

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE**

CRIMINAL WRIT PETITION NO.4017 OF 2016

Smt.Rubina Suleman Memon,
Age.36 Years, R/o.Flat No.11,
3rd Floor, Bismillah Manzil,
Cadel Road, Mahim.

... **Petitioner**

V/s.

1. The State of Maharashtra
2. The Additional D.G.P.,
Maharashtra State, Pune-1,
3. The Supt. Of Prison,
Yerwada Central Prison.
- 4 The Senior Inspector of Police,
Mahim Police Station,
Mumbai.

... **Respondent**

.....

Mrs.Farhana Shah, Advocate for the Petitioner.
Mr.H.J.Dedia, APP for the Respondent/State.

....

**CORAM : SMT.V.K.TAHILRAMANI &
A. M. BADAR JJ.**

DATED : 22nd DECEMBER 2016.

ORAL JUDGMENT : (Per V.K.TAHILRAMANI J.)

- 1 Heard both sides.
- 2 Rule. Rule is made returnable forthwith and the
matter is heard finally.

3 The case of the petitioner is that the petitioner preferred an application for furlough on 22/01/2015. The said application was rejected by order dated 15/01/2016. Being aggrieved thereby the petitioner preferred an appeal. The appeal was dismissed by order dated 24/05/2016, hence this petition.

4 The application of the petitioner for furlough came to be rejected under Rule 4(4) of the Prisons (Bombay Furlough and Parole) Rules, 1959. Rule 4(4) states that prisoners whose release is not recommended by the Commissioner of Police/District Magistrate on the ground of public peace and tranquility, shall not be granted furlough. In that order, it is reflected that the petitioner is the wife of brother of Yakub Abdul Razak Memon. She will spend her period of furlough in Mahim area, in which area people of all communities reside. If she is released on parole people will turn up to meet her in large numbers and there would be a law and order problem. This is stated in view of the fact that during the funeral of Yakub Abdul Razak Memon, the crowd was in thousands. The learned Additional Public Prosecutor

also pointed out that the petitioner has been convicted under the Terrorist and Destructive Activities Act, 1987 (In short, 'TADA Act') hence under Rule 4(13) the petitioner would not be entitled to be released on furlough, as sub rule 13 to Rule 4 states that prisoners who are convicted for terrorist crime shall not be released on furlough. He pointed out that admittedly, the petitioner is convicted under TADA, hence, she is not entitled to be released on furlough. He further pointed out that this court in two decisions has held that sub rule 13 to Rule 4 is not ultra vires.

5 In reply Ms.Farhana Shah submitted that three co-accused of the present petitioner who have also been convicted under TADA have been released on bail. They are Sardar Shahwali Khan, who was released on furlough by order dated 09/06/2014, Nasir Abdul Kadar, who was released on furlough by order dated 27/06/2014 and Isa Abdul Razak Memon, who was released on furlough by order dated 10/06/2016. She submitted that these three co-accused have also been convicted under TADA Act, hence they are similarly situated as the present petitioner and if they have been

granted furlough, the petitioner also ought to be released on furlough.

6 In reply, the learned Additional Public Prosecutor submitted that the three co-accused were granted furlough based on the decision dated 18/2/2014 of the Aurangabad Bench of this Court in Criminal Writ Petition No.432 of 2013. The said decision is in the case of **Balu s/o. Savleram Ubale v. State of Maharashtra and others** and it is reported in **2014 ALL MR (Cri) 2413**. The said decision is on Rule 4(13) of The Prisons (Bombay Parole & Furlough) Rules (hereinafter called the Rules). The learned Additional Public Prosecutor also relied on the notification / Circular dated 23/02/2012 by which sub rule 13 was added to Rule 4 of the Rules. Rule 4(13) states that prisoners who have been convicted for terrorist crime cannot be released on furlough.

