits any offence or abets, directly or indirectly commission of any offence he will have to undergo the unexpired portion of the sentence in addition

to any sentence imposed upon him by reasons of such an offence. In case the permanent release on parole is rejected, the prisoner will be eligible for release on parole for 40 days every year, subject to the same conditions for the remaining period of his sentence.

6. This is the normal parole to which each prisoner is entitled and as soon as he becomes eligible on completion of one-fourth of his sentence including remission, he is entitled to 20, 30 and 40 days parole every year respectively and even thereafter in case he is not released on permanent parole, he is entitled for parole of 40 days every year. It may be mentioned here that this rule shall be subject to Section 433A Cr.P.C. Permanent parole to a person sentenced to life imprisonment after December 1978 for an offence which is also punishable with death can be granted only after he has undergone 14 years of actual imprisonment. However, he would be entitled to regular yearly paroles in case the conditions given in Rule 9 of the Parole Rules are fulfilled, after he has completed five years" imprisonment including remission. As under rule 15 of the Parole Rules life sentence has been reckoned as 20 years, hence one-fourth would be five years. Thus, under the rules, a life convict is entitled to parole every year, if other conditions are satisfied, after having undergone five years" sentence including remission.

7. Apart from regular parole, there is provision for release on parole in emergent cases. The Superintendent of Jail can grant parole upto a period of seven days subject to confirmation by the Inspector General, Prisons. The Inspector General of Prisons can grant parole for not more than 15 days. The emergent cases involving humanitarian considerations have been given in rule 10A of the Parole Rules as; critical condition on account of illness of any close relations, death of any such relation; serious damage to life or property from any natural calamity, and marriage of a prisoner, his son daughter, brother and sister. A copy of the order for release of a prisoner on parole is to be endorsed to the next higher authority giving full circumstances under which parole has been allowed and if the higher authority does not approve the grant of parole, he may ask the authority granting parole to revoke the same.

8. Under the Parole Rules, the parole period is regarded as special remission and the aim in granting parole is to encourage good conduct. However, certain prisoners have been made ineligible for release on parole and they are: persons whose ordinary place of residence is outside the State of Rajasthan or who have been convicted by a court of another State; persons convicted under the Explosive Substances Act, 1908; prisoners who have escaped from the Jail or Police custody or attempted to escape; persons convicted for the offences mentioned in rule 14(d) have also been made ineligible for release on parole unless they have undergone one-fourth of sentence inclusive of remission and the Superintendent of Jail recommends the case in consultation with the District Magistrate with special reasons therefor.

While granting parole to prisoners sentenced u/s 302 IPC, the circumstances of

the case under which the murder was committed, shall be kept in view and favourably considered for parole. In case of breach of condition, parole order shall be revoked and punishment can also be awarded for breach of conditions of parole.

9. Release on parole for a short period or even the permanent release on parole is not very much different from the shortening of sentence. In cases of temporary release on parole, a prisoner has to surrender and undergo the remaining period of his sentence while in cases where the sentence has been shortened, the punishment is complete but he can be rearrested when the release is conditional and he commits the breach of the terms of release as contained in form no.11 appended to the Rules. After permanent release on parole also, a person can be ordered to undergo the unexpired part of his sentence in case he commits a breach of the conditions. The permanent release on parole is always conditional, as the effect of a permanent parole is the commutation or remittance of the sentence. This benefit shall be available to prisoners convicted of offences for which death sentence is also one of the sentences but he is to be released only after undergoing 14 years" actual punishment as the Rules cannot override the provisions of the Code. Under Rule 15(c) of the Parole Rules, remission already earned by the prisoner as well as the period of release on parole shall be counted as imprisonment served by him.

