

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CRIMINAL WRIT PETITION NO.361/2020

Chandradev @ Chandu S/o Pareshwar Rai C-538, detained in Open Prison Morshi, Distt. – Amravati (PRESENTLY IN JAIL).	... <u>Petitioner</u> In Jail
..Versus...	
1. State of Maharashtra through Chief Secretary of Home Department, Mantralaya, Mumbai.	... <u>Respondents</u>
2. Superintendent of Open Prison, Morshi, Dist. – Amravati.	

Miss R.M. Mishra, Advocate for the petitioner
Ms N.R. Tripathi, Addl. PP for the respondents

WITH

CRIMINAL WRIT PETITION NO.362/2020

Satish S/o Ramchandra Ninapure C-554, detained in Open Prison Morshi, Distt. - Amravati (PRESENTLY IN JAIL).	... <u>Petitioner</u> In Jail
..Versus...	
1. State of Maharashtra through Chief Secretary of Home Department, Mantralaya, Mumbai.	... <u>Respondents</u>
2. Superintendent of Open Prison, Morshi, Dist. – Amravati.	

Miss R.M. Mishra, Advocate for the petitioners
Shri A.M. Joshi, Addl. PP for the respondents

**CORAM : SUNIL B. SHUKRE AND
AVINASH G. GHAROTE, JJ.**

Judgment reserved on : 15/10/2020

Judgment pronounced on : 20/10/2020

J U D G M E N T : (PER : AVINASH G. GHAROTE, J.)

1. Rule. Rule made returnable forthwith. Heard learned Counsel for the parties finally.

2. The petitioner in Criminal Writ Petition No.361/2020, has been lodged in Morshi Open Jail, undergoing punishment on account of conviction under Section 302 of IPC by the learned District and Sessions Judge, Shivaji Nagar, Pune, in the year 2007, from which period he is in prison. The petitioner is a permanent resident of Gram : Paniara, Post : Paniara, District : Maharajganj (U.P.).

3. The petitioner in Criminal Writ Petition No.362/2020 has also been lodged in Morshi Open Jail and is undergoing punishment on account of conviction for the offence under Section 302 of IPC passed by the learned District and Sessions Judge, Wardha, vide judgment dated 1/4/2009, since which date he is in

prison. The petitioner is a permanent resident of Shivaji Nagar, near Railway line, Multai, Baitul Road, Taluka – Multai, District Baitul (M.P).

4. Both these petitions raise a common challenge to the constitutional validity of a part of the proviso to Sub Clause (ii) of Clause (C), Sub Rule 1 of Rule 19 of the Maharashtra Prisons (Bombay Furlough and Parole) Rules 1959, (hereinafter referred to as the “Mah. Prison Rules, 1959”) as amended in the year 2020, as being discriminatory, unequal, arbitrary and unreasonable thereby violating the principles of equality and reasonableness as enshrined in Articles 14 and 21 of the Constitution of India. It is contended that the said provision is discriminatory and unequal because it creates two classes amongst equally situated prisoners and gives advantage to one class, while denying the same advantage to the other class of prisoners, only on account of their residence, within the State and outside the State of Maharashtra.

5. It is further contended that the entire Country is affected by Covid-19 epidemic and Maharashtra is the most affected

State, and considering the situation in prisons, which are overflowing their capacity, it was impossible to maintain social distancing, on account of which, the prisoners carried a higher risk of being infected, which was required to be prevented, by causing their release for temporary period.

6. It is further contended that the Hon'ble Apex Court in Suo Moto Writ Petition (Civil) No.1/2020, taking cognizance of the wide spread and effect of Corona Virus (Covid-19) and having regard to the provisions of Article 21 of the Constitution of India, considering it imperative to ensure that the spread of Corona Virus within the prisons is controlled, had on 23/3/2020 issued certain directions including the constitution of a High Power Committee to determine which classes of prisoners can be released on parole or on interim bail for such period as may be thought appropriate. The High Power Committee so appointed was to determine the category of prisoners who could be released depending upon the nature of offence, the number of years to which the convict has been sentenced or the severity of the offence with which the under-trial is charged with and is facing trial or any other relevant factor which

the Committee may consider appropriate. It was further directed that the under-trial review committee contemplated by the Hon'ble Apex Court in *re inhuman conditions in 1382 prisons*, (2016) 3 SCC 700, shall meet every week and take such decision in consultation with the concerned authority as per the said judgment and so also the directions contained in para 11 in *Arnesh Kumar Vs. State of Bihar* (2014) 8 SCC 273.

7. It is submitted that in pursuance to the above directions, in exercise of the powers conferred by clause (5) and (28) of Section 59 of the Prisons Act (ix) of 1894 in its application to the State of Maharashtra and of all other powers enabling it in that behalf the Government of Maharashtra amended the Maharashtra Prisons (Bombay Furlough and Parole) Rules, 1959 by Notification dated 8/5/2020, inserting clause (C) in Sub Rule 1 of Rule 19. The effect of the amendment was that on declaration of epidemic under the Epidemic Diseases Act, 1897 by the State Government, the applications of prisoners convicted were to be considered favourably for release on emergency parole by the Superintendent of Prison for a period of 45 days or till such time that the State Government

withdraws the notification issued under the Epidemic Diseased Act, 1897, whichever was earlier. The proviso to sub-clause (ii) to Clause (c) the above amendment however created an exception to the categories of convicted prisoners as mentioned in Clause (c). The proviso also made a further exception to the effect that the said directions would not apply presently to foreign nationals and prisoners having their place of residence out of the State of Maharashtra.

