

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO.1298 OF 2018

Dhananjay s/o. Namdeo Kharade
(C-17713),
Central Jail, Yerwada,
Pune

..Petitioner

Vs.

1. State of Maharashtra,
Through Superintendent of Jail,
Yerwada, Pune

2. State of Maharashtra,
Through D.I.G. Prisons,
Pune

3. State of Maharashtra,
Through I.G. Prisons, Pune

..Respondents

Mr.R.A.Jaiswal, Advocate for petitioner
Mr.S.B.Yawalkar, APP for respondents

**CORAM : S.S. SHINDE AND
R.G. AVACHAT, JJ.**

**RESERVED ON : JANUARY 07, 2019
PRONOUNCED ON : JANUARY 15, 2019**

JUDGMENT (PER R.G. AVACHAT, J.) :-

Rule. Rule made returnable forthwith. With
the consent of learned Counsel for the parties, taken
up for final hearing.

2. In this petition under Article 226 of the Constitution of India, the petitioner seeks following two main reliefs :-

A) To issue appropriate Writ, order or direction and to allow the petition, and thereby direct the respondent no.3 to send petitioner in Open Prison, and, or,

B) To issue appropriate Writ, order or direction to quash and set aside the acts of respondents including Registration of offence and forfeiture of cash surety of petitioner, and, or,

3. The petitioner is a life convict. He had been been undergoing sentence at Visapur District Open Prison. On 23.04.2016, the petitioner was released on furlough for 28 days. He was supposed to surrender on 25.05.2016. He, however, surrendered late by two days. The reason for delay is attributable to he, having been required to make

arrangements to secure admission to his children, who had passed 10th and 12th standards examinations with good marks.

4. As a result of overstay of two days, offence punishable under Section 224 of the Indian Penal Code ("I.P.C.", for short) came to be registered against him. Moreover, his two days remission has also been forfeited besides forfeiture of cash security furnished by him for his release on furlough. Furthermore, respondent no.3 transferred the petitioner from Open Prison to a central prison. The petitioner claims to have been punished with multiple punishments for two days overstay. The petitioner has, therefore, urged to direct respondent no.3 to send him back to open prison.

5. In reply, the Superintendent of Visapur District Open Prison has filed an affidavit contending that the petitioner was presented before the Open Prison Selection Committee since he had

jumped the furlough. The Committee recommended for his transfer from open prison to a central since a criminal case has been filed against the petitioner under Section 224 of I.P.C. Pendency of criminal case is stated to be disqualification for continuation in open prison.

6. Mr.Rupesh Jaiswal, learned Counsel for the petitioner, made submissions on the lines of the averments made in the petition.

7. Learned APP, on the other hand, submits that since the petitioner had overstayed furlough and is being prosecuted for the same, he incurred disqualification to continue to stay in open prison. The concerned Committee, after having considered his case, has recommended for his transfer from open prison to central prison. The recommendation has been approved by the Special Director General of Police (Prisons).

8. The petitioner is a life convict. He has been undergoing imprisonment since 2004. He had been released on furlough and/or parole leave every year since 2008 to 2017. During each of those years, except in 2016, he returned to prison on the day his leave was to over. It was only in 2016, he overstayed for two days. He returned prison on his own. For the said lapse, a crime has been registered against him for the offence under Section 224 of I.P.C.

9. Intention is one of the main ingredients of offence under Section 224 of I.P.C. The petitioner was convicted for having murdered his wife. He has two grown up children. Both of them have passed 10th and 12th standard examinations during 2015-2016 with good marks. The documents on record vouch for the same. It is the case of the petitioner that he had overstayed for two days as he was engaged in securing admission for his children in colleges of good repute. Whether the petitioner had intentionally

overstayed, would be considered by the appropriate Court. Suffice it to say that for such a lapse, his cash security deposit has been forfeited besides his two days' remission. Moreover, he is facing prosecution. In our view, therefore, two days overstay ought not to have weighed with the concerned authorities to transfer him from open prison to central prison.

10. Rule 3 of the Maharashtra Open Prisons Rules, 1971 ("Open Prisons Rules", for short), speaks of constitution of a four member committee for selection of prisoners for keeping them in open prison. Whereas Rule 4(1) of the Open Prisons Rules states who could be selected for confinement in open prison. Sub-rule (2) thereof states who shall not normally be confined in open prison. It gives a list of categories of prisoners, who shall not normally be confined in open prison. The word "normally" does indicate the prisoners described therein are not

disqualified for confinement in open prison. We are here more concerned with Rule 6 of the Open Prisons Rules, which speaks of check-up of work and suitability of prisoners transferred to open prisons. Rule 6 reads thus :-

6. Check up of work and suitability of prisoners transferred to open prison:-

The case of each prisoner transferred to an open prison shall be put up before the Classification Committee once a month, which shall analyse the problems of the prisoner in details. If it finds that a particular prisoner is found unfit for being kept in confinement in the open prison on the ground of indiscipline or unsatisfactory work or any other good and sufficient cause, he shall be transferred, after obtaining approval of the Inspector General of Prisons, to such prison as the Inspector General of Prisons may specify."

11. The second limb of Rule 6 indicates that if found unfit for being kept in open prison on the ground of indiscipline, unsatisfactory work or any other good and sufficient cause, prisoner shall be transferred, after obtaining approval of the Inspector General of Prisons, to such prison as the Inspector General of Prisons may specify.

12. In view of the directions of the Division Bench of this Court in the case of **Ravi alias Ravindra Umaji Gunjkar Vs. State of Maharashtra and ors., 2011 All MR (Cri) 1904**, the proper procedure for transferring the prisoners selected by Selection Committee for confinement from open prison to central prison would be to place the proposal before the same Selection Committee.

13. Facts of the case on hand undoubtedly indicate non-compliance of Rule 6 and or the directions given in the case of **Ravi alias Ravindra**

Umaji Gunjkar (supra). The statute/Rules mandate to do a particular thing in particular manner. The same has to be done in that manner. The Superintendent of Visapur District Open Prison by his letter dated 08.05.2017, transferred the petitioner from open prison to Yerwada Central Prison on the ground that the petitioner was so directed to be transferred by the Deputy Inspector General of Prisons (West Zone). The petitioner's case was then placed before the selection Committee on 17.06.2017. The Committee decided to permanently keep the petitioner in Central Prison. The said decision has been ratified/approved two months thereafter by Special Inspector General (Prisons), Maharashtra State, Pune. The aforesaid facts would, undoubtedly, indicate that the petitioner had first been transferred from open prison to central prison upon oral directions of the Deputy Inspector General (Prisons), West Zone. Rule mandates that there should first be approval of Inspector General (Prisons) and then transfer from

open prison to central prison. In the present case, the action of the respondents is in complete breach of the mandatory Rule 6 of the Maharashtra Open Prisons Rules, 1971. The impugned action of respondent no.2, therefore, needs to be interfered with.

14. For the aforesaid reasons, the petition succeeds in terms of the following order :-

(i) Respondent no.2 is hereby directed to re-transfer the petitioner to open prison immediately.

(ii) Rule is made absolute in the above terms. The petition stands disposed of.

[R.G. AVACHAT, J.]

[S.S. SHINDE, J.]