10. The duty of a Judge is to award a proper punishment to the guilty and the judicial function culminates in a judgment pronounced in accordance with law. Such judicial verdict can be set aside only in an appeal as provided by law. Thereafter, the function of the executive commences and it has to give effect to the judicial verdict. The appropriate Government may u/s 432 Cr.P.C., (a) suspend the execution of the sentence; or (b) permit the whole or part of the punishment; (c) impose suitable conditions; (d) cancel the suspension or remission if conditions are not fulfilled; and (e) the appropriate Government may by general rules or special orders give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with.

11. u/s 433 Cr.P.C., the appropriate Government has the power to commute a sentence without the consent of the person sentenced and this power includes to commute (a) a sentence of death for any other punishment provided by the IPC; (b) a sentence of imprisonment for life for imprisonment for a term not exceeding fourteen years; or (c) a sentence of rigorous imprisonment for simple imprisonment or fine; and (d) a sentence of simple imprisonment for fine.

12. However, Section 433A Cr.P.C. places embargo on the powers of the Government u/s 432 and 433 Cr.P.C. and this relates to those cases (a) where the sentence is for imprisonment for life for an offence for which death is one of the punishments provided by law; (b) sentence of death imposed on a person has been commuted u/s 433 into one for imprisonment for life. In both these cases, such persons shall not be released unless they have served 14 years;

actual imprisonment.

13. The rules framed by the State Government for shortening of sentences under the Prisons Act, 1984, the Rajasthan Prisoners (Release on Parole) Rules, 1958 and the Rajasthan Prison Rules, 1948 have to be subject to the above provisions of the Code of Criminal Procedure and cannot be contrary to the statute itself.

14. Apart from the aforesaid powers of the State to suspend the execution of sentence, cancel suspension; remission of sentence etc., powers have also been conferred on the judiciary to pass orders in a pending case, in respect of release of a convicted person. It would be useful to consider here the provisions of Section 389(1) of the Code of Criminal Procedure:

"Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond."

15. The aforesaid provision specifically deals with a situation in which an appeal is pending. The appellate court is seized with the matter and thus entitled to pass such orders as it thinks fit and proper to suspend the sentence. Therefore, provision with regard to the powers to be exercised by the State, through its executive, deals with a situation in which pendency of appeal is not envisaged whereas in the case of the power of the courts pendency of an appeal is postulated. In other words, the powers of the State deals with the person sentenced to punishment for an offence, in general terms but the powers of the judiciary are special where after awarding sentence an appeal is pending before the appellate court. Therefore, the powers of the judiciary must be out of the operation of the State through its executive. A question then arises, as to whether the powers of the State for suspension of sentence; release from custody on parole etc. do cover the entire period after the order of conviction of sentence, even when an appeal is pending in the appellate court and section 389 can be availed off by an appellant.

16. The question with regard to the extent of power between the executive and the judiciary had come up for consideration before a Constitution Bench of the Hon'ble Supreme Court in the case of K.M. Nanavati Vs. The State of Bombay, The court observed as follows:

"16..... Section 426, therefore, deals specifically with a situation in which an appeal is pending and the Appellate court has seisin of the case and is thus entitled to pass such orders as it thinks fit and proper to suspend a sentence. It will thus be seen that whereas Chap. XXIX, in which S.401 occurs, deals with a situation in which pendency of an appeal is not envisaged, S. 426 deals with a situation in which pendency of an appeal is postulated. In other words, Chap. XXIX deals with persons sentenced to punishment for an offence simpliciter in general term whereas S.426 deals with a special case and therefore must be out of the operation of S. 401. But it has been vehemently argued by

the learned Advocate General that the words "at any time" indicate that the power conferred by S. 401 may be exercised without any limitation of time. In the context of S.401 "any time" can only mean after conviction, because there cannot be any sentence before conviction. The question then is: "Does it cover the entire period after the order of conviction and sentence even when an appeal is pending in the appellate court and S. 426 can be availed of by the appellant."