8. The petitioners who are residents of places outside the State of Maharashtra, take exception to this portion of the proviso to Sub Clause (ii) of clause (C) of Sub Rule 1 of Rule 19 of the Mah. Prison Rules, 1959, to contend, that this portion of the proviso which makes the amended clause (C) of Sub Rule 1 of Rule 19 of the Mah. Prison Rules, 1959 inapplicable to convicts who are residents outside the State of Maharashtra, creates a discrimination against such convicts, by creating two separate classes of convicts, one resident of the State and the other resident outside the State. The petitioners contend that there is no rationality to such discrimination, as the fact, that the prisoners stand convicted, for whatever reason, would

remain a convict under law, for which such person would be lodged in the prison to undergo the sentence and no discrimination on the ground that a convict belongs to or/resides in a particular State or otherwise can be permitted on this count. The petitioners, therefore, submit that the proviso to Rule 19 (1) (C) (ii) of the Mah. Prison Rules, 1959, in so far as it, creates two classes of prisoners on the basis of their residence, inside the State and outside the State cannot withstand the test of reasonability and therefore is liable to be struck down as being violative to Article 14 of the Constitution. Article 21 of the Constitution, which guarantees personal liberty is also pressed into service.

9. Ms N.R. Tripathi, learned Additional Public Prosecutor appearing for the respondents in Criminal Writ Petition No.361/2020 and Shri A.M. Joshi, learned Additional Public Prosecutor appearing for respondents in Criminal Writ Petition No.362/2020, oppose the submissions as advanced by the learned Counsel for the petitioners and support constitutionality of the above noted portion of the proviso to Rule 19 (1) (C) (ii) of the Mah. Prison Rules, 1959.

10. Before we consider the rival contentions, it is necessary to note a few things. The Hon'ble Apex Court taking suo moto cognizance of the pandemic created due to Corona Virus, on 23/3/2020, directed each State and Union Territory to constitute a High Power Committee in the following terms :-

“Having regard to the provisions of Article 21 of the Constitution of India, it has become imperative to ensure that the spread of the Corona Virus within the prisons is controlled. We direct that each State/Union Territory shall constitute a High Powered Committee comprising of (i) Chairman of the State Legal Services Committee, (ii) the Principal Secretary (Home/Prison) by whatever designation is known as, (ii) Director General of Prison(s), to determine which class of prisoners can be released on parole or an interim bail for such period as may be thought appropriate. For instance, the State/Union Territory could consider the release of prisoners who have been convicted or are undertrial for offences for which prescribed punishment is up to 7 years or less, with or without fine and the prisoner has been convicted for a lesser number of years than the maximum. It is made clear that we leave it open for the High Powered Committee to determine the category of prisoners who should be released as aforesaid, depending upon the nature of offence, the number of years to which he or she has been sentenced or the severity of the offence

with which he/she is charged with and is facing trial or any other relevant factor, which the Committee may consider appropriate. The Undertrial Review Committee contemplated by this Court In re Inhuman Conditions in 1382 Prisons, (2016) 3 SCC 700, shall meet every week and take such decision in consultation with the 8 concerned authority as per the said judgment. The High Powered Committee shall take into account the directions contained in para no.11 in Arnesh Kumar v. State of Bihar (2014) 8 SCC 273. ”

(emphasis supplied)

11. By an order dated 7/4/2020 in Suo Moto Writ Petition (Civil) No.1/2020 the Hon'ble Apex Court, finding that the prisoners released in pursuance to its earlier orders, were stranded, and were unable to reach their respective homes, because of lockdown in absence of any transportation, passed the following order :-

“In these circumstances, we consider it appropriate to direct that Union of India shall ensure that all the prisoners having been released by the States/Union Territories are not left stranded and they are provided transportation to reach their homes or given the option to stay in temporary shelter homes for the period of lockdown. For this purpose, the

Union of India may issue appropriate directions under the Disaster Management Act, 2005 or any other law for the time being in force. We further direct that the States/Union Territories shall ensure through Directors General of Police to provide safe transit to the prisoners who have been released so that they may reach their homes. They shall also be given an option for staying in temporary shelter homes during the period of lockdown. Ordered accordingly.”

(emphasis supplied)

12. On 13/4/2020, clarifying its earlier orders, as passed in Suo Moto WP 1/2020, the Hon'ble Apex Court stated as under :-

“We make it clear that we have not directed the States/ Union Territories to compulsorily release the prisoners from their respective prisons. The purpose of our aforesaid order was to ensure the States/Union Territories to assess the situation in their prisons having regard to the outbreak of the present pandemic in the country and release certain prisoners and for that purpose to determine the category of prisoners to be released.”

