

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CRIMINAL APPELLATE JURISDICTION****CRIMINAL WRIT PETITION NO. 2789 OF 2018**

Vishal Baban VannePetitioner
Vs.
The State of MaharashtraRespondents.

WITH**CRIMINAL WRIT PETITION NO. 34 OF 2019**

Laxman Rudrappa BasargiPetitioner
Vs.
The State of MaharashtraRespondents.

Mrs. Nasreen S.K. Ayubi, Advocate appointed for the Petitioners.
Mr. Arfan Sait, APP for the Respondent-State.

CORAM : A. S. OKA, AND

A. S. GADKARI, JJ.

DATE : 30th JANUARY, 2019.

ORAL JUDGMENT (PER- A.S. OKA, J.):

On the earlier date, the parties were put to the notice that an endeavour shall be made to decide these Petitions finally at the stage of admission.

2 We issue rule. The learned APP waives service. Forthwith taken up for final disposal.

FACTS OF WRIT PETITION NO. 2789 OF 2018

3 In Writ Petition No.2789 of 2018, the Petitioner is undergoing sentence of life imprisonment. The Petitioner was granted parole on the ground of death of his father. Parole was granted for the period between 3rd February 2017 to 9th February, 2017 (both days inclusive). Therefore, the Petitioner was under an obligation to report back to the prison on 10th February 2017. However, he reported back to the prison on 12th February 2017. A show cause notice was served to the Petitioner calling upon him to show cause as to why his remission should not be cut.

4 The Superintendent of the Kolhapur Central Prison proposed to penalize the Petitioner by cutting remission by 2 days (1 remission for per day's delay). A Judicial appraisal was made by the learned Additional Sessions Judge, Kolhapur and he approved the proposed action by the Order dated 6th January, 2018. That is how the remission of the Petitioner has been cut by two days.

5 The challenge in this Petition received through Jail is twofold. The first challenge is to the Order of cutting of remission by two days. The second prayer is for refund of Rs.15,000/- which was deposited by the Petitioner by way of deposit as a condition for grant of parole.

FACTS OF WRIT PETITION NO. 34 OF 2019

6 In Writ Petition No.34 of 2019, the Petitioner is undergoing sentence of life imprisonment. By the Order dated 5th December, 2013, the State Government in exercise of Appellate power granted parole to the Petitioner for a period of 30 days. The Petitioner applied for extension of parole. As per the first Order granting parole, the Petitioner was released on 8th January, 2014. The first extension was granted from 8th February, 2014 to 9th March, 2014. However, the prayer for second extension was rejected by the State Government by the Order dated 2nd June, 2014. As a result of the grant of first extension, the Petitioner was granted parole of sixty days upto and inclusive of 9th March, 2014. The Petitioner reported back to the Jail on 9th April, 2014. In view of this default, the Superintendent of the Kolhapur Central Jail, proposed cutting of remission by 90 days (30 days x 3). The said proposal was approved by the Deputy Inspector General of Prisons. Thereafter, the same was sent for Judicial appraisal. By the Order dated 6th April, 2017, the Additional Sessions Judge, Kolhapur approved the same. The challenge in this Petition received through Jail is to the imposition of penalty of cutting of remission for 90 days.

7 We have heard the learned counsel appearing for the
Petitioners and the learned APP for the Respondent-State.

CONSIDERATION OF SUBMISSIONS

8 The Prisons Act, 1894 (for short, “*the Prisons Act*”) has
been enacted for regulation of prisons. The perusal of the said Act
shows that it contains exhaustive provisions such as Maintenance of
the Prisons, Duties of Prison Officers, Discipline of Prisoners,
Employment of Prisoners, Facilities to the Prisoners as well as the
Offences relating to Prison. Chapter XI of the Prisons Act deals with
Prison Offences. Section 45 contains a list of Prison offences. Section
46 lays down the punishment to the prison offences. One of the
punishments under Sub-Section (4) of Section 46 is punishment of
loss of privileges admissible under the remission or furlough or parole
system for the time being in force as may be prescribed by rules made
by the State Government. Section 48A was introduced in the Prisons
Act by way of amendment by the Bombay Act No. XXVII of 1953.
Section 48A reads thus-

“48A. 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

Superintendent may, after obtaining his explanation, punish such offence by

(1) a formal warning as provided in clause (1) of Section 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 Government may by a general or special order directed”.