17. It will be seen that S. 426 is as unfettered by other provisions of the Code as S.401 with this difference that powers under S. 426 can only be exercised by an appellate court pending an appeal. When both the provisions are thus unfettered, they have to be harmonised so that there may be no conflict between them. They can be harmonised without any difficulty, if S. 426 is held to deal with a special case restricted to the period while the appeal is pending before an appellate court while S. 401 deals with the remainder of the period after conviction. We see no difficulty in adopting this interpretation nor is there any diminution of powers conferred on the executive by S. 401 by this interpretation. The words "at any time" emphasised that the power under S. 401 can be exercised without limit of time, but they do not necessarily lead to the inference that this power can also be exercised while the court is seized of the same matter under S. 426."

21. In the present case, the question is limited to the exercise by the Governor of his powers under Art. 161 of the Constitution suspending the sentence during the pendency of the SLP and the appeal to this Court; and the controversy has narrowed down to whether for the period when this Court is in seisin of the case the Governor could pass the impugned order, having the effect of suspending the sentence during that period. There can be no doubt that it is open to the Governor to grant a full pardon at any time even during the pendency, of the case in this Court in exercise of what is ordinarily called "mercy jurisdiction". Such a pardon after the accused person has been convicted by the Court has the effect of completely absolving him from all punishment or disqualification attaching to a conviction for a criminal offence. That power is essentially vested in the head of the Executive, because the judiciary has no such "mercy jurisdiction". But the suspension of the sentence for the period when this Court is in seisin of the case could have been granted by this Court itself. If in respect of the same period the Governor also has power to suspend the sentence, it would mean that both the judiciary and the executive would be functioning in the same field at the same time leading to the possibility of conflict of jurisdiction. Such a conflict was not and could not have been intended by the makers of the Constitution. But it was contended by Mr. Seervai that the words of the Constitution, namely, Art. 161 do not warrant the conclusion that the power was in any way limited or fettered. In our opinion there is a fallacy in the argument in so far as it postulates what has to be established; namely, that the Governor's power was absolute and not fettered in any way. So long as the judiciary has the power to pass a particular order in a pending case to that extent the power of the Executive is limited in view of the words either of Ss. 401 and 426 of the

Code of Criminal Procedure and Arts. 142 and 161 of the Constitution. If that is the correct interpretation to be put on these provisions in order to harmonise them it would follow that what is covered in Art. 142 is not covered by Art. 161 and similarly what is covered by S. 426 is not covered by S. 401. On that interpretation Mr. Seervai would be right in his contention that there is no conflict between the prerogative power of the sovereign State to grant pardon and the power of the courts to deal with a pending case judicially.

25. As a result of these considerations we have come to the conclusion that the order of the Governor granting suspension of the sentence could only operate until the matter became sub judice in this Court on the filing of the petition for special leave to appeal. After the filing of such a petition this Court was seized of the case which would be dealt with by it in accordance with law. It would then be for this Court, when moved in that behalf, either to apply R. 5 of O. XXI or to exempt the petitioner from the operation of that rule. It would be for this Court to pass such orders as it thought fit as to whether the petitioner should be granted bail or should surrender to his sentence or to pass such order or further orders as this Court might deem fit in all the circumstances of the case. It follows from what has been said that the Governor had no power to grant the suspension of sentence for the period during which the matter was sub judice in this Court."

17. Therefore, in our considered opinion, the powers of the State Government under the Parole Rules cannot be exercised so long as an appeal by a convicted person is pending and the appellate court is in seisin of the case. The Parole Rules cannot stultify or thwart the judicial process and even in the most emergent circumstances the courts will be open to grant relief to a convict in deserving cases.

18. Learned counsels for the petitioners have, in support of their contentions, heavily relied upon the case of Bhanwar Lal Godara & Ors. Vs. State of Rajasthan & ors- 2005(1) WLC (Raj.) 93. In the said case, while considering the question, as to whether the provisions contained under the Rajasthan Prisoners (Release on Parole) Rules, 1958 can be invoked during the pendency of the criminal appeal. Reliance has also been placed on the case of K.M. Nanavati (supra) and para 21 has been extensively considered.