(emphasis supplied)

13. In the meantime, as directed by the Apex Court vide its order dated 23/3/2020 in Suo Moto Writ Petition (Civil) No.1/2020, the High Power Committee, was constituted by the State of Maharashtra vide Government Resolution No.JLM0320/CR58/Prison-2, dated 24/3/2020. The High Power Committee (HPC) so constituted took a decision in its meeting dated 25/3/2020, categorizing under-trial and convicted prisoners. These categorizations were as under :-

“8. After considering all the relevant factors and also the circumstances presently prevailing in the State of Maharashtra, this Committee has decided as under:

(i) Undertrial prisoners who have been booked/charged for such offences for which maximum punishment is 7 years or less be favourably considered for release on interim bail on personal bond of such amount as may be determined, for a period of 45 days or till such time that the State Government withdraws the Notification under The Epidemics Act, 1897, whichever is earlier. The initial period of 45 days shall stand extended periodically in blocks of 30 days each, till such time that the said Notification is issued (in the event the said Notification is not issued within the first 45 days). The undertrial prisoners shall report

to the concerned police station within whose jurisdiction they are residing, once every 30 days.

(ii) The convicted prisoners whose maximum punishment is 7 years or less, shall, on their application be favourably considered for release on emergency parole, for a period of 45 days or till such time that the State Government withdraws the Notification under The Epidemics Act, 1897, whichever is earlier. The initial period of 45 days shall extended periodically in blocks of 30 days each, till such time that the said Notification is issued (in the event the said Notification is not issued within the first 45 days). The convicted prisoners shall report to the concerned police station within whose jurisdiction they are residing, once every 30 days.

(iii) The convicted prisoners whose maximum sentence is above 7 years shall on their application be appropriately considered for release on emergency parole, if the convict has returned to prison on time on last 2 releases (whether on parole or furlough), for a period of 45 days or till such time that the State Government withdraws the Notification under the Epidemics Act, 1897, whichever is earlier. The initial period of 45 days shall stand extended periodically in blocks of 30 days each, till such time that the said Notification is issued (in the event the said Notification is not issued within the first 45 days). The convicted prisoners shall report to the concerned police station within jurisdiction they are residing,

once every 30 days.

(iv) The aforesaid directions shall not apply to undertrial prisoners or convicted prisoners booked for serious economic offences/bank scams and offences under Special Acts (other than IPC) like MCOC, PMLA, MPID, NDPS, UAPA, etc., (which provide for additional restrictions on grant of bail in addition to those under CrPC) AND also presently to foreign nationals and prisoners having their place of residence out of the State of Maharashtra.

(v) This decision shall apply to only such prisoners, which in the opinion of the concerned jailor, keeping in view the overall infrastructure available at the concerned jail and the number of prisoners, it is not practically possible to maintain the required social-distance between the prisoners.

(vi) Before the temporary release of prisoners, the necessary medical protocol in relation to screening of Corona virus (COVID - 19) shall be followed by the jail authorities and action be taken accordingly.

(vii) The prisoners who fall in the 'class' or the 'category' spelt out by this decision will be entitled to be released in accordance with law. In considering every case for such release, the "nature of the offence" and the "severity of the offence" shall be considered. The possibility of the prisoners committing offence in case of temporary release (such as habitual offenders) or likelihood his/her absconding should also be considered an important tests to decline such requests

for temporary release.

(viii) The decision for temporary release of the prisoner shall be taken and implemented as expeditiously as possible, enabling his/her actual release within a maximum period of one week from the date of filing of an application in this regard by the prisoner.

(ix) All the above factors shall be considered before taking a decision of the temporary release of the prisoner. The directions and spirit of the said order of the Hon'ble Supreme Court shall however be foremost kept in mind.

(x) Inasmuch as the Hon'ble Supreme Court is in seisin of the matter, the aforesaid decision/directions shall be subject to further orders of the Hon'ble Supreme Court."

(emphasis supplied)

It is worthwhile to note that the exception carved out by the proviso to Rule 19 (1) (C) (ii) of the Mah. Prison Rules, 1959, was also a condition contained in the guideline of the HPC dated 25/3/2020. The guidelines of the HPC dated 25/3/2020 have been amended/modified from time to time.

14. The aforesaid guidelines of the HPC, dated 25/3/2020, categorizing the prisoners, who would be entitled to temporary bail/

parole/release on account of Covid-19, came to be challenged before the Principal Seat of the Bombay High Court by way of a Public Interest Litigation filed by ***National Alliance for People's Movement and others .Vs. State and others, PIL-CJ-LD-VC-No.44/2020*** on the ground, that the categorization and classification made by the HPC, was violative of Article 14 of the Constitution. By a reasoned judgment, pronounced on 5/8/2020, the challenge was rejected. In para 34 thereof, the learned Court noted the amendment to Rule 19 of the Maharashtra Prisons (Bombay Furlough and Parole) Rules, 1959, by insertion of clause (C) therein and so also the decision by a Co-ordinate Bench of this Court in ***Milind Ashok Patil Vs. State of Maharashtra and others (Cri.WP – ASDB-LD-VC-65 of 2020)*** and held that the observations as made therein, would be applicable to the convicts whose cases fall in the criteria laid down therein. While rejecting, the challenge to the constitutional validity on the touchstone of Article 14 of the Constitution vis-a-vis the categorization made by the HPC under its guidelines dated 25/3/2020 and the amendment to Rule 19 of the Maharashtra Prisons Rules, 1959, it was held as under :-

“33. The aforesaid Full Bench and Division Bench decisions are not applicable to the report of the HPC as well as consequent amended Rule 19(1) (C) (i) and (ii) of the Maharashtra Prisons (Bombay Furlough and Parole) Rules, 1959, as the said amended Rules are providing for temporary release of prisoners on temporary parole leave till the Notification under the Epidemic Diseases Act, 1897 is in operation. The objectives of releasing of prisoner on furlough and parole leave are set out in Rule 1(A) of the Rules of 1959 and the same are as follows:-

- (a) To enable the inmate to maintain continuity with his family life and deal with family matters,
- (b) To save him from evil effects of continuous prison life,
- (c) To enable him to maintain and develop his self-confidence,
- (d) To enable him to develop constructive hope and active interest in life.