9 Thus, by a legal fiction incorporated in Section 48A, the failure without sufficient cause to observe any of the conditions on which furlough or parole was granted to a prisoner is made a prison offence. Section 48A also prescribes the punishments which can be imposed for such prison offence. One of the punishments as provided in Sub-Section (3) of Section 48A is loss of privileges admissible under the remission or furlough or parole. Section 49 of the Prisons Act lays down that except for an Order of Court, no punishment other than the punishments specified in Sections 46 and 47 shall be inflicted on any prisoner and no punishment shall be inflicted on any prisoner otherwise than in accordance with the provisions of those Sections.

10 Under Section 59 of the Prisons Act, the State Government is conferred a power to frame rules. Accordingly, the State Government has framed the Maharashtra Prisons (Punishment) Rules, 1963, (for short, “*the Punishment Rules of 1963*”). There are also non-statutory rules framed dealing with the punishments to the prisoner. Sub-Section 5 of Section 59 of the Prisons Act confers a Rule making power on the State Government for framing Rules providing for award of remission and for release a prisoner on parole or furlough. In exercise of the said powers, the State Government has framed the Maharashtra Prisons (Remission System) Rules, 1962, (for short, “*the Remission Rules of 1962*”). The Remission Rules of 1962 lay down the eligibility of convicts for grant of various categories of remissions. Rule 23 of the Remission Rules of 1962 reads thus-

“23. *Subject to the provisions of rule 22, a Superintendent may punish any prison-offence under [Section 46 of the Act, in either of both the following methods, that is to say, by]*

(a) *forfeiting any ordinary or special remission for a period not exceeding 60 days. +.....+*

(b) *removing any prisoner from the remission system for a period not exceeding one year :*

Provided that where the Superintendent is of opinion

that higher punishment by way of forfeiture of remission or removal from the remission system \$(or both)\$ is necessary in the case of any prisoner, he may, with the previous sanction of the Inspector General, award such higher punishment (including permanent removal from the remission system)."

11 Thus, there is a power vesting in the Superintendent of a Jail of forfeiting ordinary or special remission for a period not exceeding 60 days or removing any prisoner from remission system for a period not exceeding one year.

12 In certain cases, punishment can be imposed with a previous sanction of Inspector General of Prisons. The said Remission Rules of 1962 were amended by the State Government by the Maharashtra Prisons (Remission System) (First Amendment) Rules, 2011 (for short, "*the Amended Remission Rules of 2011*"). By the said Amended Remission Rules of 2011, Rule 23-A was brought on the rule book, which provided for cutting of remission of the Prisoners who have indulged in delay in reporting to the Jail after expiry of the period of parole or furlough. A mathematical formula is laid down in the table which is a part of Rule 23-A. For example, in case of parole, if the prisoner indulges for the first time in delay in reporting to the prison for a period between 2 to 15 days, for every day's delay,

remission is cut by one day, provided he surrenders himself. In case, he is arrested by the Police and brought to the Jail, the remission is cut by 2 days for every day's delay. There are similar provisions in relation to furlough. Thus, punishment which is provided under Section 48A is now governed by the said Remission Rules of 1962 as amended by the notification dated 2nd August, 2011.

13 In the case of **Sunil Batra (II) Vs. Delhi Administration**¹, the Apex Court issued several directions to the States. Direction No.6 in paragraph No.78 reads thus-

“6. No solitary or punitive cell, no hard labour or dietary change as painful additive, no other punishment or denial of privileges and amenities, no transfer to other prisons with penal consequences, shall be imposed without judicial appraisal of the Sessions Judge and where such intimation, on account of emergency, is difficult, such information shall be given within two days of the action.”

14 Thus, the Apex Court laid down that no punishment involving denial of privileges shall be imposed on any prisoner without Judicial appraisal by the learned Sessions Judge. Based on the said decision, a Circular was issued on 2nd January, 1984 by the State Government laying down that no punishment of withdrawal of privileges shall be imposed on a prisoner without Judicial appraisal by

¹ (1980) 3 SCC 488

the learned Sessions Judge.

