

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

WRIT PETITION NO.1119 OF 2019

Bashir Ahmed Usman Gani Khairulla	.. Petitioner
Vs.	
State of Maharashtra & Ors.	.. Respondents

.....

Mrs.Aisha Ansari a/w. Mrs. Narseen Ayubi, Advocate for the
Petitioner.

Mr.Arfan Sait, APP for the Respondent-State.

.....

**CORAM : B. P. DHARMADHIKARI AND
PRAKASH D. NAIK, JJ.**

DATE : APRIL 11, 2019.

P.C.:

Petitioner, a convict in Bombay Bomb Blast case questions order dated 18th May, 2015, by this Appeal against order rejecting grant of furlough has been dismissed.

2 Learned counsel for the petitioner has relied upon averments in petition and submitted that on all earlier occasions, petitioner has returned back to prison on due date and during leave period has not abused the liberty. Contention is on the ground of parity also, the petitioner is entitled to release.

3 Our attention has been drawn to judgment of Hon'ble Apex Court reported on ***Asfaq Son of Abdul Aziz Vs. State of Rajasthan***¹, to explain how such request for grant of parole or furlough needs to be dealt with.

4 Our attention is also invited to latter reported judgment in the case of ***Asgar Kadar Shaikh Vs. Deputy General (Prison)(East) Nagpur & Anr.***² to claim parity. Learned counsel for the petitioner states that Asgar Shaikh is co-convict and because of his previous good conduct, he has been given the leave.

5 Learned APP has pointed out that as per provisions of Rule 4(13), convict like petitioner is not entitled to grant of furlough at all. Our attention is invited to order of Division Bench dated 1st May, 2017, passed by Rajasthan High Court from which matter went to Supreme Court which judgment has been reported in the case of ***Asfaq Son of Abdul Aziz Vs. State of Rajasthan (Supra)***. Learned APP submits that Rajasthan High Court was not required to look into the

1 2017 Volumn 15 SCC Page 55

2 2018 ALL MR (Cri.) 5158

provisions of the Rajasthan Prisoners Release on Parole Rules, 1958, and, as such Apex Court also was not required to consider said provisions. Our attention is invited to an order dated 13th October, 2017, passed by Hon'ble Apex Court in very same matter to show that when the long time spent in prison was pointed out, Hon'ble Apex Court only permitted prisoner Asfaq before it to submit a representation.

6 Learned APP has also relied upon judgment of Division Bench of this Court at Nagpur in case of ***Kishor @ Prakash Lalse Sadmek Vs. Deputy Inspector General of Prison (East Region) Nagpur & Anr.***³, and judgment of Division Bench at Bombay in the case of ***Bashir Ahmed Usman Gani Kairullah Vs. State of Maharashtra & Ors.***⁴ He submits that provisions made in law have been accepted as determinative.

7 Learned counsel for the petitioner in brief reply has invited our attention to the fact that judgment of Division Bench at Nagpur relied upon by her is latter in point of time, and, there the Hon'ble Senior Judge constituting the Bench

3 2018 ALL MR. (Cri.) 4558

4 2018 (3) ABR (Cri.) 511

was same. She submits that in the face of earlier judgment, in latter judgment, more importance has been given to conduct and parity.

8 Judgment delivered at Aurangabad Bench on 7th February, 2019 in ***Criminal Writ Petition No.33 of 2019 (Mohammad Moin S/o. Faridullah Qureshi Vs. State of Maharashtra and Ors.)***, and on 24th November, 2017 in Criminal Writ Petition No.1293 of 2017 ***(Jafar S/o. Abdul Haq Shaikh Vs. State of Maharashtra & Ors.)***, is also relied upon to press the ground of parity.

9 With the assistance of respective counsel, we have perused above judgments.

10 Here, petitioner Bashir was released earlier on nine occasions on parole leave and on four occasions, he was permitted to avail furlough leave. While on parole leave, he reported back belatedly only once but voluntarily, by one day. Apart from this solitary occasion, he has not violated any term or condition of his release.

11 Division Bench of this Court at Nagpur on 1st March, 2018, in case of ***Kishor @ Prakash Lalse Sadmek (Supra)*** has in paragraphs 10, 11 and 12 looked into all relevant judgments including judgment of Hon'ble Apex Court in case of Asfaq, it then found proper to follow the view of Division Bench of High Court in case of ***Smt.Rubina Suleman Vs. State of Maharashtra***. Therefore, it held that provisions of Rule 4(13) were decisive. At that juncture, it did not look into the previous conduct either of prisoner or of respondent.

12 In latter judgment on which counsel for petitioner has placed reliance i.e. in case of ***Asgar Kadar Shaikh (Supra)*** who is co-convict of the prisoner, the Division Bench looks into provisions of Rule 4(13), reference already made by it to larger Bench about constitutionality of discrimination and then the previous conduct of prisoner. It therefore granted the prayer made to it and petitioner was directed to be released on furlough.

13 On 11th October, 2018, the larger Bench at Nagpur considered the facts and found that parole and furlough leave

needed to be considered independently and in facts before it, only an emergency parole was being sought. Reference was therefore found only of academic importance. Thus, view taken by Division Bench at Nagpur in case of **Asgar Shaikh (Supra)**, when reference was pending before larger Bench.

14 Division Bench at Bombay on 7th August, 2018, has considered the request for release on parole made by this petitioner (Bashir Ahmed) in judgment in the case of **Bashir Ahmed Usman Gani Kairullah Vs. State of Maharashtra & Ors.**⁵ In that judgment, in paragraph no.17, it has considered the judgment of Aurangabad Bench in case of **Jafar s/o. Abdul Haq Shaikh (Supra)** and in paragraph 19, it has considered the earlier judgment of Aurangabad Bench in case of **Mohammed Moin s/o. Faridulla Qureshi (Supra)**. After considering these judgments, which basically apply parity, and therefore, Article 14 of the Constitution of India, that Division Bench has found it necessary to follow the statutory prescription i.e. mandate of Rule 4(13) of Maharashtra Parole and Furlough Leave. This law is laid down in case of present petitioner only.

15 The fact that Rule 4(13) does not empower or enable respondents to release a convict like petitioner on furlough, is not in dispute. Thus, respondents do not have power with them to take a particular decision. In this jurisdiction, therefore, we cannot overlook that statutory bar. The judgment and order, which permit release on the ground of parity, cannot come to the rescue of present petitioner, as per law has been clarified by Division Bench of this Court in his own case of ***Bashir Ahmed Usman Gani Kairullaha (Supra)***.

16 We, therefore, find no case made out. Hence, writ petition is rejected.

17 No costs.

(PRAKASH D. NAIK, J.)

(B.P. DHARMADHIKARI, J.)