39. After examining the various recommendations/directions of the HPC and the directions of the Supreme Court and the nature of offences and the severity of the offences which are contemplated under the Special Acts mentioned by the HPC as well as offences under the IPC, which were excluded by the HPC from getting benefit of emergency parole/bail, it is clear that the HPC balanced the rights of the prisoners to maintain maximum possible distancing to contain the spread of COVID-19 as well as the rights of the society.”

The Hon'ble the Chief Justice, while concurring with the view expressed by his brother colleague on the Bench, posed the question, whether the inmates of correctional homes have a right to claim release on interim bail/emergency parole in view of the prevailing pandemic. While answering the same, it was held as under :-

*“It is truism that once in custody, the individual under detention loses his right to free movement without, however, sacrificing his right to life and that failure of the State to protect the right to life of the detainee could lead to consequences for the State, not too palatable. The judiciary being an organ of the State, reaction of the Supreme Court to rise to the occasion reminds me of the maxim *salus populi est suprema lex*, meaning that regard for the public welfare is the supreme law. This principle would seem to authorize a State instrumentality to serve society as a whole without granting unwarranted favours to a particular class of people, unless justified, at the cost of others. It needs no reiteration that at all times and by all quarters, sincere efforts have to be made to maintain and sustain the safety of the people. Although not expressly referred to in its orders, the Court might have called in aid such maxim. Having read the orders of the Supreme Court passed in the said writ petition, a justice-oriented approach appreciating the safety of the home inmates is indeed*

discernible leading to directions requiring decongestion of the correctional homes. I am, however, of the firm opinion that the orders passed by the Court on the said writ petition, targeted as it were to do proper justice to the cause before it, reflect the exercise of equitable power under Article 142 of the Constitution of India, rather than such orders declaring any law under Article 141 constituting a binding precedent.

2.7 It is fallacious to contend that home inmates can claim an absolute right for release in a situation like the prevailing pandemic as if it were flowing either from Part III of the Constitution or any other statute. An exception has been made to the rule requiring confinement in terms of an extant law. In my opinion, relief by way of release of home inmates for a temporary period contemplated by the order dated March 23, 2020 is in the nature of a special privilege conferred on them by the Supreme Court amid the looming crisis, whereby a class of inmates (to be determined by the HPC) would enjoy an exemption from continuing to remain in the correctional homes till such time the lockdown continues and the pandemic is not brought under complete control but subject to determination made by the HPC. Such special, Court ordered, privilege conferred on the home inmates, which is equitable in nature, is not a vested right since the benefit of release can be taken away by the Court without the consent of the home inmates; hence one cannot complain of breach unless of course the determination of the HPC suffers from fundamental flaws vitally affecting rights guaranteed by

Article 14 of the Constitution. If indeed release for a temporary period on interim bail or emergency parole could have been claimed as a matter of right by every inmate of a correctional home citing the uncertainties of the prevailing pandemic, such a right ought to have had the sanction of law traceable either to a legislation of the competent legislature, or to an order having the force of law which the executive has authority to make or to a law declared by the Supreme Court binding on all Courts under Article 141 of the Constitution. In the absence of any such law, no right did crystallise for the inmates of the correctional homes to seek release on interim bail or emergency parole as a matter of entitlement as contended by Mr. Talekar. Restricted to the determination made by the HPC, an inmate could raise a grievance if he were to suffer a legal injury thereby and not otherwise.

2.9. *The first question is, therefore, answered against the petitioners by holding that there is no right or entitlement that a home inmate may claim to seek temporary release during the pandemic merely based on the order dated March 23, 2020 of the Supreme Court; however, if the offence with which he has been charged or convicted is included in the 'qualifying category' by the HPC, he has a right to claim the benefit of temporary release by the appropriate court/authority in the light of the HPC's determination as well as the overriding object of such release.*

4.4. The HPC while proceeding to comply with the orders of the Supreme Court, as of necessity, had to create groups ~ one group including classes of home inmates who could be considered for temporary release on bail/parole and the other, not entitled to such release ~ or else all the inmates of the correctional homes would have to be released in view of the pandemic. The intelligible differentia is provided by classification of alleged offenders charged with offences that could be characterised as anti-national those aiming to destabilize the economy of the country and/or forming a potential threat to the unity, integrity and sovereignty of the nation and/or by their criminal acts making themselves liable to be proceeded under the special enactments. In the opinion of the HPC, these inmates form part of the 'excepted category' who should continue to remain behind the bars despite the object of decongestion of correctional homes that the Supreme Court had in mind as well as to deny them the benefit of release looking at the object of prevention of activities directed towards causing economic loss, questioning and disrupting the sovereignty and territorial integrity of India and the nature of aggravated offence towards women and children. Manifestation of a fine balance is, thus, conspicuous by its presence.