19. A close look to the observations made in Para 21 by their Lordships of the Supreme Court in K.M. Nanavati's case which has been quoted in the case of Bhanwar Lal Godara would reveal that it has been specifically observed that, "But the suspension of the sentence for the period when this Court is in seisin of the case could have been granted by this Court itself. If in respect of the same period the Governor also has power to suspend the sentence, it would mean that both the judiciary and the executive would be functioning in the same field at the same time leading to the possibility of conflict of jurisdiction. Such a conflict was not and could not have been intended by the makers of the Constitution.

Further, so long as the judiciary has the power to pass a particular order in a pending case to that extent the power of the Executive is limited in view of the words either of Ss. 401 and 426 of the Code of Criminal Procedure and Arts. 142 and 161 of the Constitution".

20. Even then it has been held in the case of Bhanwar Lal Godara (supra) that "when the application of a prisoner seeking suspension of sentence is rejected and criminal appeal is pending, in that eventuality the prisoner, in our opinion still has a right to move an application for parole if he has completed with remission, one fourth of his sentence subject to his good conduct in jail."

21. We are respectfully of the view that the aforesaid observation made by the learned court in the case of Bhanwar Lal Godara (supra) is not in consonance with the principle of law laid down by the Constitution Bench of the Supreme Court in the case of K.M. Nanavati (supra). It is rather in conflict with the principle as laid down by the Constitution Bench of the Hon"ble Supreme Court in that case.

22. Besides, the learned counsels for the petitioners have placed reliance on the case of S.Sant Singh Vs. Secretary Home Department, Government of Maharashtra- 2006 Cr.L.J. 1515, decided by the Full Bench of the Bombay High Court, wherein it has been held that the Government or the competent authority can grant parole to convicts under the Rules framed under the Prisons Act. The power of the executive to grant parole under the Prisons Act and Rules could not create any conflict with the power of the court to grant bail or suspend the sentence or conviction u/s 389 Cr.P.C.

23. In order to properly appreciate the principle of law laid down by the Full Bench of the Bombay High Court in the case of S. Sant Singh (supra), it would be appropriate to consider the relevant facts as well as the provisions of law under which it was considered. In that case, the learned Sessions Judge, by his judgment dated 30.4.2002, convicted the petitioner u/s 302 IPC. The said judgment was challenged by the petitioner in an appeal, which was pending before the High Court. During the pendency of appeal, the petitioner preferred an application for parole on the ground that his wife was required to be operated. The said application came to be rejected and against it the petitioner preferred a writ petition before the High Court. The writ petition came to be dismissed as the petitioner had remedy of preferring an appeal against the order of rejection of parole. Thereafter, the petitioner preferred an appeal before the State Government which came to be dismissed. Being aggrieved by the said order of the State Government rejecting his appeal for grant of parole, the petitioner preferred a writ petition before the High Court.

24. The relevant provisions of law under which the case of S.Sant Singh (supra) was being considered, had come to be framed by the government of then Bombay, to be known as Prison Rules, in exercise of powers conferred by clauses (5) and (28) of Section 59 of the Prisons Act, 1894, in its application to then

Bombay, which deals with parole as under:

18. Authorities competent to sanction parole.--The authority competent to sanction release of a convicted prisoner on parole (hereafter referred to as "the Competent Authority") shall be :--

(i) the State Government in the following cases:-

(a) prisoners convicted by Courts situated outside the State of Maharashtra,

(aa) prisoners convicted by courts situated within the State of Maharashtra, but confined in prisons situated outside the State,

(b) prisoners convicted by political offences,

(c) any other case or class of cases wherein the State Government has directed that the case or specified class of cases wherein the State Government has directed that the case or specified class of cases be referred to it for orders,

(ii) The Commissioner of the Division, in all other cases in a Division, in which the convicted prisoner is confined, or when the Divisional Commissioner is out of headquarters, the Additional Divisional Commissioner:

Provided that if an application for release on parole or for an extension of the period of parole is refused by the Divisional Commissioner or the Additional Divisional Commissioner, as the case may be, an appeal shall lie to the State Government, whose decision thereon shall be final.