15 Coming back to the Prisons Act, the power to punish a prisoner who fails to observe any of the conditions on which he is released on parole or furlough is conferred by Section 48A. The Section begins with the words “*If any prisoner fails without sufficient cause.....*”. Thus, the intention of the legislature is very clear. Only because a prisoner fails to observe any conditions on which he was released on furlough or parole, the punishment as provided in section 48A read with the Remission Rules of 1962 as amended on 2nd August, 2011 cannot be imposed. The punishment can be imposed only on the failure to observe any of the conditions without sufficient cause. Thus, before the Authority which is empowered to impose punishment under Section 48A exercises the power of imposing punishment, the said Authority must be satisfied that the breach or failure to observe the conditions is without a sufficient cause. Thus, it follows that if there is a sufficient cause which has resulted into a breach or violation of the conditions on when parole or furlough was granted, the punishment under Section 48A cannot be imposed. We may note here that non-statutory rules framed by the State Government dealing with punishments to the prisoner and in particular Rule 1(1) clearly lay

down that no prisoner shall be punished unless he has been informed about the offence alleged against him and is given a proper opportunity of representing himself. In any event, on the plain language of Section 48A, before any punishment is imposed under the said Section, an opportunity has been given to the prisoner to show whether there was a sufficient cause for breach or non-observance of any of the conditions on which he was released on furlough or parole. Thus, the Authority which is empowered to recommend and impose punishment under Section 48A is under an obligation to examine the reply filed by the prisoner to the show cause notice and to come to a conclusion whether there was a sufficient cause for non-observance or committing breach of terms and conditions. The punishment of cutting of remission provided for in Rule 23-A of the Amended Remission Rules of 2011 cannot be imposed mechanically.

16 Thus, in a given case for showing sufficient cause, petitioners produces documents or seeks to rely upon the record, before the concerned Authority to comes to the conclusion whether there was a sufficient cause or not, it is necessary for the Authority to apply its mind to the reply of the prisoner and the documents on record relied upon by the Petitioners. The very fact that punishment

can be imposed only if there is no sufficient cause for the breach or violation, a discretion vests in the Authority to recommend cutting of remission, which is less than what is provided in Rule 23-A of the Amended Remission Rules of 2011 for the brief reasons which may be recorded by the Authority. If the Authority is satisfied that a sufficient cause is established, the Authority can decline to impose punishment as provided in Rule 23A.

17 Now, we come to the Judicial appraisal. In view of the directions of the Apex Court, no punishment can be imposed on a prisoner without Judicial appraisal by the learned Sessions Judge. The very concept of Judicial appraisal requires an application of mind by the learned Sessions Judge. Therefore, whenever a case is sent for the Judicial appraisal with a proposal to impose punishment by exercising powers under Section 48A of the Prisons Act read with Rule 23-A of the Amended Remission Rules of 2011, it is the duty of the Prison Authority to forward to the learned Sessions Judge along with its proposal, a copy of the reply to the show cause notice submitted by the prisoner along with the material relied upon by the prisoner in support of the reply. When the learned Sessions Judge makes Judicial appraisal, it is necessary for the learned Sessions Judge to come to a

conclusion whether or not there was a sufficient cause, which is contemplated by Section 48A of the Prisons Act. Thus, the learned Sessions Judge, while making Judicial appraisal will have to record his opinion whether there was sufficient cause for non-observance or breach of the terms and conditions on which parole or furlough was granted. Depending upon the facts of the case, the learned Sessions Judge may recommend a punishment which is prescribed under Rule 23-A of the Amended Remission Rules of 2011 or recommend that either no punishment should be imposed or a lesser punishment be imposed. Therefore, Judicial appraisal cannot be an empty formality.

18 We may hasten to add here that while recording opinion based on the Judicial appraisal, the learned Sessions Judge is not expected to write a Judgment or a Judicial Order. However, the Order made by the learned Sessions Judge on Judicial appraisal must show application of mind to the cause pleaded by the prisoner and the brief reasons for coming to a particular opinion should be recorded.

19 We must note that Rule 23-A of the Amended Remission Rules of 2011 prescribes more stringent punishment to a case where prisoner does not report back to the prison after expiry of leave and is arrested and brought to the prison. Even in such a case, the prisoner

is entitled to plead existence of a sufficient cause. However, the fact that police were required to step in and arrest the prisoner is also a factor which will have to be considered by the concerned Prison Authority and the learned Sessions Judge.