4.5. To my mind, it could not have been and was never the intention of the Supreme Court that the pandemic notwithstanding, those awaiting trial because of their involvement in serious economic offences/socioeconomic offences, offences aimed at

subverting the unity, integrity and sovereignty of India, offences against women and children, etc. or those convicted for such offences should be temporarily released, ignoring the nature and the gravity of the offences with which they have either been charged or convicted. That is precisely the reason as to why the HPC was guided to bear in mind the nature of the offence and the severity of the offence. The order dated April 13, 2020 is eloquent that “certain prisoners” are to be released. In that view of the matter, the contention that unreasonable classification has been made is thoroughly misconceived.

4.6. The attack to the determination made by the HPC on the ground that it fails the test of proportionality is equally unmeritorious. The doctrine of proportionality requires the Court to judge whether an action taken was really needed as well as whether it was within the range of course of action which could reasonably be followed. Applying such test, I see no reason to hold that the HPC acted in a manner warranting interference.

4.7. I, accordingly, hold that the recommendations made by the HPC are not arbitrary and do not offend the equality clause in Article 14.”

(emphasis supplied)

The Court also noted that a Co-ordinate Bench in ***People's Union for Civil Liberties .Vs. State of Maharashtra and others*** (PIL-CJ-LD-VC-2 of 2020) had laid down comprehensive

guidelines for implementation by the authorities of the correctional homes, which would be adequate and sufficient to cater to the needs of such inmates, who would stand deprived of temporary release on interim bail/emergency parole.

15. The above judgment in ***National Alliance for People's Movements*** (Supra) was challenged before the Apex Court in Special Leave Petition (CRL) No.4116/2020 [***National Alliance for People's Movements and others .Vs. State of Maharashtra and others***], rejecting the challenge, the Hon'ble Apex Court held as under :-

“8. On the contentions urged and the decisions cited before the High Court we are of the opinion that the High Court in fact has appropriately adverted to the same and has not committed any error in arriving at its conclusion. In this regard we notice that the High Court has aptly referred to the decision of this Court in the case of The State of West Bengal vs. Anwar Ali Sarkar (AIR (39) 1952 SC 75), Arun Kumar & Ors vs. Union of India & Ors. (2007)17 SCC 732 and K.R. Lakshman & Ors. vs. Karnataka Electricity Board (2001) 1 SCC 442 wherein the circumstances when requirement of Article 14 of the Constitution is to be satisfied is considered in detail. It is articulated therein that equality before the law or the equal

protection of laws does not mean identity or abstract symmetry of treatment and that reasonable classification is permitted. In that background the High Court while approving the categorisation made by HPC has gathered the intention of the order dated 23.03.2020 passed by this Court in its correct perspective.

9. While arriving at such conclusion, in addition to the reasons assigned by the High Court we cannot also lose sight of the fact that the entire right to claim such interim bail has arisen in the unprecedented circumstance of the pandemic and the consideration for interim bail is not in the nature of a statutory right for bail based on other legal consideration but is more in the nature of human right to safeguard the health. The provision for bail as otherwise provided in law in any case would be considered by the competent courts if such right for bail is made out before the competent court irrespective of the pandemic or not. The present option provided is only as a solution to help decongestion and to avoid the spread of virus. At the same time the benefit granted in such circumstance cannot be to the detriment of social order by releasing all categories of prisoners irrespective of the categorisation to be made depending on the severity of the crime etc. The genesis for the present claim being the order passed by this Court in a *Suo Motu Writ Petition*, a balance was struck. As such, as noticed from the extracted portion of the order (*supra*), this Court had directed the constitution of the HPC consisting of a senior High Court Judge and highly placed officials so that an appropriate categorisation be made

in each State dependant on the circumstance arising therein. Further, the intention of this Court was not that every undertrial or convicted prisoner is to be released irrespective of the nature of offence or severity thereof. The consideration was for the purpose of decongesting the prisons so that social distancing could be maintained to avoid the spread of virus. In that circumstance the consideration would certainly be different in each State/Union Territory depending on the occupancy in the prison, the spread of virus, the infrastructure available and the need, if any, to release certain number of prisoners so as to decongest.

11. Therefore, the very purpose of directing each of the States/Union Territories to constitute a High Powered Committee is that the HPC taking note of the subsisting position in such State will take a decision in the matter as the HPC will have the wherewithal to secure all details and take a decision. If the said aspect is kept in view, it is noticed that by the guideline dated 25.03.2020 the Committee in question has categorised the undertrials/convicted persons by the nature of the crime and the length of the punishment which will take care of the severity in the process of consideration. In that regard, insofar as the undertrial/convicted persons charged under the common law, namely, the Indian Penal Code; they are classified into two categories i.e. category (I) as punishment below 7 years and category (ii) as punishment above 7 years so that the consideration could be in that manner. The Committee has thought it fit to separately

classify the undertrials/convicted persons who are charged under the Special Enactments irrespective of the duration of imprisonment notwithstanding the fact that the punishment imposed could be less than 7 years. In that regard, what has weighed with the HPC is that such enactments provide for additional restrictions on grant of bail in addition to those under the Criminal Procedure Code. The said categorisation in our view cannot be considered as unreasonable since at the first instance, based on the categorisation made a consideration is required by the Court for grant of interim bail if such undertrial/convicted person is seeking bail purely on taking benefit of the notification issued pursuant to such decision taken by the HPC. The exclusion made has a reasonable basis and cannot be termed arbitrary."