(2) Notwithstanding anything contained in sub-rule (1), the Superintendent of Prison shall also be the Competent Authority to release a convicted prisoner on parole for a period not exceeding fifteen days, in case of death of his close relation i.e. father, mother, brother, sister, spouse or child of the prisoner.

19. When a prisoner may be released on parole -- A prisoner may be released on parole for such period not exceeding thirty days at a time as the Competent Authority referred to in rule 18, in its discretion may order, in cases of serious illness, or death of nearest relative such as mother, father, sister, brother, children, spouse of the prisoner, or in case of natural calamity such as house collapse, floods, fire. No such parole or extension of parole shall be granted without obtaining a police report in all cases except in the case of death of his nearest relatives mentioned above.

20. Parole not to be counted as remission of sentence.-- The period spent on parole shall not count as remission of the sentence.

21. Application for grant of parole-- A prisoner may be granted parole either on his own application or on an application made by his relatives or friends, or legal adviser.

22. Applications for parole how to be dealt with.--(1) Any prisoner desiring to be released on parole shall ordinarily submit his application (in triplicate) in Form D

appended to these rules to the Superintendent of Prison who shall endorse his remarks thereon and submit one copy direct to the Competent Authority along with the nominal roll of the prisoner and the other to the District Superintendent of Police of the district in which the prisoner proposes to spend his parole period and to the Commissioner of Police if such place is in Greater Bombay.

Note.-- Prisoners who apply for parole on false grounds or who, abuse the concession or commit breach of any of the conditions of parole are liable to be punished u/s 51B of the Prisons Act, 1894, as applicable to the State of Bombay.

(2) The District Superintendent of Police concerned or the Commissioner of Police, Bombay, as the case may be, shall immediately make enquiries to ascertain whether the ground or grounds on which parole is applied for is or are genuine and submit immediately his report to the Competent Authority mentioning inter alia whether it recommends the grant of parole and also whether there is a likelihood of breach of peace if the prisoner is released on parole.

23. Enquiries may be made on receipt of application.-- On receipt of an application for parole, the Competent Authority may make such enquiries as it considers necessary, and pass such orders as it considers fit. If the Competent Authority considers that there is no objection to release the prisoner concerned on parole it shall make an order for his release on parole.

24. Conditions subject to which prisoners may be granted parole.-- The Competent Authority may grant parole to a prisoner subject to his executing a surety bond and a personal bond in Forms A and B respectively to observe all or any of the conditions mentioned therein and also subject to such other conditions, if any, as may be specified by the Competent Authority:

Provided that when prisoners convicted of serious offences are released on parole, a condition shall be included in the parole order directing or requiring the prisoner to report at the Police Station nearest to the place where he intends to spend his parole initially on his reaching such place and thereafter once or twice a week at such intervals as may be considered expedient:

Provided further that when a prisoner applies for parole for the purpose of appearing at an examination he will not be eligible to be released on parole unless the Inspector - General of Prisons has passed an order permitting him to appear at such examination:

25. Extension of the period of parole.--The Competent Authority may, on the application made by the prisoner or by his relatives or friends or legal adviser, one week in advance, before the expiry of the period of parole granted by an order in writing, extend the period of parole for such further period or periods as may be specified in such order, on the same grounds, and on the same conditions on which the prisoner was originally granted parole, or on such other conditions as the Competent Authority may determine: Provided that the total

period of parole so extended shall not exceed ninety days."

25. Parole order ineffective on prisoner's surrender,--- As soon as a prisoner released on parole surrenders to the Prison Authority, his original order of release will be inoperative. Where, therefore, a prisoner who is released on parole has applied for the extension of the period of parole and before his application has been sanctioned surrenders himself to the Prison authority, he shall not be released after such surrender without obtaining a fresh release order passed by the Competent Authority.

