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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.4813 OF 2018

Vijay Ramchandra Thopte ...Petitioner
vs.
The State of Maharashtra & Ors. ...Respondents

Mr.Naveen R. Chomal for the Petitioner
Ms P.P.Shinde, APP for the respondent-State

CORAM : A.S.OKA, &
A.S.GADKARI, JJ.
DATE : JANUARY 25, 2019

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

1 Heard the learned counsel for the petitioner and the learned APP for the respondents. Rule. The learned APP waives service for the respondents. Forthwith taken up for final disposal.

2 It appears that the petitioner made an application in April 2016 for grant of parole under the Prisons (Bombay Furlough and Parole) Rules, 1959 (for short "the said Rules"). We must note here that the said Rules underwent major amendments firstly on 26th August 2016 and secondly on 16th April 2018. However, as the application was made in April 2016, the same will be governed by the Rules which were prevailing before the amendment of 25th August 2016. By the order dated 20th June 2016, the Competent Authority (the Divisional Commissioner,

Pune) rejected the application on the ground that in the year 2004, when the petitioner was released on furlough, he reported back late by 28 days. Another ground is that in the year 2005, when the petitioner was released on furlough, he did not report back on expiry of furlough and after lapse of 1859 days, he was arrested by the police and brought back to the prison. The third ground is that in view of aforesaid defaults, the Jail Superintendent has not recommended grant of parole to the petitioner.

3 An appeal was preferred by the petitioner against the said order to the State Government. The appeal was dismissed by the order dated 26th December 2016. While confirming the grounds of rejection set out by the Competent Authority, the Appellate Authority added a ground that the petitioner's brother and other relatives are capable of taking care of his ailing mother. These are the two orders which are subjected to a challenge in this petition under Article 226 of the Constitution of India.

4 The learned counsel for the petitioner submitted that the grounds given by the Competent Authority and the Appellate Authority are not at all justified and legal. He submitted that the petitioner wants to produce additional documents for showing the present health condition of his mother. The learned APP submitted that the Authorities had rightly exercised the discretion considering the prior conduct of the petitioner and especially in

view of the fact that when he was released on furlough in the year 2005, he was arrested by the police and brought back to the jail after expiry of five and half years from the date on which period of furlough expired. Hence, no interference is called for.

5 We have considered the submissions. It is true that the application made by the petitioner will be governed by the said Rules as prevailing prior to coming into force amendment dated 26th August 2016. At the relevant time, there was no provision under which the Competent Authority could have relied upon one of the grounds of rejection in Rule 4 of the said Rules which is applicable to the grant of furlough and reject the application for grant of parole. However, we may note here that under Rule 19 as it existed prior to the amendment dated 26th August 2016, it provided that for release of a prisoner on parole, there was a discretion vesting in the Competent Authority. There was also a provision that except in the case of death of nearest relative of the prisoner, parole cannot be granted without obtaining police report. Thus, a discretion always vested in the Competent Authority, and therefore, the Competent Authority was entitled to take into consideration the past conduct of the prisoner though the disqualifications provided Rule 4 could not have been specifically applied to an application for grant of parole. In view of the amendment made on 26th August 2016, from that date,

the disqualifications under Rule 4 could have considered.

6 In the present case, we find that while dismissing the appeal preferred by the petitioner, it was observed that the petitioner's brother and other relatives are capable of taking care of petitioner's ailing mother. This ground is not found in the order of the Competent Authority. If the respondents wanted to rely upon the said ground, the same should have been taken when the Competent Authority decided the application made by the petitioner. The petitioner had no opportunity to deal with this ground while preferring an Appeal. Therefore, the order of the Appellate Authority in the present case stands vitiated.

7 There is one more aspect of the case. As per the amended Rule 19, police report was called for. The order of the Competent Authority shows that the police report dated 7th June 2016 was considered by it. Perusal of the said police report shows that the concerned Officer was under an impression that the petitioner had sought furlough and not parole. The Officer has mentioned that he was making an enquiry as the petitioner had applied for grant of furlough. We may also note that the report recommends release of the petitioner on furlough.

8 Considering the aforesaid discussion and the fact that the petitioner wants to produce additional

documents showing the present health condition of his mother, it will be appropriate if the application for parole is reconsidered by the Competent Authority.

9 Accordingly, we pass the following order:

- (I) The impugned orders dated 28th June 2016 and 23rd December 2016 are hereby quashed and set aside;
- (II) It will be open for the petitioner to submit additional documents pertaining to present health condition of his mother to the Competent Authority within a period of one month from today;
- (III) The Competent Authority shall decide the application afresh as per the Rules prevailing on the date of application made by the petitioner;
- (IV) Needless to add that the Competent Authority will be entitled to call for a fresh police report;
- (V) The Competent Authority shall decide the application afresh in the light of observations made in this Judgment and Order;
- (VI) The Competent Authority shall decide the said application as expeditiously as possible and in any event within a period of three months from today;
- (VII) Rule is made partly absolute on above terms.

(A.S.GADKARI,J.)

(A.S.OKA,J.)