It is thus clear that the challenge on the touchstone of Article 14 of the Constitution of India, to the categorization made by the HPC, constituted in pursuance to the order dated 23/3/2020, has been rejected, which rejection has attained finality.

16. The present petitions, as stated above, raise a limited challenge to that portion of the proviso to Sub Clause (ii) of Clause (C) of Sub Rule 1, Rule 19 of the Maharashtra Prisons Rules, 1959, in so far as it makes the provisions of Clause (C) inapplicable to

convicted prisoners whose place of residence is out of the State of Maharashtra, also on the ground that in ***National Alliance for People's Movements*** (Supra) the amendment to Rule 19 (1) of the Mah. Prison Rules, 1959, by insertion of clause (C) was not under a direct challenge but was noted only as a passing reference in para 33 thereof, for which contention reliance is placed on para 2 of the judgment, which does not mention any challenge to the amendment.

17. While considering the rival contentions, it is necessary to consider the purpose, nature, import, scope and ambit of the amendment by way of clause (C) to Sub Rule 1 of Rule 19 of the Maharashtra Prisons Rules, 1959. Clause (C) to Sub Rule 1 of Rule 19 of the Mah. Prison Rules, 1959 as amended by the notification dated 8/5/2020, reads as under :-

“(C) On declaration of epidemic under the Epidemic Diseases Act, 1897, by State Government :

(i) For convicted Prisoners whose maximum punishment is 7 years or less, on their application shall be favorably considered for release on emergency parole by the Superintendent of Prison for a period of 45 days or till such time that the State

Government withdraws the Notification issued under the Epidemics Diseases Act, 1897, whichever is earlier. The initial period of 45 days shall stand extended periodically in blocks of 30 days each, till such time that the said Notification is in force (in the event the said Notification is not issued within the first 45 days). The convicted prisoners shall report to the concerned police station within whose jurisdiction they are residing, once in every 30 days.

(ii) For convicted prisoners whose maximum sentence is above 7 years shall on their application be appropriately considered for release on emergency parole by Superintendent of Prison, if the convict has returned to prison on time on last 2 releases (whether on parole or furlough), for the period of 45 days or till such time that the State Government withdraws the Notification issued under the Epidemics Diseases Act, 1897, whichever is earlier. The initial period of 45 days shall stand extended periodically in blocks of 30 days each, till such time that the said Notification is in force (in the event the said Notification is not issued within the first 45 days). The convicted prisoners shall report to the concerned police station within whose jurisdiction they are residing, once in every 30 days :

Provided that the aforesaid directions shall not apply to convicted prisoners convicted for serious economic offences or bank scams or offences under Special Acts (other than IPC) like MCOC, PMLA,

MPID, NDPS, UAPA etc. (which provide for additional restrictions on grant of bail in addition to those under the Code of Criminal Procedure, 1973 (2 of 1974) and also presently to foreign nationals and prisoners having their place of residence out of the State of Maharashtra.”

(emphasis supplied)

18. The law regarding the parameters upon which the constitutionality of a provision in a statute has to be tested, is no longer *res integra*. The same is spelt out in numerous decisions by the Apex Court as well as this Court. The position in this regard has been spelt out by this Court, in *National Alliance for People's Movements* (Supra) in paras 14 to 17, by considering the decisions as rendered in *State of West Bengal .Vs. Anwar Ali Sarkar AIR 1952 SC 75*; *K.R. Laxman and others .Vs. Karnataka Electricity Board and others (2001) 1 SCC 442* and *Arun Kumar and others .Vs. Union of India and others (2007) 1 SCC 372*, in the following words :-

“18. Thus, it is clear that as per the settled legal position the principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in

the same position, and the varying needs of different classes of persons often require separate treatment. The principle of equality does not take away from the State the power of classifying persons for legitimate purposes. It is settled legal position that the concept of equality before law means that among equals the law should be equal and should be equally administered and that the likes should be treated alike. Equality before law does not mean that things which are different shall be treated as though they were the same. The State has always the power to have a classification on the basis of rational distinctions relevant to the particular subject to be dealt with but such permissible classification must satisfy the two conditions, namely the classification should be founded on intelligible differentia which distinguishes persons or things that are grouped from others who are left out of the group and that the differentia must have a rational relation to the object sought to be achieved by the legislation.”

(emphasis supplied)

By applying the above principles, the categorization made by the HPC as reflected in its decision dated 25/3/2020, have been held to be constitutionally valid by rejecting the challenge laid to it on the ground of being violative of Article 14 of the Constitution, which rejection, has been upheld by the Hon'ble Apex

Court, by the judgment dated 22/9/2020, in SLP (CRL) No.4116/2020.

