

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CWP No.12470 of 2019

Decided on: 26.08.2019.

Hemant alias Bunty

.....Petitioner

versus

State of Haryana and others

....Respondents

CORAM : HON'BLE MR.JUSTICE DR.RAVI RANJAN

Present: Mr.Siddharth Gupta, Advocate,
for the petitioner.

Mr.D.K.Khanna, Additional Advocate General, Haryana.

DR.RAVI RANJAN, J. (Oral Judgment)

Through this writ petition the petitioner seeks quashing of the order dated 24.01.2019, as contained in Annexure P-1, passed by respondent no.3, i.e., the Divisional Commissioner, Hisar Division, Hisar, by which respondent no.3 has declined to release the petitioner on parole/furlough. He further seeks direction to the respondents to release him or parole for a period of four weeks.

1. The facts in brief, which would be necessary for consideration of the *lis*, stand enumerated as under:

The petitioner was convicted in criminal trial arising out of FIR No.33 of 16.04.2009, registered at Police Station Behal, District Bhiwani and was sentenced to undergo rigorous imprisonment for life for

commission of offences punishable under Sections 302 and 120-B of the IPC and also to pay fine of Rs.1 Lakh and, in default thereof, to further undergo simple imprisonment for one year by the Additional Sessions Judge, Bhiwani vide his Judgment and order dated 10.02.2012. That apart, he was convicted under Section 25(1) (1B) (a) of the Arms Act, 1959 and was sentenced to undergo rigorous imprisonment for 3 years and a fine of Rs.10,000/-, in default thereof, to further undergo simple imprisonment for one month.

The petitioner assailed the aforesaid Judgment and order by preferring an appeal bearing No. CRA-D-534-DB-2012 before this Court but the same was dismissed by the Division Bench of this Court vide the Judgment dated 11.05.2015.

2. The petitioner, prior to the filing of the present writ petition, had moved this Court in CWP No.14054 of 2018 for quashing of the order dated 16.10.2017 passed by respondent no.3 by which his application seeking parole for 4 weeks for the purpose of house repair was rejected but the writ petition was dismissed on the ground that after jumping the period of parole, the petitioner, in view of the definition contained in Section 2(aa)(v) of the Haryana Good Conduct Prisoners (Temporary Release) Act, 1988 (as Amended Act No.8 of 2014), (hereinafter to be referred to as 'the Act'), has become a hardcore prisoner and as such, he cannot seek parole or furlough under Section 3 or Section 4 of the Act, as his case would be covered under Section 5A of the Act. Thereafter, the petitioner again filed an application seeking parole for 4 weeks, under the aforesaid provision,

for getting his house repaired. However, even though the District Magistrate has recommended his case for grant of parole, the respondent no.4, the Superintendent of Jail-I, Hisar, has given a dissenting opinion and respondent no.3 has declined the request.

3. In the aforesaid background of factual matrix, I have heard learned counsel for the petitioner as well as the learned Additional Advocate General, Haryana.

4. Learned counsel for the petitioner has tried to impress upon this Court by submitting that on the date of application, though the petitioner was indeed a hardcore prisoner, still he could have been released on parole under Section 5A(2) of the Act.

On the other hand, learned State Counsel has submitted that once he became a hardcore prisoner, he cannot be released on parole or furlough prior to completion of 5 years of imprisonment as such. It is contended that respondent no.3 has rejected the case of the writ petitioner finding him habitual offender. It is further submitted that his request for release on temporary basis made under the same ground was already rejected on an earlier occasion and the said order passed by respondent no.3 was challenged by filing writ petition bearing CWP No.14054 of 2018 but the same was also dismissed.

5. It appears from the pleadings of the parties that the petitioner was earlier released for 3 weeks on parole/furlough on 27.02.2014 and he was expected to come back on 21.03.2014 but he jumped the furlough and remained absconded about 02 month and 24 days. He was arrested by the

police on 15.06.2014. In that connection FIR No.139 of 2014 was lodged under Section 8/9 of the Act.

6. The aforesaid fact of jumping the aforesaid furlough for which FIR No.139 of 2014 was lodged under Section 8/9 of the Act, is an admitted fact and it is further admitted position that, in view of the provisions contained in Section 2(aa)(v) of the Act, since the petitioner admittedly jumped the period of parole and did not surrender himself within a period of 10 days from the date on which he should have surrendered, he became a hardcore prisoner.

This is also an admitted position that during the period he jumped parole, two more police cases were registered, one being FIR No.87 of 2014 lodged under Section 323/341/506/34 of the IPC, in the Police Station Bhatu Kalan and another was FIR No.12/2014 which was lodged under Section 392 of the IPC in PS GRP, Jind. However, the petitioner has been acquitted in both the aforesaid cases vide order dated 04.11.2014 by the CJM, Fatehabad and the order dated 08.08.2017 by the Additional District Judge, Jind respectively. These facts are reflected from the counter-affidavit/written statement filed on behalf of respondents no.1 to 4.

So far the FIR No.139/2014 lodged under Section 8/9 of the Act, at Police Station Bhatu Kalan, is concerned, he had been sentenced to period already undergone by the Judicial Magistrate Ist Class, Fatehabad on 04.03.2015.

7. Now the question would arise, as to whether in such a

situation, it can be held that the petitioner was a habitual offender?

