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

CRIMINAL WRIT PETITION NO. 1008 OF 2018

Pundalik G. Gole

| .. Petitioner

Versus

The State of Maharashtra

| .. Respondent

Appearances

<i>Ms. Rohini M. Dandekar</i>	<i>Advocate (appointed) for the Petitioner</i>
<i>Mrs. G. P. Mulekar</i>	<i>APP for the State</i>

**CORAM : SMT. V. K. TAHILRAMANI, Acting C.J. &
M. S. SONAK, J.**

DATE : 25.04.2018.

ORAL JUDGMENT: [PER SMT. V.K. TAHILRAMANI, A.C.J.]

- 1] Heard both sides.

- 2] The petitioner had preferred an application for furlough on 7.10.2016. The said application was rejected by order dated 06.03.2017. Being aggrieved thereby, the petitioner has preferred an appeal. The appeal was dismissed by order dated 10.08.2017, hence, this petition.

- 3] The application of the petitioner for furlough came to be rejected mainly on the ground that he is convicted for an

offence under section 376 of Indian Penal Code, 1860. The petitioner has also prayed that direction be issued to respondent – State to rectify the Government Notifications dated 1st December 2015 and 26th August 2016. Both these Notifications are now not in force, they have been substituted by a new Notification dated 16th April 2018. By Notification dated 16th April 2018, necessary amendments and deletions have been carried out as far as earlier Notifications are concerned.

4] By judgment and order dated 5th December 2013, the petitioner was convicted under sections 376(2)(c), 377, 307, 304 -II, 354, 420 and 506 of I.P.C. as well as 25 of Juvenile Justice (Care and Protection of Children) Act, 2015. This order was passed by the learned Sessions Judge, Mumbai in Sessions Case No. 669 of 2011. The petitioner has sentenced to life imprisonment under section 376 (2)(c) as well as 377 of I.P.C.. In our opinion, the only relevant fact is that the conviction and sentence has been recorded for an offence punishable under section 376 of I.P.C., i.e., rape & section 377 IPC.

5] The case of the petitioner is that he preferred an application for furlough on 7th October 2016. However, in

view of Notification dated 1st December 2015, he was denied furlough. The said notification stated that prisoners who are convicted for rape will not be eligible to be granted furlough. The case of the petitioner appears to be that other prisoners, who had been convicted for offence of rape or for terrorist crimes used to be released earlier on furlough, however, after Notification dated 1st December 2015, prisoners, who are convicted for rape are denied furlough and in view of Notification dated 26th August 2016, prisoners who are convicted for terrorist crimes are denied furlough.

6] Learned counsel for the petitioner submitted that the petitioner is convicted and sentenced to suffer life imprisonment for offence punishable under sections 376 and 377 of I.P.C. Such a person is not entitled to furlough leave in terms of sub-rule (2) of Rule 4 of the Prisons (Bombay Furlough and Parole) Rules, 1959. Learned counsel for the petitioner submitted that the nature of the offence, its gravity and it being under sections 376 and 377 of I.P.C. cannot be said to be a valid ground for rejection of furlough leave. Thus, it appears that the challenge is raised to the provisions by which the authorities are empowered to refuse furlough leave in case of convicts/prisoners, who have been

convicted for the offence under section 376 /377 of I.P.C. It is not disputed that the petitioner has been convicted for the offence under Sections 376 & 377 of IPC.

7] Learned counsel for the petitioner submitted that when a person is convicted for rape, then, he would not be released on furlough, which would mean that for his entire tenure, as a prisoner/ convict, the petitioner will never be released on furlough. The petitioner would, therefore, be permanently deprived of the right to be released on furlough.

8] It is argued that the selection of section 376 for being included in the list of offences in respect of which furlough leave shall not be granted is arbitrary and that it is not based on any rational principle. If prisoners convicted for more serious offences such as murder are not precluded from claiming furlough leave, why should prisoners convicted of offences under Section 376 be denied the right to claim furlough leave? It is urged that the classification made by the rule making authority is not rooted in any rational principle and, therefore, Rule 4(2) must be struck down.

9] Lastly, it is submitted that the Rules do not mean that the application for furlough has to be rejected. Such rules cannot be construed as a mandate or a prohibition or embargo but will have to be construed as enabling the authority to refuse furlough in appropriate cases. Further, if this interpretation is not placed on the provision, then, it is ultra vires Article 14 of the Constitution of India.