19. The above position of law in light of the concept of equality, is also reiterated in a recent Constitution Bench decision of the Apex Court, in *Chebrolu Leela Prasad Rao and Others Versus State of A.P. and Others* 2020 SCC OnLine SC 383 paras 64 to 68, considering *Col A.S. Iyer v. V. Balasubramanyam*, (1980) 1 SCC 634; *Lachhman Das v. State of Punjab*, (1963) 2 SCR 353, 395 : AIR 1963 SC 222; *Ajay Hasia v. Khalid Mujib Sehravardi*, (1981) 1 SCC 722; *E.P. Royappa v. State of Tamil Nadu*, (1974) 4 SCC 3; *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248; *International Airport Authority case*, (1979) 3 SCC 489 .

20. It is thus trite that the validity of any Statutory provision has to be tested in the background in which the same was enacted and the purpose which is sought to be achieved by enacting it, and in case if distinctions made therein, satisfy the test of reasonableness, rationality and fairness, having a rational nexus to the purpose sought to be achieved, the Courts would refrain from

declaring such provision and the distinction created as ultra-vires the Constitution.

21. The country is presently reeling under the Covid-19 epidemic, since the middle of March, 2020, which has affected the lives of the citizenry, adversely to an extent, which is incomparable, to anything in the recent past. Social distancing, considering the nature of Corona Virus, the virulent infection which it causes, its rapid spread, and abysmally insufficient data/information regarding its affectation, behavior has turned lives of people upside down. The Corona Virus has affected one and all, without any categorization altogether, to such an extent, that the provisions of the Epidemic Diseases Act, 1897, were required to be taken recourse to, for declaring a State of pandemic in the entire country.

22. The plea of discrimination, will have to be tested on the touchstone of the reason for which the provision was enacted and the purpose sought to be achieved. Corona Virus, is of very recent origin, as recent as February, 2020, when it for the first time struck in the city of Wuhan in China. There is no definitive information, as

to its nature, potency, activity, path of attack, organs which it affects, etc. available even as of date. That it spreads a million times faster than wildfire, through means as yet not fully understood, is also true. That it affects multiple organs of the body is a given, however, which organ, in what manner and to what extent, is still in the realm of uncertainty. Extensive research by leading laboratories and Doctors in the world has, as yet, not led to any definite conclusions on the above aspects. There is no medicine available as yet, which would countermand the action of the virus. Research is still going on and everyone is hopeful of finding a cure and a vaccine. That it spreads through air and by touch, is also now nearly established. The survival period and capacity of the virus, which earlier was thought to be in minutes, is now being found to extend into hours. That its infection may lead to fatality, depends on various factors, none of which have as yet been established, beyond doubt, as it has been found to affect one and all, without any signs of favouratism or discrimination, whether it be an infant, child, youth or aged person, with mortality spread across the spectrum, randomly which makes it all the more lethal. Its symptoms are not much different from a common cold and cough, making it that much more difficult to

isolate and detect.

23. It is in the above background, being concerned by the situation prevalent in the prisons in the country, housing both convicts and under-trials, and the possibility of the spread of the virus in these communities, which considering their close proximity to each other, within a limited confined space of the prison, and moved by their eventual plight, that directions were issued, as quoted above by the Hon'ble Apex Court in Suo Moto W.P. (Civil) No.1/2020, to each State/UT, for forming a high power committee to determine norms for de-congestion of prisons, by categorizing the persons who could and could not be released.

24. One such committee was also formed for the State of Maharashtra, which dwelt on the issue and deliberated upon what it was tasked with and came up with the guidelines as contained in the decision dated 25/3/2020, which have been amended from time to time. It is based upon these guidelines of the HPC, that the State of Maharashtra, came up with the notification dated 8/5/2020, whereby the Mah. Prison Rules, 1959 were amended by insertion of

Clause (C) in Sub Rule 1 of Rule 19 thereof, which includes the proviso, containing the so called discriminatory portion as per the petitioners, making a distinction between convicts resident within the State and convicts residing outside the State.

25. What needs to be considered, is also the situation prevalent in the country, when the provisions of the Epidemic Diseases Act, 1897 were invoked by the States and the Covid-19 Regulations were framed by the States in the month of March 2020, to combat with the unprecedented calamitous situation created by the virus . The only mode, suggested by medical experts in the field to stop the spread of the virus, was to clamp a complete lockdown in the entire country, including public transport, both inter and intra-State, which also included sealing of the District and State borders, stopping complete movement. This was done by the notification dated 24/3/2020, issued by the Ministry of Home Affairs, Government of India, which closed down all places of public assemblies, malls, multiplexes, market places, religious and public places, business concerns/ establishments, factories, industries and all public and private transport. Thus, all activities and movement

came to a complete halt, except of the nature as permitted, with effect from the date of the notification. This position continued thereafter, and still continues to a considerable extent, as restrictions imposed, including those on free-travel, both within and outside the State, continue to be in force, though relaxations are being issued from time to time by assessing the situation.

