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

WRIT PETITION NO. 3609 OF 2018

Mohammed Majid Mohammed Shafi .. Petitioner
Vs.
The State of Maharashtra & Ors. .. Respondents

Mrs. Farhana Shah for the Petitioner.
Mrs. P. P. Shinde, APP for the Respondent-State.
Mr. B. S. Sandanshiv, Jailor Gr. II, Amravati Central Prison present.

CORAM : R. M. SAVANT AND V. K. JADHAV, JJ.
DATE : 21st NOVEMBER, 2018.

P. C.

1. The order dated 17.11.2017 communicated by the Under Secretary, Home Department, Government of Maharashtra to the Petitioner is taken exception to by way of the above Petition. By the said order, the Appeal filed by the Petitioner against the order dated 05.09.2017 passed by the Divisional Commissioner, Amravati came to be dismissed. The said orders arise out of the application filed for parole by the Petitioner. The said application was received in the office of the First Appellate Authority i.e. the Divisional Commissioner, Amravati on 03.04.2017. The application is founded on the fact that the Petitioner desires to remain present in Kolkata as his wife is suffering from serious renal ailment and that she would require kidney transplant. In so far as the First Authority is concerned, the application has been rejected as the report as regards the medical condition

of his wife was vague. On the Petitioner carrying the matter by way of an Appeal to the Appellate Authority i.e. the State Government, the State Government has rejected the said Appeal by the impugned order dated 17.11.2017, inter alia, on the ground that the application filed by the Petitioner is covered by Rule 4(13) of the Notification dated 26.08.2016 and that the report in respect of condition of the wife is about 8 months old and in view of the latest position as regards medical condition of his wife is not known. As indicated above, it is the said order dated 17.11.2017 which is taken exception by way of above Writ Petition.

2. On behalf of the Petitioner, the learned Counsel Mrs. Shah would submit that the Notification which find mention in the Appellate order i.e. Notification dated 26.08.2018 has been superceded by the Notification dated 16.04.2018 and therefore the legal position has changed. The learned Counsel also seeks to place reliance on the order dated 29.10.2018 passed by the Division Bench of this Court in Writ Petition 4550 of 2018 in which order the Division Bench has made a reference to the Judgment of the Apex Court in Asfaq Vs. State of Rajasthan, (2017) 15 SCC 55 and thereafter has remanded the matter back to the concerned Authority to denovo consider the application of the Petitioner in the said case for parole.

3. *Per contra*, the learned APP Mrs. P. P. Shinde would draw our

attention to the report of the Assistant Commissioner of Police, Eastern Suburban Division, Kolkata dated 14.11.2018 as also the report dated 07.06.2017 of the Sub Inspector of Police, Narkeldanga Police Station, Kolkata to contend that the release of the Petitioner on parole is not warranted.

4. We have heard the learned Counsel for the Petitioner as well as the learned APP. Though by the Notification dated 16.04.2018 which superceded the Notification dated 26.08.2016 no change in so far as Clause 4(13) is concerned has come about, the Apex Court in the case of Asfaq Vs. State of Rajasthan (supra) which concern an application for parole by a TADA convict has made the following observation in paragraph 19. The said paragraph is reproduced hereinbelow for the sake of ready reference.

“19) Another vital aspect that needs to be discussed is as to whether there can be any presumption that a person who is convicted of serious or heinous crime is to be, ipso facto, treated as a hardened criminal. Hardened criminal would be a person for whom it has become a habit or way of life and such a person would necessarily tend to commit crimes again and again. Obviously, if a person has committed a serious offence for which he is convicted, but at the same time it is also found that it is the only crime he has committed, he cannot be categorised as a hardened criminal. In his case consideration should be as to whether he is showing the signs to reform himself and become a good citizen or there are circumstances which would indicate that he has a tendency to commit the crime again or that he would be a threat to the society. Mere nature of the offence committed by him should not be a factor to

deny the parole outrightly. Wherever a person convicted has suffered incarceration for a long time, he can be granted temporary parole, irrespective of the nature of offence for which he was sentenced”.

5. In the instant case as indicated hereinabove, the Appellate Authority has rejected the application on the basis of Rule 4(13) as appearing in the Notification dated 26.08.2016, the said Notification as also the conduct of the convict was a subject matter of the proceeding before another Division Bench of this Court in **Bashir Ahmed Usman Gani Kairullah Vs. State of Maharashtra** in Cr. Writ Petition No. 3988 of 2017 dated 07.08.2018. In the said case, the Authority has also considered the conduct of the convict whilst in prison apart from applying Rule 4(13) of the Notification dated 26.08.2016. In the instant case what is noticeable is that the application for parole filed by the Petitioner has been rejected primarily on the touchstone of Rule 4(13) of the Notification dated 26.08.2016. The learned Counsel for the Petitioner whilst moving the above Writ Petition before Vacation Court has placed reliance on the latest medical report of the wife of the Petitioner which is dated 22.10.2018. In our view in the light of the Judgment of the Apex Court in the case of Asfaq Vs. State of Rajasthan (supra) as also having regard to the material now placed on record on behalf of the Petitioner, it would be just and proper to remand the matter back to the Divisional Commissioner for denovo consideration of the Petitioner's application.

6. Hence, the following directions:

(i) The impugned order dated 05.09.2017 passed by the Divisional Commissioner, Amravati and the order dated 17.11.2017 passed by the Appellate Authority is quashed and set aside and the Petitioner's Appeal is remanded back to the Divisional Commissioner, Amravati Division, Amravati for a denovo consideration of the same in the light of the observations as mentioned hereinabove.

(ii) On remand, the Petitioner's Appeal to be decided within a period of four weeks from date i.e. on or before 18.12.2018 by following the procedure prescribed for the same.

(iii) With the directions as aforesaid, the Writ Petition is disposed of.

(iv) All the parties to act on a copy duly authenticated.

[V. K. JADHAV, J.]

[R. M. SAVANT, J.]