10] We are unable to accede to the argument addressed to us by the learned counsel on behalf of the petitioner for reasons which will become presently evident.

11] The learned APP on the other hand has submitted that furlough is not a right of the prisoner and the distinction as made is not ultra vires Article 14 of the Constitution of India but consistent with the Legislative scheme of not permitting such convicts and prisoners whose mingling with the society will have an adverse effect on the citizens and as such persons are likely to indulge in similar acts, if released temporarily.

12] Rule 4 sets out the cases when prisoners shall not be granted furlough. As the petitioner has been convicted under

section 376 of I.P.C., we are concerned mainly with Rule 4(2) of the Prisons (Bombay Furlough & Parole) Rules, 1959.

13] Earlier Rule 4(2) of the Prisons (Bombay Furlough and Parole) Rules, 1959 read as under:-

“4. When prisoners shall not be granted furlough;

4.(2) Prisoners convicted of offence under section under sections 392 to 402 (both inclusive) of the Indian Penal Code .”

14] However, by Notification dated 1st December 2015, it was stated that in Rule 4 of the Principal Rules, in the sub-rule (2), after the words “*under sections*” the numbers and word “*376, 377 and*” shall be inserted.

15] The learned counsel for the petitioner submitted that the first ground assigned by the learned APP that furlough is not a right of the convict is wholly erroneous and not the correct position in law. She pointed out that the contention that furlough leave is not the right of the petitioner is contrary to the judgment of the Full Bench of Gujarat High Court in the case of **Bhikhabhai Devshi Vs. State of**

Gujarat and Ors.¹. The Full Bench has held that furlough is a matter of right and the same cannot be taken away. In that behalf, she relied upon the following observations in the Full Bench decision in the case of *Bhikhabhai Devshi (supra)*:

"13. The parole and furlough rules are part of the penal and prison system with a view to humanise the prison system. These rules enable the prisoner to obtain his release and to return to the outside world for a short prescribed period. The objects of such a release of prisoner can be read from para 101 of the report submitted by the All India Jail Manual Committee as also the objects mentioned in Model Prison Manual. These objects are:

- (i) to enable the inmate to maintain continuity with his family life and deal with family matters;
- (ii) to save the inmate from the evil effects of continuous prison life;
- (iii) to enable the inmate to maintain constructive hope and active interests in life."

"14. In the Statement of Objects and Reasons for Bombay (Prisons Amendment) Act No. 27 of 1953, the Jail Reforms Committee had recommended and the Govt. accepted the recommendation that;

"there should be the system of release of prisoners on furlough under which **well behaved prisoners of certain categories should, as a matter of right have a spell of freedom occasionally** after they undergo a specified period of imprisonment, so that they may maintain contact with their near relatives and friends and may not feel uprooted from society. Government accepted

1 A.I.R. 1987 Gujarat 136.

these recommendations and also decided that the furlough period should count towards the prisoner's sentence."

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The experience has shown that the system has worked satisfactorily. The Prisons Act, 1894 does not specifically provide for the grant of furlough and the remission of sentence consequent upon it. In order to place the system on a permanent footing and to enable the Govt. to delegate its powers to the Inspector General of Prisons, it is necessary that the Prisons Act, 1894 should be amended in its application to the State of Bombay."

15. *Thus, the Legislature has put the furlough system in the Act and it is made a matter of right.*
16. *In furtherance of these objects, the parole and furlough rules are framed in exercise of powers under Ss.59(5) and 28 of the Prisons Act, 1894. Section 3 defines various terms in the Act and Cls. (5A) and (5B) of S.3 define furlough system and parole system CL (5A) added by Bombay Act XXVII of 1953 reads as under :-*

"(5A) :

"furlough system means the system of releasing prisoners in jail on furlough in accordance with the rules for the time being in force." Section 59(5) reads as follows :-

"S. 59 : Power to make rules : The State Govt. may make rules consistent with this Act

.....

Xx xx xx xx

.....