20 In the light of the aforesaid legal position, we examine the cases before us.

21 In Writ Petition No. 2789 of 2018, there was a delay of only 2 days on the part of the Petitioner in reporting back to Jail after the expiry of the period of parole. The first stage when the application of mind is required is when the Competent Prison Authority empowered to impose a punishment under Section 48A proposes a punishment as prescribed by Rule 23-A of the Amended Remission Rules of 2011 by passing an Order. In this case, it appears that the parole was granted to the Petitioner on the ground of death of his father. Instead of reporting to the Jail on 10th February, 2017, he reported on 12th of February, 2017 on his own. Though a copy of the reply submitted by the Petitioner to show cause notice is not on record, it appears that the Petitioner pleaded that his mother was unwell and she was required to undergo a surgery. Certain documents regarding hospitalization of the mother were also

produced by the prisoner. The Order proposing the penalty passed by the Superintendent of Jail shows that there was no application of mind to the cause pleaded by the Petitioner. The Order of the learned Sessions Judge on Judicial appraisal records that the Petitioner's mother was discharged on 10th February, 2017. It also records that the Petitioner's mother was suffering from cancer. It mentions that the Petitioner has a brother who could have taken care of the mother. In such a situation, whether there was sufficient cause or not depends on various factors. One factor can be the gravity of illness of his mother depending upon which it can be decided whether the presence of the Petitioner by the side of the mother was necessary.

22 It appears to us that neither the Prison Authority nor the learned Sessions Judge have examined sufficient cause pleaded by the Petitioner in proper perspective. When application of mind is made to the sufficient cause as pleaded, various factors are required to be taken into consideration including the conduct of the Petitioner. As there is no proper application of mind to the existence of the sufficient cause as pleaded by the Petitioner, this is a case where the issue of imposing punishment requires reconsideration.

23 Now, coming to the Writ Petition No. 34 of 2019, as noted

earlier, the Petitioner was released on parole on 8th January, 2014 for a period of 30 days. The said period was extended by further period till 9th March, 2014. It appears from the Order dated 2nd June, 2014 that before expiry of the extended period of parole, on 18th February, 2014, the Petitioner applied to the State Government for further extension of parole. The said Application remained pending and was rejected by an Order dated 2nd June, 2014. We must note here that the Petitioner on its own reported back to the Prison on 9th April, 2014. The Petitioner had applied for third extension up to 8th April, 2014. That prayer was not rejected till 8th April, 2014. The Petitioner surrendered on 9th April, 2014. The Order of the learned Sessions Judge shows that the Petitioner had pleaded in the reply to the show cause notice that his Application for grant of second extension was pending. We find that the fact that second Application was decided on 2nd June, 2014 and the Petitioner surrendered immediately after expiry of the period of second extension sought by him were the relevant factors for consideration whether there was a sufficient cause for non-observing the terms and conditions on which parole was granted. However, there does not appear to be an application of mind about the existence of the sufficient cause. Therefore, even in the

second case, there will have to be reconsideration by the concerned Jail Authority as well as by the learned Judicial Officer.

24 Perhaps the Authorities ignored that the condition precedent for imposing punishment under Section 48A of the Prisons Act read with the Remission Rules of 1962 as amended on 2nd August, 2011, is the failure of the prisoner to show sufficient cause for non-observing the terms and conditions or committing breaches of the terms and conditions on which he was released on parole or furlough.

25 Therefore, both the Petitions must succeed in part and we pass the following Order:-

- a) The impugned Orders passed against the Petitioners in these two Petitions imposing punishment of cutting of remission in exercise of powers under Section 48A of the Prisons Act and Rule 23-A of the Remission Rules of 1962 as amended on 2nd August, 2011, are hereby quashed and set aside;
- b) The concerned Prison Authority which is empowered to recommend and impose punishment

shall consider the cases of the Petitioners afresh in the light of law laid down under this Judgment and Order and for the reasons recorded, shall submit a recommendation to the learned Sessions Judge for Judicial appraisal;

- c) There shall be a fresh Judicial appraisal in the light of observations made in this Judgment and Order. After the Judicial appraisal, final decision shall be taken by the Competent Authority regarding imposition of punishment under Section 48A of the Prisons Act read with Rule 23-A of the Remission Rules of 1962 as amended in the year 2011;
- d) Copies of this Judgment and Order shall be forwarded to the Superintendents of all the Jails in the State of Maharashtra as well as to the learned Sessions Judges in the State of Maharashtra;
- e) Rule is made partly absolute in the above terms.

(A.S. GADKARI, J.)

(A.S. OKA, J.)