

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.1581 OF 2018

Dipak s/o Subhash Patil,
Age-36 years, Occu:Nil Convict No.6125,
R/o-At present in Central Prison,
Nashik, Dist-Nashik

...PETITIONER

VERSUS

- 1) The State of Maharashtra,
Through Secretary, Home Department,
Mantralaya, Mumbai-32,
- 2) The Deputy Inspector General/
Inspector General of Central
Prison, Aurangabad,
- 3) The Superintendent of Central
Prison, Nashik.

...RESPONDENTS

...

Mrs.Bharati B. Gunjal Advocate for Petitioner.
Mr.A.B. Girase, Public Prosecutor for
Respondent Nos. 1 to 3.

...

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

DATE OF RESERVING JUDGMENT : 30TH JANUARY, 2019

DATE OF PRONOUNCING JUDGMENT: 4TH FEBRUARY, 2019

JUDGMENT [PER S.S. SHINDE, J.] :

1. Rule. Rule made returnable forthwith and heard finally with the consent of the learned counsel appearing for the parties.

2. By way of present Petition, the Petitioner seeks quashing of orders dated 27th January, 2012, and 27th December, 2017, passed by the Deputy Inspector General of Prisons, Central Region, Aurangabad, thereby removing his name from the remission register permanently, and rejecting his request for re-entering his name in the remission register.

3. The Petitioner was convicted under Section 302 of the Indian Penal Code in Sessions Case No.84 of 2004 by the Additional Sessions Judge, Jalgaon, and was sentenced for life imprisonment. The Petitioner was released on

parole for 30 days on 14th November, 2007, pursuant to the order passed by the Divisional Commissioner, Nashik. But after expiry of the said period of parole, Petitioner did not surrender to the jail authorities and was required to be arrested and brought back to the jail by the police after a long period of 1237 days. As per the provisions of law and Prison Manual, the Petitioner was treated as absconding for more than six months and his name was permanently removed from the remission register. The Petitioner claims that due to serious illness of his mother and sudden death of his father, as there was nobody in the family to take care of his ailing mother, he could not surrender before the jail authorities within time. After his arrest, the Petitioner was served with show-cause notice dated 5th May, 2011, as to why he should not be penalized for breach of terms and conditions of parole, for remaining outside the jail for 1237 days, unauthorizedly,

and not returning on his own. The Petitioner submitted reply communicating the fact of his mother's illness and sudden death of his father. After submitting the reply, the Petitioner was not communicated in this regard and meanwhile he was granted parole and furlough for nine times and on each occasion, he surrendered within time before the jail authority.

4. It is the case of the Petitioner that he had again filed a request application to Respondent No.2 on 11th December, 2017, mentioning therein all the circumstances for his overstay and requested to re-enter his name in the remission register. However, Respondent No.2, by its order dated 27th December, 2017, turned down the request made by the Petitioner. Hence this Petition is filed by the Petitioner challenging the orders passed by Respondent No.2, dated 27th January, 2012 and 27th December, 2017.

5. Learned counsel appearing for the Petitioner submits that the Petitioner has given reply to the show cause and stated that his mother was seriously ill and due to sudden death of his father, as there was nobody in the family to take care of his mother, he could not surrender before the jail authority within time. It is submitted that without considering the reply filed by the Petitioner the impugned orders are passed, and before passing the impugned orders, no opportunity of hearing was given to the Petitioner. It is submitted that the act of the Petitioner in not returning to the jail within time was not intentional and due to unavoidable circumstances, i.e. serious illness of his mother and sudden death of his father, he could not surrender before the jail authorities within time. Learned counsel further submits that the guidelines provided by the Government with regard to imposition of