Thus, the rules have to be consistent with the Act as S.59 expressly provides. One more relevant provision is S.48A (also added by Act 27 of 1953) which reads as follows:-

S. 48 A :Punishment for breach of conditions of suspension or remission of sentence or of grant of furlough:- If any prisoner fails without sufficient cause to observe any of the conditions on which his sentence was suspended or remitted or furlough or release on parole was granted to him, he shall be deemed to have committed a prison offence and the Supdt. may, after obtaining his explanation, punish such offence by

- (i) a formal warning as provided in CL (i) of S.46;
- (2) reduction in grade if such prisoner has been appointed an officer of prison;
- (3) **loss of privileges admissible under the remission or furlough or parole system; or**
- (4) loss of such other privileges as the State Govt. may by general or special order, direct."**

17. Rule 1287 of the Bombay Jail Manual is also relevant for our present purpose. It reads as under : -

"In each case of late surrender or breach of any of the conditions of furlough or parole, the necessary punishment or punishments should be awarded by the Supdt. of Prison with due regard to the circumstances of each case. All the punishments mentioned below or in S. 48-A of the Prisons Act, 1894 need not necessarily be awarded in each case but it is left to the discretion of the Supdt. to decide which particular punishment or punishments should be awarded. If, in certain cases, the Supdt. is satisfied that the overstay was for good or sufficient reasons, he may excuse the prisoner. However, before awarding any punishment, the Supdt. should invariably obtain a prisoner's explanation in each case of overstay of period or breach of

any conditions of furlough or parole.

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18. *From the aforesaid provisions in the Prisons Act, the definition and the creation of furlough system, there is no doubt that the prisoners have a privilege admissible to them under the furlough system as mentioned in R.2(17) of the furlough rules. Even if **furlough is not an absolute right of the prisoner**, nonetheless it is a right and privilege admissible and regulated under the rules **and it can be granted, refused or withdrawn as per rules.***

(Emphasis supplied)

16] Thus, even in the decision of the Full Bench of the Gujarat High Court in the case of Bhikhabhai Devshi (supra), it is held, as is clear from paragraph 18 thereof, that furlough is not an absolute right of the prisoner and furlough can be granted, refused or withdrawn as per rules. Clause 14 makes it clear that only well behaved prisoners and prisoners falling under certain categories can be granted furlough and furlough is not a right which can be granted to all prisoners. Reference is also made in this decision to Section 48A which deals with cases where there is breach of conditions of furlough, parole or remission. It is stated that if there is breach of conditions, it can lead to loss of privilege admissible under the remission, parole or furlough system. From this, it becomes clear that if there is a breach, the convict can lose the privilege of furlough.

17] In this regard useful reference may be made to a decision of the Supreme Court in the case of **State of Maharashtra Vs. Suresh Pandurang Darvakar**² wherein it is observed that, " But release on furlough cannot be said to be an absolute right of the prisoner as culled out from Rule 17". Rule 17 reads as under:-

" 17. Nothing in these rules shall be construed as conferring a legal right on a prisoner to claim release on furlough."

18] The learned counsel for the petitioner urged that once sub-rule (2) is applied, then, the petitioner will not ever be entitled to be released on furlough. All other reasons then are insignificant and irrelevant, once the benefit of furlough is taken away by virtue of the amendment. It was further contended that the incident occurred in 2010 and the Notification / Circular is dated 1.12.2015 which brought about the amendment to Rule 4. Therefore, the learned counsel for the petitioner submitted that the amendment cannot be given retrospective effect and cannot be made applicable to the petitioner.

2 AIR 2006 SC 2471 : 2006 ALL M.R. (Cri) 1839 (S.C.)

19] Ms. Rohini Dandekar, the learned counsel for the petitioner submitted that in a decision dated 18.2.2014, the division Bench of this Court, Aurangabad Bench in the case of **Balu s/o. Savleram Ubale Vs The State of Maharashtra**³ has held that the rules would apply prospectively and not retrospectively and as the convict in the said case was convicted in the year 2002 for the offence under section 364-A of IPC, the Notification dated 23.2.2012 would not apply to the convict. As far as the issue of prospective or retrospective effect of the circular is concerned, the Government by Circular No. sankirn 0913/1074/CR 593/13/PRS-31 dated 13.6.2014 has clarified that the Government Notification dated 23.2.2012 would apply with prospective effect. Thus, now there cannot be any dispute about the said Notification & Notification dated 1.12.2015 being retrospective or prospective as it now clear that the said notifications would apply with prospective effect. Ms. Dandekar submitted that in view of Balu Ubale (supra) which holds that the notification will apply prospectively and as the offence took place prior to the notification, the notification which is stated to apply prospectively would not be attracted in the case of the petitioner. We find this submission to be incorrect because in Balu Ubale (supra), the