26. Intimation of release and of non-surrender of a prisoner.-- (1) Whenever any prisoner is released on parole, an intimation of his release on parole shall forthwith be given by the Superintendent of Prison to the authority which granted him parole and copies thereof shall also be sent-

(i) to the Inspector-General of Prisons,

(ii) to the District Magistrate and the District Superintendent of Police of the District in which the prisoner intends to spend his parole and if the prisoner intends to spend his parole in Greater Bombay, to the Commissioner of Police.

2) Where a prisoner does not surrender himself to the prison authorities after the expiry of the period of parole, the Competent Authority may, if it is satisfied that any of the conditions on which the parole was granted has not been fulfilled cancel its order granting such parole. An intimation regarding such cancellation shall forthwith be given by the Superintendent of Prison to the officers specified in clause (ii) of sub-rule (1). Upon such intimation, the police authorities may arrest the prisoner, if at large, and remand him to undergo the unexpired portion of his sentence.

27. Application of certain rules to parole cases,-- The provisions of rules 8(5), 10,11 and 12 shall mutatis mutandis apply in the case of release of prisoners on parole.

26. Rules 19 and 25 had been amended in 1989 by Prisons (Bombay Furlough and Parole) (Amendment) Rules, 1989 by notification in the official gazette dated 21.11.1989 issued by the Home Department, Mantralaya, Mumbai. Rules 19 and 25 read as under:

19. When a prisoner may be released on parole -- A prisoner may be released on parole for such period as the Competent Authority referred to in rule 18 in its discretion may order, in cases of serious illness, or death of any member of the prisoner's family or of his nearest relatives or for any other sufficient cause.

25. Extension of the period of parole.-- The Competent Authority may, on the application of the prisoner or otherwise, by an order in writing, extend the period of parole for such further period or periods as may be specified in such order on the same conditions on which the prisoner was originally granted parole or on such other condition as the Competent Authority may determine."

The amended Rule 19 had added three important provisions i.e. (i) it had set out the specific cases in which parole can be granted; (ii) it provides for police report; and (iii) it states the period for which parole can be granted.

Rule 19 states that the parole cannot be granted for more than 30 days at a time. Rule 25 provides the maximum period for which the parole can be extended. These provisions were not there in the earlier rules.

26. It would be noted that so far as Rajasthan Prisoners (Release on Parole) Rules, 1958 are concerned, they have been made by the Government of Rajasthan in exercise of the powers conferred by the sub-section (6) of section 401 of the Code of Criminal Procedure, 1898 (Section 432 of the new Code of Criminal Procedure, 1973). Further, it may be noted that according to Rule 12, a parole period is regarded as imprisonment served. The period for which a prisoner stays on parole under Rule 9, without violating the condition laid down for the purpose, shall be treated as imprisonment served by him.

Rule 9 of the Rajasthan Prisoners (Release on Parole) Rules of 1958 relates to parole period which reads as under:

"9. Parole period- A prisoner, who has completed with remission, if any, (one fourth) of his sentence and subject to good conduct in the Jail, may be released on 1st parole for 20 days including days of journey to home and back, and for 30 days on 2nd parole provided his behaviour has been good during the 1st parole and for 40 days on third parole provided his behaviour has been good during the second parole. If during the third parole also the prisoner has behaved well and his character has been exceedingly well and if the prisoner's conduct has been such that he is not likely to relapse into crime, his case may be recommended to the Government through the State Committee for permanent release on parole on such conditions as deemed fit by the Superintendent Jail and the District Magistrate concerned: The chief condition among them being that if the prisoner while on parole commits any offence or abets, directly or indirectly, commission of any offence, he has to undergo the unexpired portion of the sentence in addition to any sentence imposed upon him by reason of such an offence. In case the permanent release on parole is rejected, the prisoner will be eligible for release on parole for 40 days every year subject to the same conditions for the remaining period of his sentence. Provided that cases of prisoners who have been sentenced to imprisonment for life, for an offence for which death penalty is one of the punishments provided by law or who have been sentenced to death but this sentence has been commuted u/s 433 of the Code of Criminal Procedure into one of life imprisonment shall not be placed before the State Committee for permanent release on parole unless he has served 14 years of imprisonment excluding remission, but including the period of detention passed during enquiry, investigation or trial. Such prisoners may be released on parole for 40 days every year for the remaining period of their sentence subject to the conditions stated above."