punishment were not followed. Learned counsel appearing for the Petitioner, therefore, submits that the Writ Petition deserves to be allowed. In support of her submissions, learned counsel placed reliance upon the unreported Judgments of the Division Bench of the Bombay High Court, Aurangabad Bench, in the case of Arun Shankar Ramlingam Naydu vs. the State of Maharashtra (Criminal Writ Petition No.1478 of 2017, CORAM: PRASANNA B. VARALE & SMT. VIBHA KANKANWADI, JJ.), dated 2nd February, 2018, and in the case of Dhanraj s/o Tanhu Marathe vs. the State of Maharashtra (Criminal Writ Petition No.1391 of 2017, CORAM: S.S. SHINDE & A.M. DHAVALA, JJ.), dated 25th January, 2018, and Judgment of the Bombay High Court at Principal Seat at Mumbai in the case of Kishor Jairam Vaity vs. the State of Maharashtra (Criminal Writ Petition No.216 of 2013, CORAM: A.S. OKA & S.C. GUPTE, JJ.) dated 24th December, 2013.

6. On the other hand, learned P.P. appearing for the State, referring to the reply filed on behalf of Respondent Nos.2 and 3, submits that the Petitioner is convicted for the offence punishable under Section 302 of the Indian Penal Code and sentenced to suffer life imprisonment. It is submitted that the Petitioner was released on parole for 30 days on 14th November, 2007. After the expiry of parole leave, the Petitioner ought to have surrendered before the jail authority on 15th December, 2017, but he did not surrender. Thereafter the Petitioner was arrested by the police on 4th May, 2011, and brought back to the jail. The Petitioner was absconding for the long period of 1237 days and therefore, the prison authority has passed an order thereby permanently removing name of the Petitioner from the remission register. It is submitted that on 5th May, 2011, a show cause notice was given to the

Petitioner calling upon his explanation, as to why his name should not be removed from the remission register. However, the Petitioner failed to give reply to the said show cause notice within reasonable time. It is submitted that the police authorities have followed the provisions laid down under the Maharashtra Prison Manual, 1979. The order of removal of the name of the Petitioner permanently from the remission register has been approved by the District and Sessions Judge, Nashik. Learned P.P. further submits that though it was requested by the Petitioner to take his name again in remission register, but considering the past history that he was absconding from the jail for a long period of 1237 days, his request came to be turned down, after considering the relevant provisions of the Maharashtra Prison Manual, 1979. It is submitted that the the Petitioner is not law abiding person and therefore he is not entitled to seek the

relief as prayed for. Learned P.P. therefore, submits that the Petition deserves to be dismissed.

7. We have given careful consideration to the submissions made by learned counsel appearing for the Petitioner and learned P.P. appearing for the State. With their able assistance, we have carefully perused the pleadings in the Petition, grounds taken therein, annexures thereto, reply filed on behalf of Respondent Nos.2 and 3, and the exposition of law in the unreported Judgments relied upon by learned counsel appearing for the Petitioner.

8. It is true that on 5th May, 2011, a show cause notice was given to the Petitioner, calling his explanation for overstay. But perusal of the impugned order dated 27th January, 2012, shows total non application of mind. The impugned order

is very cryptic and without assigning the reasons. It does not disclose that before passing the order, explanation given by the Petitioner was taken into consideration and that the same was not found satisfactory. In the said order it is mentioned that the name of the Petitioner should be removed permanently from the remission register and it appears from the record that the said order was not served upon the Petitioner.

9. We have also perused the impugned order dated 27th December, 2017, thereby rejecting the request of the Petitioner to re-enter his name in the remission register. In the request letter tendered by the Petitioner, he has specifically stated that as his mother was seriously ill and due to sudden death of his father, there was nobody in the family to take care of his ailing mother, therefore he could not surrender before the jail authorities within time. It does not

disclose that before passing the impugned order, the explanation tendered by the Petitioner was taken into consideration.

10. It would be useful to refer the observations made in Para- 5 of the Judgment dated 24th December, 2013, delivered in the case of Kishor Jairam Vaity vs. State of Maharashtra and others, cited supra, which reads as under:

"5. In terms of the judgment and order dated 5th September, 2008 passed by the Division Bench of this Court at Nagpur Bench in Criminal Writ Petition No.283 of 2006 (Sk. Jakir Shaikh Babu vs. State of Maharashtra), guidelines for imposing the punishment have been laid down which read thus:-

"(1) Sufficient notice preferably of at least seven days' duration be given to the prisoner for submitting reply to the notice of showing cause to proposed higher punishment.

