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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.5086 OF 2018
(THROUGH JAIL)

Takkusingh Ajitsingh Kalyani	... Petitioner
Vs.	
The State of Maharashtra	... Respondent

Mr. Shantanu R. Phanse for the Petitioner.
Ms. M.H. Mhatre, APP for the Respondent.

CORAM : A.S.OKA AND
A.S. GADKARI, JJ.

DATE : 22nd FEBRUARY 2019.

P.C. :

1 Heard the learned counsel appearing for the petitioner appointed to espouse the cause of the petitioner and the learned APP for the State. The substantive grievance made in this petition filed through jail is the denial of grant of benefit of sending the petitioner to open prison in terms of Maharashtra Open Prisons Rules, 1971 (for short “the said Rules”). Our attention is invited to the orders passed by this Court on earlier two petitions filed by the petitioner seeking prayer for sending the petitioner to open prison. By the order dated 18th January 2018 passed by a Division Bench of this Court in Criminal Writ Petition No.3558 of 2017, a direction was issued to the State to consider the case of the petitioner for transfer to open prison. This Court directed consideration of the case of the petitioner by the Selection Committee constituted under Rule 3 of the said Rules of 1971. The learned APP has placed on record a compilation of

documents which is taken on record and marked as 'C-1' for identification. It records that the Selection Committee in its meeting held on 11th May 2018 considered the case of the petitioner for transfer to open prison. The Selection Committee did not recommend the case of the petitioner on the ground mentioned in sub-rule (2)(g) of Rule 4 of the said Rules of 1971. There is no dispute between the parties that clause (g) of sub-rule (2) of Rule 4 is now clause (vii) of sub-rule (2) of Rule 4. Perusal of sub-rule (2) of Rule 4 of the said Rules of 1971 shows that the cases of prisoners who are covered by various sub-clauses of sub-rule (2) shall not be considered for being sent for confinement in an open prison. As per the report of the Selection Committee, in the present case, the disqualification attracted is under clause (vii) of sub-rule (2) of Rule 4. Clause (vii) of sub-rule (2) of Rule 4 reads thus :-

“(vii) prisoners convicted and sentenced for offences under sections 121, 121-A, 122, 123, 124, 124-A, 125, 126, 128, 129, 130, 131, 132, 133, 134, 135, 376, 392 to 402 of the Indian Penal Code or for offences under the Sea Customs Act,”

2 Chart signed by the Selection Committee indicates that the petitioner has been convicted under three separate judgments by three different Courts. By judgment and order dated 30th April 2002, the learned Special Court under Maharashtra Control of Organised Crime Act, 1999 convicted the petitioner for the offence punishable under section 302 read with sections 143 and 148 of the Indian Penal Code and section 4 read with section 25 of the Arms Act and for the offence punishable under section 302 he has been sentenced to suffer rigorous imprisonment for life. The second conviction is under the judgment and order dated 20th

January 2005 by the learned Sessions Judge, Mumbai for the offences punishable under sections 452 and 395 of the Indian Penal Code. The petitioner was sentenced to suffer imprisonment for five years for the said offence. The third conviction is under the order dated 22nd April 2013 by the learned Judicial Magistrate, First Class at Parola for the offence punishable under section 379 of the Indian Penal Code. He was sentenced to undergo rigorous imprisonment for six months.

3 Coming back to clause (vii) of sub-rule (2) of Rule 4, only one offence for which the petitioner was convicted falls in clause (vii). The said offence is under section 395 of the Indian Penal Code.

4 The petitioner has admittedly undergone sentence for the said offence. The conviction for the said offence is under order dated 20th January 2005. Our attention is invited to a decision of this Court in the case of *Ashokkumar Satyanarayan Arya Vs. State of Maharashtra and Anr.*¹. The said decision holds that if for the offences which are treated as disqualification under sub-rule (2) of Rule 4, if the convict has undergone the entire sentence, disqualification under sub-rule (2) of Rule 4 is not attracted. Hence, in the present case, disqualification as suggested by the Selection Committee was not attracted at all. Therefore, the case of the petitioner for transfer to open prison ought to have been considered favourably on 11th May 2018 inasmuch as no other disqualification or no other ground is mentioned by the Selection Committee except for the conviction of the petitioner for offences under section 395 of the Indian Penal Code.

1. 2010 (3) Bom. C.R. (Cri.) 272

5 We are informed across the bar by the learned APP on instructions that the Selection Committee is likely to meet in March 2019. Therefore, the Selection Committee will have to consider the case of the petitioner in the light of the aforesaid finding that the case of the petitioner ought to have been favourably considered in May 2018.

6 Accordingly, we dispose of the petition by passing the following order :-

ORDER

- (i) We hold that the ground set out by the Selection Committee in its meeting held on 11th May 2018 rejecting the case of the petitioner for transfer to open prison is not legal and cannot be sustained;
- (ii) We direct the State Government to place the case of the petitioner before the Selection Committee constituted under Rule 3 of the said Rules of 1971 as expeditiously as possible and in any event in the immediately next meeting;
- (iii) The Selection Committee shall consider the case of the petitioner in the light of the findings recorded in this judgment and order;
- (iv) Rule is made absolute on above terms;
- (v) A copy of this order shall be forwarded to the petitioner through the concerned Jail Superintendent of Yerwada Central Prison at Pune.

(A.S. GADKARI, J.)

(A.S.OKA, J.)