7 As far as decision in the case of **Balu Ubale** is concerned, it was held that the Rule 4(13) would apply prospectively and not retrospectively and as the convict in the said case was convicted in the year 2002, the notification of

23/02/2012 would not apply to the convict. Mr. Farhana Shah pointed out that the petitioner has been convicted by Judgment and Order dated 12/09/2006, hence, the Notification dated 23/02/2012 would not apply to the petitioner. As far as issue of prospective or retrospective effect of the notification dated 23/02/2012 is concerned, the Government by Circular No.SANKIRN/0913/1074/CR/593/13/PRS-31 dated 13/06/2014 has clarified that the Government Notification dated 23/02/2012 would apply with prospective effect. Thus now there is no dispute about prospective or retrospective effect of the Notification dated 23/02/2012, as it has been clarified that said notification would only apply with prospective effect. The learned Additional Public Prosecutor pointed out that in view of the decision in the case of Balu Ubale in which it was held that as conviction took place prior to the Notification, the Notification would apply prospectively and it would not be attracted in case of prisoners who were convicted prior to the date of notification, hence the three co-accused Sardar Nasir and Isa relying on the decision in the case of **Balu Ubale** were released on furlough as their conviction date was prior to Notification. The learned Additional Public Prosecutor

submitted that no doubt, in the case of **Balu Ubale**, it was held that as the conviction took place prior to the Notification, the Notification would not be attracted in case of prisoners where the offence took place prior to the circular, but the decision in the case of **Balu Ubale** has been held to be per incuriam in the decisions of this court in the case of **Sharad Devaram Shelake vs. The State of Maharashtra** reported in **2016 ALL MR (Cri) 4128** and in the case of **Santosh Namdeo Bhukan vs. State of Maharashtra** (Criminal Writ Petition 3325 of 2014) decided on 5/05/2016. The learned Additional Public Prosecutor argued that the decision in the case of **Balu Ubale** would not be good law in view of the decision of this Court in **Sharad Shelake and Santosh Bhukan**. Hence, no reliance can be placed on the fact that three co-accused were released on furlough, because they were released in view of the decision in the case of **Balu Ubale**.

8 The Division Bench of this Court in the case of **Subhash Hiralal Bhosale vs. State of Maharashtra and another¹** which was decided prior to **Santosh Ubale** has held that the relevant date is date of application for furlough

1 2014 ALL MR (Cri.) 4330

and not the date of conviction. It, therefore, followed that the relevant date is date of the application and not the date of offence or the date of conviction. Thus, it is not the date on which the offence was registered or the prisoner was convicted and sentenced which is relevant, but the date on which the prisoner makes an application for furlough. If the application is after 23/03/2012 the notification dated 23/02/2012 would apply and a prisoner who is involved in a terrorist crime would not be entitled to be released on furlough. The decision in the case of Subhash Hiralal Bhosale is dated 04/09/2013 and the decision in the case of Balu Ubale is dated 18/02/2014. The decision in the case of Balu Ubale was rendered in ignorance of the earlier decision of the Division Bench of this Court in the case of Subhash Bhosale, hence, in the case of Sharad Shelake and Santosh Bhukan it was held that the decision in the case of Balu Ubale is per incuriam.

9 Thus, by the above three decisions in the case of ***Subhash Bhosale, Sharad Shelake and Santosh Bhukan*** the issue is concluded that the relevant date to be

considered in relation to the circular dated 23/02/2012 is the date of application. The decision in the case of of Subhash Bhosale was not pointed out when the case of Balu Ubale was decided. Thus, it was held in ***Sharad Shelake and Santosh Bhutan*** that the decision in the case of ***Balu Ubale*** is *per incuriam*.

10 In this view of the matter, reliance placed by the Competent Authority on decision in the case of Balu Ubale for grant of furlough to the three co-accused Sardar, Nasir and Isa cannot be relied upon. As the authority granting furlough to Sardar, Nasir and Isa was not aware of the decision of this Court dated 05/05/2016 in the case of ***Santosh Namdeo Bhukan and Sharad Shelake*** wherein it was held that the decision in the case of is *per incuriam*, the authority has granted furlough based on the decision in the case of Balu Ubale.

11 As stated earlier, the petitioner has been convicted under the TADA Act as she is a terrorist. Hence, the notification dated 23/03/2012 whereby sub rule 13 to Rule 4

was added fully applies to the case of petitioner, hence, we are not inclined to release the petitioner on furlough.

12 Rule is discharged.

(A. M. BADAR J.) (SMT. V. K. TAHILRAMANI J.)