In the impugned order, reference has been made to four police cases out of which two FIRs were lodged prior to his conviction and those cases/FIRs were finalised on the basis of sentence already undergone on 06.02.2010 (arising out of FIR No.179/2008) and on 09.11.2009 (arising out of FIR No.184/2006) by the concerned Courts. Under the Act, as the name of the statute suggests, decision regarding the temporary release has to be taken upon the good conduct of the prisoner which means that while deciding the issue, the conduct of the prisoner during the period of undergoing sentence in the prison has to be considered by the competent authority and not the case/FIRs which were lodged against him prior to his conviction for which he is undergoing sentence. Of course, during the relevant period also he has jumped the period of parole/furlough for which a case/FIR was lodged against him but the same has now been put to an end by sentencing him for a period already undergone in prison. In view of the aforesaid facts, of course, he had become a hardcore prisoner, however, it has to be understood that he was not a hardcore prisoner before jumping the parole. In certain cases, for example, on conviction under Sections 392/394/395/396/397 of the IPC and for other offences specified in Section 2(aa), a prisoner is to be considered to be a hardcore prisoner from the beginning itself. However, the petitioner became hardcore prisoner when he did not surrender after the expiry of period of parole/furlough. Accordingly, it can not be considered that he had violated any condition of temporary release or furlough as a hardcore prisoner rather it can safely be

construed that, since he has violated such condition as a prisoner, he became hardcore prisoner. Sub-section 2 of Section 5A of the Act is extracted and reproduced for better appreciation of the matter:

(2) Notwithstanding anything contained in sub-section(1) a hardcore prisoner, who has not been awarded death penalty, may be entitled for temporary release or furlough only if he has completed his five years imprisonment and has not been awarded any major punishment by the Superintendent of Jail, as judicially appraised by the concerned District and Sessions Judge;

Provided that the five years imprisonment period shall not include imprisonment during trial period for more than two years, while counting five years of imprisonment:

Provided further that if the prisoner so released under this sub-section violates any condition of temporary release or furlough, he shall be debarred from such release in future.”

It has been vehemently argued on behalf of the State that, since Sub-section 2 of Section 5A of the Act lays down in clear terms that a convicted hardcore prisoner, who has not been awarded death penalty, may be entitled for temporary release or furlough only if he has completed his 5 years of imprisonment and if he has not been awarded any major punishment by the Superintendent of Jail, as judicially appraised by the concerned District and Sessions Judge. It has been urged that he has not completed 5 years of imprisonment after becoming a hardcore prisoner and, apart from that, since he has jumped the period of parole/furlough, for which FIR was lodged, he does not qualify himself of the benefit of temporary release under the aforesaid provision of law. Now it is to be tested as to whether the said 5 years period is to be counted from the beginning of serving the sentence or from the date when the writ petitioner became a

hardcore prisoner. The clue is in the first proviso to Sub-section 2 of Section 5A of the Act which lays down that while counting 5 years imprisonment, one shall not include imprisonment during trial period for more than 2 years. This indicates in clear terms that the aforesaid provision would be for the period of imprisonment from the beginning of sentence in view of the concerned conviction rather the period of incarceration during trial, upto maximum of 2 years, can also be considered for that. The petitioner on conviction is facing imprisonment but not having been considered under any provision of law for which he could have been declared a hardcore prisoner in the beginning of the sentence itself and since the proviso also lays down that 2 years or less, which he had spent in imprisonment during trial period, would also have to be added while computing or granting 5 years of imprisonment. The second proviso further clarifies it as it lays down that if the prisoner, so released under the sub-section, violates any condition of temporary release, he shall be debarred from such release in future. Thus, it can safely be considered that the said provision is for the hardcore prisoner who was as such from the beginning of sentence after conviction as in such case, if they violated any condition of temporary release or furlough, they would be debarred forever from temporary release in future.

8. Secondly, Sub-section 2 also lays down a pre-condition for release that the prisoner should not have been awarded any major punishment by the Superintendent of Jail as judicially appraised by the concerned District and Sessions Judge. In the case in hand there is no order

passed by the Superintendent of Jail inflicting any major punishment upon him which has been judicially appraised by the concerned District and Sessions Judge rather a police case/FIR was lodged in which sentence of period already undergone had been passed by the Court concerned but not by the Superintendent. A reference is made in this regard to a decision rendered by a learned Single Judge of this Court in **“Surjeet Singh vs. State of Haryana and others” 2018(1) RCR (Criminal) 497**, holding that 5 years period of imprisonment cannot be counted after a prisoner becomes a hardcore prisoner as it is nowhere stated in the aforesaid provision that the prisoner has to complete his 5 years of imprisonment as a 'hardcore prisoner' rather the word 'prisoner' has been used by the legislature. The learned Single Judge has also come to the conclusion that the punishment by the trial Court in the FIR lodged under Section 9 cannot be held to be a punishment given by the Superintendent which has been appraised by the concerned District and Sessions Judge. This Court is also in respectful agreement with the aforesaid view expressed by the learned Single Judge.

9. In the result, since in two cases/FIRs lodged during the period during which the prisoner/petitioner remained absconded as he did not surrender after completion of the period of parole/furlough, has ended in his acquittal, that cannot be taken into consideration for declaring him a habitual offender. That apart, it cannot be held that the statute debars him from taking to take benefit of temporary release before completing 5 years of imprisonment as hardcore prisoner as the term used in Sub-section 2 of Section 5A is 'prisoner' and not 'hardcore prisoner' as has been discussed

above.

It is further held that the conviction by the trial Court and sentencing him the period already undergone cannot be held to be a major punishment imposed by the Superintendent of Jail which has been appraised by the concerned District and Sessions Judge.

10. In the result, this writ petition stands allowed. The order impugned dated 24.01.2019, as contained in Annexure P-1, is quashed and set aside and the matter is remitted back to respondent no.3-The Divisional Commissioner, Hisar Division, Hisar, to take a fresh decision in the matter expeditiously, preferably, within a period of four weeks from the date receipt/production of the copy of this order.

August 26, 2019
dharamvir

(DR. RAVI RANJAN)
JUDGE

Whether speaking/reasoned	Yes
Whether Reportable	Yes