(2) Cause shown be considered. If no

sufficient cause is shown, reasoned order be passed for not accepting the contentions/cause shown by prisoner.

(3) If higher punishment is proposed against the prisoner, then the proposal be submitted to the higher prison authority competent to grant sanction for higher punishment for the prison offence committed in the case.

(4) After receipt of sanction order from the competent sanctioning authority and judicial appraisal from the Sessions Judge concerned, an order imposing higher punishment may be passed and communicated to the prisoner.

(5) The order of higher punishment may be implemented after following steps (1) to (4)."

11. In Sk. Jakir Shaikh Babu's case, cited supra, the period of overstay of the Petitioner therein, was of 190 days and his remission of 380 days was curtailed. In the present case, no doubt the period of overstay is of 1237 days is too long. However, the procedure prescribed for

imposing punishment for deducting remission should be followed and before imposing punishment, an opportunity of hearing must be given. Besides, there should be a reasoned order showing the basic facts as well as the defence raised and the subjective satisfaction of the authority that the reason given by the prisoner was not satisfactory.

12. It is pertinent to note that on 2nd August, 2011, specific rules were framed prescribing various punishments for overstay, after furlough and parole period is over. It discloses that if a convict stays away from the jail for more than six months (180 days), his name should be removed permanently from the remission register. However, these rules are subsequent and those cannot be applied to the act of the Petitioner, which took place much earlier. Admittedly, the Petitioner was arrested on 4th May, 2011, i.e. much before 2nd August, 2011, when

afore-stated rules were framed.

13. We have also perused the order of appraisal passed by the learned Extra Joint Ad-hoc District Judge & Additional Sessions Judge, Nashik, thereby approving the proposed penalty to be inflicted on the Petitioner. The order passed by the Additional Sessions Judge is composite one and the same is in respect of many convicts and no individual case of the Petitioner is considered. It appears that before imposing the punishment, no reasoned order of appraisal is passed.

14. In the present case, though the period of overstay of 1237 days is huge and probably very difficult to explain, we find that the procedure prescribed must be followed and a reasoned order should have been passed by the concerned authority. The contention of the Petitioner that

after his arrest on 4th May, 2011, during the period from 2012 to 2017, he was released for five times on furlough and four times on parole, is not seriously disputed by the learned A.P.P. appearing for the State. Thus it is not clear, if the name of the Petitioner was permanently removed from the remission register, how he was granted furlough and parole on several occasions thereafter. While determining the period of imprisonment for life, it will be necessary to determine the period undergone by the Petitioner in jail, for which proper order regarding removal of his name from the remission register is necessary.

15. Since there is non application of mind and no fair procedure was followed while imposing the punishment, we deem it proper to quash and set aside the impugned orders, with directions to the competent authority to grant opportunity to the Petitioner to put forth his contentions, and after

hearing him, to pass the reasoned order. Hence, we pass the following order:-

O R D E R

(I) The Writ Petition is allowed. The impugned orders dated 27th January, 2012 and 27th December, 2017, passed by the Deputy Inspector General of Prisons, Central Region, Aurangabad, are quashed and set aside.

(II) The Competent Authority – Respondent No.2 is directed to give opportunity to the Petitioner to show cause his absence and to consider the reasons given by the Petitioner and thereafter to pass an appropriate order as per the law and the Maharashtra Prison Manual. When such order will be passed, it should be communicated to the

Petitioner and his acknowledgement should be taken so that he can avail any remedies in case the order is against him.

(III) Rule is made absolute in above terms. The Writ Petition stands disposed of, accordingly.

[R.G. AVACHAT, J.]

asb/JAN19

[S.S. SHINDE, J.]