3 Criminal Writ Petition No. 432 of 2013

relevant date was held to be the date of conviction and if the date of conviction was prior to the notification, it was held that the notification would not apply. Thereafter Ms Dandekar pointed out that in the present case, the petitioner was convicted on 5.12.2013, i.e., much before the notification dated 1.12.2015, hence, the notification would in fact not apply to him. However for reasons stated in paragraph 21 of this decision, we are of the opinion that the decision in the case of Balu Ubale (supra) would not be good law.

20] Reliance was also placed by Ms. Dandekar on the decision dated 5th March, 2014 of the Division Bench of this Court, Aurangabad Bench in the case of **Sardar Shahwali Khan Vs. State of Maharashtra & Ors.**⁴. Ms. Dandekar pointed out that in the said case, the judgment convicting the prisoner was dated 6.4.2007. The Division Bench held that the Rules amended by Notification dated 23.2.2012 are prospective in nature and the order rejecting the application for furlough was set aside and the matter was relegated to the concerned authority for fresh consideration.

21] The Division Bench of this Court in the case of **Subhash Hiralal Bhosale Vs. State of Maharashtra &**

4 Cri. Writ Petition No. 48 of 2014

Anr.⁵ has held that the relevant date is the date of application for furlough and not the date of conviction. It, therefore, follows that the relevant date is the date of application and not date of offence or 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 he applied for furlough leave. If the application is after 1.12.2015, the Notification dated 1.12.2015 would apply. The decision in the case of Subhash Bhosale (supra) is dated 4.9.2013 and the decision in the case of Balu Ubale (supra) is dated 18.2.2014 and the decision in the case of Sardar Khan (supra) is dated 5.3.2014. Both these decisions were rendered in ignorance of the earlier decision of the Division Bench of this Court in the case of Subhash Bhosale (supra) by which the issue was concluded that the relevant date to be considered in relation to the Notification is the date of application. The decision in the case of Subhash Bhosale (supra) was not pointed out when the case of Balu Ubale (supra) and Sardar Khan (supra) were decided. Thus, it will have to be held that these two decisions are per incuriam. In this view of the matter, reliance on these decisions would not advance the case of the petitioner.

5 2014 ALL M.R. (Cri) 4330

22] Then, coming to the main submission of the learned APP that if furlough leave is to be refused to prisoners convicted for offences such as rape or terrorist activities as set out in sub-rule (2) & 13, then, that has a definite nexus with the object sought to be achieved. In introducing penal reforms, the State that runs the administration on behalf of the society and for the benefit of the society at large cannot be unmindful of safeguarding the legitimate rights of the citizens in regard to their security in the matters of life and liberty. It is for this reason that in introducing such reforms the authorities cannot be oblivious of the obligation to the society to render it immune from those who are prone to criminal tendencies and have proved their susceptibility to indulge in criminal activities by being found guilty (by a Court) of having perpetrated a criminal act. One of the discernible purposes of imposing the penalty of imprisonment is to render the society immune from the criminal for a specified period. It is, therefore, understandable that while meting out humane treatment to the convicts, care is taken to ensure that kindness to the convicts does not result in cruelty to the society. Naturally enough the authorities would be anxious to ensure that the convict who is released on furlough does not seize the

opportunity to commit another crime when he is at large for the time-being under the furlough leave granted to him by way of a measure of penal reform. This appears to be the object underlying Rule 4 which enjoins that prisoners falling under specified categories shall not be enlarged on furlough. It would not be safe from the point of view of the society to throw such a person in the midst of it thereby exposing the society to further crimes by him. The same idea appears to run through most of the clauses of Rule 4 including those added by Notifications dated 1.12.2015, 26.8.2016 and 16.4.2018. It would be dangerous to the society to release such a person on furlough merely out of consideration of penal reform and humane treatment. As observed earlier, consideration of sympathy for him cannot be permitted to overshadow the consideration regarding security of the society.