27. Therefore, the Prisons (Bombay Furlough and Parole) Rules, as amended in the year 1989 had been framed by the State of then Bombay, in exercise of the powers conferred by Clause (5) and (28) of Section 59 of the Prisons Act. Moreover, unlike the Rajasthan Prisoners (Release on Parole) Rules, 1958, under the Prisons (Bombay Furlough and Parole) (Amendment) Rules, 1989 the period spent on parole shall not be counted as remission of the sentence or sentence served. In such a situation, it is clear that in the case of S. Sant Singh (*supra*) considered by the Full Bench of the Bombay High Court, firstly, the parole rules were framed under the Prisons Act, 1894 whereas in the case of Rajasthan Prisoners (Release of Parole) Rules, 1958, the said rules have been framed by the Government of Rajasthan in exercise of powers conferred by sub-section (6) of section 401 of the Code of Criminal Procedure, 1898 (section 432 of the Code of Criminal Procedure, 1973). Secondly, another difference in the two relevant rules is that under the Rajasthan Prisoners (Release on Parole) Rules, 1958 the period of parole has been considered as imprisonment served and this makes it different in nature with the parole granted under the Prisons (Bombay Furlough and Parole) (Amendment) Rules, 1989. Thirdly, under the Prisons (Bombay Furlough and Parole) (Amendment) Rules, 1989, parole would not be covered u/s 432 Cr.P.C. 1973, whereas under the Rajasthan Prisoners (Release on Parole) Rules, 1958 the powers for granting parole flow from it.

28. The Full Bench of the Bombay High Court in the case of S. Sant Singh (*supra*) has distinguished the decision of the Constitution Bench of the Hon'ble Supreme Court in the case of K.M. Nanavati (*supra*) from the one before it that the Hon'ble Supreme Court was not considering the power of the competent authority or the government to grant parole but it was considering the powers of the government to suspend/remit the sentence. Firstly, the power of the government or its authority to grant parole, under the rules of Prisoners (Bombay Furlough and Parole) or Rajasthan Prisons (Release on Parole) Rules, 1958 follows from the powers under law exercised by the executive to suspend, remit etc. There cannot be any dispute about the fact that the power of the Government or the competent authority through it, to grant parole or suspend, remit the sentence etc. are powers vested with the executive of which the Governor of the State is the head. As pointed out earlier, under the Rules of the Rajasthan Prisoners (Release on Parole) Rules, 1958 the period of parole is deemed to be remission as it has to be treated as imprisonment served by a prisoner. Therefore, while considering the question of exercise of powers by the executive and the judiciary, the principle laid down by the constitution bench of the Hon'ble Supreme Court in the case of K.M. Nanavati (*supra*) was that so long as the judiciary has power to pass the particular order in a pending case to that extent the power of the executive is limited and in view of the words either of section 401 and 426 cr.P.C. and Articles 142 and 161 of the Constitution. It would, thus, follow that what is covered under Article 142 is not covered under Article 161 and what is covered by Section 426 is not covered by section 401 Cr.P.C. The Governor or the executive would not exercise the powers until the

matter is seized with the court and is sub-judice before it.

29. Another case which has been relied upon by the counsel for the petitioner is *Dadu @ Tulsidas Vs. State of Maharashtra*, it has been observed therein that the grant of parole is essentially an executive function to be exercised within the limits prescribed in that behalf. In other words, such executive functions are not to be exercised when a judicial court is seized with the matter by way of an appeal which is pending before it against the conviction and sentence awarded to the accused person by the trial court.