23] It was argued by Ms. Dandekar that if a more serious crime like murder was not included in the list, there was no rational basis for including offences stated in sub-rule 2 or 13 of Rule 4. Here again, the argument ignores the fact that though murder may be a crime against society but by and large an offence of murder is committed by a person under

some real or imagined provocation or in a moment of passion and the perpetrator of the crime usually has a motive or animus against a particular individual or individuals and not against the society at large. There is, therefore, less danger of his committing a similar crime when he is on leave on furlough whereas offences of rape, dacoity, terrorism, kidnapping & under NDPS Act are offences which are directed against the entire society at large and the entire society is exposed to the danger emanating from them. So far as rape, kidnapping, dacoity, acts of terrorism and under the NDPS Act are concerned, any victim is a good victim and the entire society is exposed to the risk. It is, therefore, clear that these offences fall in a different category. Whether or not the offence is more serious is not the relevant consideration for withholding furlough. The relevant consideration is whether his release will expose the society to any danger. Therefore, the fact that murder may be by and large considered to be a more serious crime is not a circumstance which in any way impairs the reasoning underlying the selection of the offences falling under the class specified in sub-rule 2.

24] The learned counsel for the petitioner does not dispute that the legislature in its wisdom can make a classification of prisoners and their conviction for serious offences. If all sub-rules are read together and harmoniously, then, it is evident that the Legislature intended that such of the prisoners whose presence is considered dangerous or otherwise prejudicial to the public peace and order or who have been considered dangerous because of their involvement in serious prison violence or offences which have an impact on the entire society should not be released on furlough, then that classification cannot be held to be arbitrary, unreasonable, unfair and discriminatory to say the least. The prisoners, whose conviction is for such offences, which affect larger public interest and public good so also public peace cannot claim to mingle with the society as a matter of right. Further the classification made does not suffer from any irrationality, more so, when it is not vitiated by arbitrariness, unreasonableness and malafides. One has to also keep the object sought to be achieved in mind that is to protect the larger public interest, public good and public peace. It has also to be noted that cases of rape are on the rise & especially rape of minor girls, hence a deterrent measure, is very much necessary and release of persons

convicted under 376 or 377 is not in the interest of society. We have already observed in the above paragraphs why we are of the opinion that release of prisoners falling under these categories is not advisable. The impact or release of a convict on furlough on the society and the country as a whole, therefore, is a very relevant and germane consideration. It is well settled that the nature of the offences committed, for consideration of furlough leave application, is a germane and relevant factor. This has been held by the Division Bench of this Court in Subhash Bhosale (supra).

25] The maintenance of peace or good behaviour and good conduct is necessary because there are crimes which will affect the society and would be prejudicial to the interest of public peace. Sub-rule 2 outlines such crimes and they are heinous in nature. One cannot, therefore, ignore that if the conviction is for offences like terrorist act or rape or kidnapping, then, release of such prisoners on furlough would be considered to be dangerous or otherwise detrimental to public peace and order. They may harm the victim/complainant or the witnesses who have deposed against them. The tendency to take revenge cannot be ruled

out. Moreover, they can make a victim of any person from the society. Any person is a good victim for them. Therefore, mingling of such persons with the society will not be in the interest of society and that is a valid reason for this categorization.

26] If the rules provide for furlough leave they equally contain the provisions enabling imposition of conditions for being released on furlough leave, then, the prisoner cannot claim it to be a matter of right. A prisoner cannot urge that despite the provisions in the rules and contrary thereto, his case for furlough must be considered and granted. His case can be considered, provided it falls within four corners of the rules. The petitioner before us has understood this position and, therefore, has raised a challenge to the validity of Notification dated 1.12.2015 & 26.8.2016 more particularly sub-rule 2 of Rule 4 which covers the case of the petitioner. However, we find that his challenge is not well founded.

27] From the Rules relating to furlough, it is clear that furlough is to be granted for no particular reason, hence, it can be denied in the interest of the Society.

28] In the case of **Ramchandra Raghu Naik v/s State of Maharashtra**⁶, the Furlough Rules have been referred to and the Division Bench held that the Furlough Rules provide for terms and conditions thereby, curtailing the entitlement of furlough leave to the prisoners. Such Rules are not penal in character. The Division Bench opined that any entitlement prescribed under the statute can be availed within the parameters prescribed under the statute. It was further held that if the statute imposes a condition to claim any such benefit under the statute, same are to be availed on compliance of conditions and not otherwise. The provisions regarding the entitlement of benefit has to be read along with conditions attached to the same. Being so the entitlement has to be read along with conditions provided for the same. The entitlement of leave would be to the extent permissible and would not be available in cases where it is sought to be curtailed by specific provisions in that regard. The Division Bench held that there are Furlough Rules which speak of the categories of prisoners who shall not be considered for release on furlough. In turning down the challenge raised before it that denial of furlough would amount to a punishment or double jeopardy, the Division Bench observed thus:-

⁶ 2005(3) Mh.L.J. 933

"14. Evidently, the rules make elaborate provisions regarding entitlement as well as disentitlement of furlough leave to the prisoner. Merely because under certain circumstances the rule provides that a prisoner would not be entitled to furlough leave, that does not amount to a penal provision so as to contend that the implementation of such provision would amount to double jeopardy in the case of a prisoner who is punished under Section 48A of the Prisons Act. The provisions relating to entitlement or disentitlement of furlough leave do not relate to penal action on the part of the authorities. Besides, punishment for jail offence by the Jail Superintendent would not even bar the prosecution and punishment in a Court for the same offence because the powers of the jail superintendent are in the nature of administrative authority for maintenance of discipline and to inflict summary punishment for breach of discipline and those proceedings are not judicial proceedings. In a case where a military personnel was tried in Court martial proceedings and being found guilty was sentenced to rigorous imprisonment for one year and subsequently was dismissed from service in an action taken under the service Rules, the decision was upheld by the Apex Court in Union of India v. Sunil Kumar Sarkar, reported in AIR 2001 SC 1092 holding that it does not amount to double jeopardy under Article 20(2) of the Constitution of India and two proceedings operate in two different fields though the crime or the misconduct might arise out of the same act. Hence the contention sought to be raised that on account of the punishment having been imposed under Section 48A of the Prisons Act, the respondents would not be entitled to deny the furlough leave by taking resort to the provisions of law comprised under Rule 4(10) of the Furlough Rules is devoid of substance and has to be rejected."

29] In the case of State of Maharashtra v/s Suresh Pandurang Darvakar (supra), the Supreme Court held thus:-

"5. But release on furlough cannot be said to be an absolute right of the prisoner as

culled out from Rule 17. It is subject to the conditions mentioned in Rule 4(4) and 6.

..... Since the furlough is granted for no particular reason, it can be denied in the interest of society.

6.

7. A bare reading of Rule 4(4) indicates that release can be refused when the same is not recommended by the Commissioner of Police in Greater Bombay and elsewhere, by the District Magistrate on the ground of public peace and tranquility”.

30] In sub-rules 12 & 13, furlough is denied on the basis of gravity of offence. In the case of **Sunil Batra v. Delhi Administration and Ors.**⁷, the Apex Court upheld the validity of a classification based on the gravity of the offence.

31] Useful reference may be made to a decision of the Supreme Court in the case of **State of Haryana Vs. Jaising**⁸. In that case, what the Supreme Court was considering was a case of remission to prisoners / convicts. However, a notification giving the benefit of remission made certain prisoners and convicts ineligible for the same. The classification was that the convicts who have been convicted for rape, dowry death, abduction and murder of children below 14 years, offences of robbery, prisoners sentenced under NDPS Act, TADA and Foreigners Act and those detained under detention laws and found guilty of violation

⁷ AIR 1978 SC 1675

⁸ AIR 2003 SC 1696

of Jail Manual shall not be given such remission. That provision came to be challenged before the Punjab and Haryana High Court. The High Court held that it is not open to the State Government while granting general remission to carve out special exception to cases which according to it, could be termed as heinous offences and deny benefit of remission to such class of convicts. Therefore, the petition of Jail Singh was allowed.

The State of Punjab and Haryana appealed to the Supreme Court and the Supreme Court held as under:-

"8. The answer to the said question, in our opinion, should be in the negative. This Court in a catena of decisions has recognized that the gravity of an offence and the quantum of sentence prescribed in the Code could be a reasonable basis for a classification. This Court in State of Haryana & Ors. Vs. Mohinder Singh etc. 2000(3) SCC 392 held : Prisoners have no absolute right for remission of their sentence unless except what is prescribed by law and the circular issued thereunder. That special remission shall not apply to a prisoner convicted of a particular offence can certainly be a relevant consideration for the State Government not to exercise power of remission in that case."