30. In the case of *Maru Ram and Others Vs. Union of India (UOI) and Others*, relied upon by the petitioners, the Constitution Bench of the Hon''ble Supreme Court had indicated that the executive power must not be exercised arbitrarily or malafide and must obey the guidelines made in conformity with the constitutional mandates and manifest purpose of the power. In that case, a challenge was made to the vires of Section 433A of the Code of Criminal Procedure which makes 14 years of imprisonment as minimum for release from prison of a life convict in an offence for which death is one of the punishment provided by law, or where the sentence of death imposed on a person has been commuted u/s 433 Cr.P.C. into one of imprisonment for life. In the case of *Shambhu Dayal (supra)*, the learned Division Bench of this Court has also held that "Grant of parole is essentially an executive function to be exercised within the limits prescribed in that behalf." Therefore, the principle laid down in the case of *Maru Ram (supra)* does not give any assistance to the petitioners and as submitted above the executive has to exercise its powers in accordance to the Constitution and the relevant law.

31. In the case of *Poonam Lata Vs. M.L. Wadhawan and Others*, the Hon''ble Supreme Court has considered about the concept of parole in its historical perspective as well as the nature to which the release of a prisoner denotes. It is note worthy that the release on parole and its implication would depend upon the relevant rules under which such power has been exercised.

32. In view of the above, when a trial of an accused is concluded, a Court proceeds with its judicial function by pronouncing the judgment; holding the person guilty and to award an appropriate punishment to him, in accordance with law. Thereafter, the executive takes steps to have the convict serve the sentence awarded to him. The conviction and sentence awarded by the learned trial court can only be set aside in appeal provided by law. On an appeal having been filed, the appellate court considers the matter in accordance to law, including that of the suspension of execution of sentence to the accused appellant during pendency of the appeal. The provisions are made u/s 389 Cr.P.C. for the purpose of releasing on bail a convict person during the pendency of the appeal. In case of serious offences, appeals are filed before the Division Bench in the High Court alongwith application for suspension of sentence during the pendency of appeal. When the application for suspension of execution of sentence is rejected on merits, it is often found that thereafter the accused is released from custody on

parole. But some applications for parole are rejected by the authorities after taking into consideration relevant factors, including the circumstances of the case under which the offence was committed. The accused then challenges the said order before the Division Bench. The High Court while considering the matter on appellate side had already declined to release the accused on bail after taking into consideration all the relevant facts of the case, including the circumstances in which the heinous offence had been committed but by the Division Bench, under the writ jurisdiction, the matter is to be again considered and asked to release the accused on parole. Sometimes, the same Division Bench is made to face such a precarious situation.

33. It is only on the conclusion of the judicial function that the other executive function by way of releasing the accused on parole, etc. are to be exercised. The executive powers of the State deals with a situation in which pendency of appeal is not envisaged whereas in the case of the powers of the courts, pendency of an appeal is postulated. The powers of the State deals with generally whereas that of the judiciary are special, as after awarding of sentence an appeal is pending before the appellate court. Such powers cannot be put into action simultaneously, otherwise it would bring about a conflict of jurisdiction between the two, namely the judiciary and the executive. Therefore, the powers assumed to itself by the State Government under the parole rules cannot be exercised so long as an appeal by a convicted person is pending and the judicial function is not complete. Parole relates to executive action taken after the door of judicial function is closed for a convict. The parole rules cannot stultify the judicial process and even in emergent circumstances, the court would grant the relief u/s 389 Cr.P.C. to a convict in a deserving case. So long as the judiciary has the power to pass an order in a pending case, the power of the executive is limited in view of the Code of Criminal Procedure as well as the Constitution. Accordingly, the relief of parole sought in these writ petitions, even when an appeal is pending before the appellate court, deserves to be rejected. Consequently, the writ petitions are dismissed.