32] Having come to the conclusion that the gravity of the offence can be the basis for a valid classification, we will now consider whether the offences excluded from the impugned notification can be said to be such offences which have been wrongly excluded from the benefit of furlough.

We notice that the convicts who have been excluded from the benefit of said notification, are those convicts who have been sentenced for offences of rape, kidnapping, dacoity, terrorist activities etc. The said offences can be categorized as grave offences, therefore, they can be aptly classified as grave offences, which classification will be a valid classification for the purpose of deciding whether the persons who have committed such offences should be granted furlough or not. On this basis, we are of the opinion that the State Government having decided not to grant furlough to these offenders is justified in doing so.

33] Similarly, the offences under the NDPS Act, apart from carrying heavy penal sentences are offences which could be termed as offences having serious adverse effect on the society, cognizance of which is required to be taken by the State while granting furlough. Therefore, they can also be classified as offences which should be kept out of the purview of furlough and in our opinion, can be classified for exclusion from the benefit of furlough. In *State of Haryana Vs Jaisingh* (supra), the Supreme Court upheld the provision whereby prisoners found guilty of violation of Jail Manual were excluded from remission. In such case, exclusion of

prisoners from furlough if their conduct has not been good for the last one year has been upheld. Moreover, in earlier paragraphs of this judgment, we have already observed why release of a prisoner in cases covered by sub-rules 2 or 13 is not advisable. Therefore, we are of the opinion that the offences excluded from the benefit of furlough under the impugned notification have been properly classified which classification, in our opinion, is a valid classification for the purpose of making them ineligible for the grant of furlough.

34] In view of the decision of the Supreme Court in Jaising (supra), we do not see how we can take a different view in the cases of furlough leave. If remission in sentence can be denied as held by the Supreme Court on the ground of gravity of offences or the conduct of the prisoner and that can form the basis of a valid classification, then, all the more in the case of furlough leave we cannot take a different view.

35] In view of the above, there is no substance in the argument that the mandate of Articles 14 and 21 of the Constitution of India is violated and sub-rules 2 or 13 of Rule 4 and more specifically sub-rule 2 of Rule 4 fall foul of that

mandate. In this case, we are concerned only with sub rule 2 of Rule 4, hence, we are not dealing with other sub rules in detail. Thus, it is not possible to uphold the contention that sub-rule 2 of Rule 4 is discriminatory in character and is violative of Article 14 of the Constitution of India. We are of the opinion that the classification has a rational basis and has a distinct nexus with the underlying object of the legislation and that it does not introduce any element of hostile discrimination. In the result, we come to the conclusion that sub-rules 2 of Rule 4 is valid and intra vires and not vulnerable to the charge of being violative of Article 14 of the Constitution of India.

36] Thereafter, learned counsel for the petitioner placed reliance on the decision dated 24.11.2017 of a Division Bench of this court, Aurangabad Bench in ***Jafar s/o. Abdul Haq Shaikh vs. The State of Maharashtra and ors.*** in Criminal Writ Petition No. 1293 of 2017. She pointed out that in the said case, the petitioner was convicted in a bomb blast case. However, despite the Notification dated 26.8.2016, the petitioner was granted furlough. Notification dated 26.08.2016 states that prisoners who have been convicted for terrorist activities shall not be eligible for furlough. We have

perused the said decision. We have noticed that in the said decision after placing reliance on the decision of the Division Bench at the Principal Seat (Coram: Smt. V.K. Tahilramani & Sandeep K. Shinde, JJ.) in ***Altaf Ali Mushtaq Ali Sayed vs. State of Maharashtra and ors*** decided on 21.06.2017 in Criminal Writ Petition No. 2027 of 2017, it was observed that parole was granted to the petitioner therein despite the Notification dated 26.8.2016. Notification dated 26.8.2016 states that prisoners who are convicted for bomb blast cases shall not be eligible to be released on furlough. The Division Bench of this court at Aurangabad has observed that the petitioner, in Writ Petition No.2027 of 2017, Altaf Ali Mushtaq Ali Sayed was also a bomb blast convict, and he was granted parole despite Notification dated 26.8.2016 based on the fact that the conduct and record of the petitioner in Writ Petition No. 2027 of 2011 was good. The relevant portion of the decision in *Jafar s/o. Abdul Haq Shaikh*, reads as under:

“6] We have given careful consideration to the submissions of the learned counsel appearing for the petitioner and the learned APP appearing for the respondent-State. We have carefully perused the impugned order, it appears that the main ground on which the application of the petitioner is rejected appears to be that the Government of Maharashtra, Department of Home, issued a Notification dated 26th August, 2016, merely because in view of the said Notification and since the petitioner is a convict in a bomb Blast case, no parole/furlough can be granted to him. In this respect, it would be gainful to make

reference to the order passed by the Division Bench at Principal Seat [Coram : Smt.V.K.Tahilramani & Sandeep K.Shinde, JJ.] in Criminal Writ Petition No.2027/2017, decided on 21.06.2017, wherein the petitioner was a convict in a case relating to the bomb blast and it was mentioned in the police report that if the petitioner is released on parole, he will not report back to the prison. However, keeping in view the earlier record of the petitioner therein, in respect of his release on parole/furlough and the fact that the petitioner therein did not misuse the liberty given to him, and reported back within time to the prison, the Division Bench issued directions to release the petitioner therein for a period of 30 days on parole.”

37] Relying on the above fact, the Division Bench of this Court at Aurangabad in the case of *Jafar s/o. Abdul Haq Shaikh*, granted furlough to the petitioner who was a bomb blast convict. However, the main issue which was involved in the case of *Altaf Ali Mushtaq Ali Sayed* was that his application for furlough was dated 16.3.2016, i.e., much prior to the Notification dated 26.8.2016 and in that case obviously, the Notification dated 26.8.2016 could not have been made retrospectively applicable to *Altaf Ali Mushtaq Ali Sayed* and as the said Notification could not have been made applicable to *Altaf Ali Mushtaq Ali Sayed*, the conduct of the said convict when he was earlier released on parole was kept in mind and he was released on parole. In case of *Altaf Ali Mushtaq Ali Sayed* the only ground or reason for rejecting the application for parole was that he was convicted in a

bomb blast case and if he is released on parole, he will not report back to the prison in time and the other reason was that if he is granted parole, the surety may not be able to keep a check on him. As the first ground of rejection that he was convicted in a case related to the bomb blast could not be made use of as the Notification dated 26.8.2016 was much after his application for furlough and hence the notification could not be said to be attracted in the case of *Altaf Ali Mushtaq Ali Sayed* because his application was much prior to the Notification and hence, the court had to look to the other grounds for rejecting the application of *Altaf Ali Mushtaq Ali Sayed* for parole. In view of the fact that he had been released on many occasions on furlough/parole and he had reported back on the due date to the prison and the fact that during the period that he was on parole/furlough, he had not misused the liberty granted to him, the court was of the opinion in the case of *Altaf Ali Sayed (supra)* that the other grounds were also not good grounds to reject the application for parole. Hence, the main point in the case of *Altaf Ali Mushtaq Ali Sayed* was that his application for parole was much prior to the Notification dated 26.8.2016, hence, the fact that he was a bomb blast convict would not have come in the way of *Altaf Ali Mushtaq Ali Sayed* to be granted

parole. It is very clear from the very first para of the decision in *Altaf Ali Mushtaq Ali Sayed* that his application for parole was prior to the Notification dated 26.08.2016. This important distinction in the case of *Altaf Ali Mushtaq Ali Sayed* was not brought to the notice of the court when the case of *Jafar s/o. Abdul Haq Shaikh* was decided on 24.11.2017 by the Division Bench of the Court at Aurangabad. Hence, it cannot be said that the decision in *Altaf Ali Mushtaq Ali Sayed* could have been relied upon to hold that even if the application of the prisoner for parole/furlough is after Notification dated 26.8.2016, he can still be granted parole/furlough. In view of the Notification dated 26.8.2016, any application for furlough or parole after the notification by a bomb blast convict cannot be granted.

38] For all the above reasons, we do not find any reason to interfere in the order rejecting the application of the present petitioner for furlough. Hence, Rule is discharged.

(M.S. SONAK, J.)

(ACTING CHIEF JUSTICE)

D.S.Sherla