26. In May of 2020, when the amendment inserting Clause (C) in Sub Rule (1) of Rule 19 of the Mah. Prison Rules, 1959 was published in the official gazette on 8/5/2020, the situation was truly grim, with total shutdown in all public transport, both inter and intra-States, imposed by the notification dated 1/5/2020, by the Central Government extending the lockdown for a further period of two weeks and further continuing the restraint on certain activities, including travel by Air, Rail, Metro and interstate movement by road throughout the Country, which made travel a near virtual impossibility, subject to exceptions, as laid down therein. It is in these circumstances, considering the background of the medical emergency created by the Corona Virus in the entire Country, it was deemed prudent not to apply the provisions of Clause (C) of Sub

Rule 1 of Rule 19 of the Mah. Prison Rules, 1959 to convicted prisoners, who were residing out of the State of Maharashtra, as due to the complete lockdown of transport facilities, throughout the country, the movement of such convicted prisoners, if released, so as to reach their native place of residence, was an impossibility. The logistics needed for such transportation, in the given situation, was indeed not only unmanageable but was also insurmountable, which was compounded by the fact that there were multiple prisons in the State, in which a number of prisoners who were, residents in various States of the country, were lodged. That apart the State boundaries were also sealed and no crossing was being permitted in May, 2020, and even thereafter to avoid spread of the virus. There were no definite tests to determine whether one was infected with the virus, and if yes, what were the necessary protocols to contain and cure it. The tests available for detection, were indeterminate and time consuming. Except isolation or social distancing, no preventive medicines were available. All of this clearly points out the rationality of the distinction, made in the proviso, not to apply the mandate of Clause (C) Sub Rule 1 of Rule 19 of the Mah. Prison Rules, 1959, to the convicted prisoners, lodged in various prisons within the State of

Maharashtra.

27. Even if an under-trial prisoner or convict, would have been released, he had no means of transport available to reach his place of residence in the other State. This is clearly demonstrable, from the earlier quoted order of the Hon'ble Apex Court dated 7/4/2020, where it had to step in to ensure that stranded prisoners, who had been released according to the guidelines framed by the HPC's, in various States, and who did not have any means to reach their homes or places of residence because of the lockdown in absence of any transportation, were directed to be provided transportation to reach their homes or given option to stay in temporary shelter homes for the period of lockdown. In fact, there have been instances, such as that of daily wagers, who were compelled to walk down hundreds of kilometers to reach their place of residence in other States. In the case of other daily wagers, it is the Hon'ble Apex Court, which came to the rescue, when their plight was brought to its notice, by directing the various State Governments to arrange transportation to reach them to their respective residences in various States.

28. It is further material to note that the process of restoring normalcy has commenced, though restrictions continue to remain in force, in one form or the other, to some extent or the other. inter-state transport has not been fully restored even as of date and it is with great trepidation that citizens have started to commence undertaking travel, that too, only if situation so warrants and not otherwise. Things have not been restored to what they were before the imposition of the lockdown. The threat and apprehension posed by Corona Virus, still is extant, which continues to take its toll daily. Only the figures of mortalities change and though a downward trend is being noticed, by no stretch of imagination, can it be said that we are out of the shadow of the virus, rather it continues to haunt us, in our daily lives in one form or the other. No definite protocol for its treatment is presently available and the medical fraternity is still groping in the dark, though millions are being spent on research to find a solution and cure, which is, still proving elusive, not to say about availability of a vaccine in the near future and its efficacy, considering that the virus has multiple mutations. In such a situation, though the medical fraternity and its associated institutions, their respective staff are making herculean efforts,

which definitely need to be applauded, much more needs to be done, to contain the spread of the virus and a cure for it. The citizenry is therefore required to act with utmost restraint, and plan its activities in accord with the guidelines laid down in this regard from time to time, which are ultimately aimed at the benefits of the citizens themselves.

29. No under trial/convicted prisoner, even otherwise, can claim an absolute right to be let off under Clause (C) of Sub Rule 1 of Rule 19 of the Mah. Prison Rules, 1959, as there are other factors to be considered and taken into account too, as indicated by sub-Clause (ii) whereby the conduct of such convicted prisoner, of his return upon release on earlier two occasions, whether on parole or furlough, was also required to be considered by the Superintendent of Prisons, while entertaining an application by a convict for release which was in consonance with guideline no.(iii) as framed by the HPC on 25/3/2020, in pursuance of the order dated 20/3/2020 by the Hon'ble Apex Court in *Suo Moto W.P. (C) No.1/2020*. In fact, the benefit has been considered to be a special privilege created to meet special situation of pandemic, as we have seen earlier, and hence the

privilege comes with certain conditions, which too are consistent with the purpose behind such privilege.

30. A closer look at the language of the proviso, to sub-clause (ii) of Clause (C) indicates, the use of the word “presently” in the matter of non-applicability of Rule 19 (1) (C) of the Mah. Prison Rules, 1959, to convicts resident out of the State of Maharashtra. The use of the word “presently” clearly indicates that the prohibition as to applicability of Rule 19 (1) (C) of Mah. Prison Rules, 1959 to convicts resident out of the State, is not a permanent feature, but is based upon the current pandemic situation, and is capable of being changed, depending upon an improvement in the situation.

31. Even otherwise, the purpose of enacting Rule 19 (1) (C) of the Mah. Prison Rules, 1959 was not to create a bonanza for convicted prisoners, who may have their residences, either within or outside the State, to claim release for being with their families at their residences, but to meet the situation created by the pandemic and the nature of its communicable spread, considering the density of prisoners in the various prisons across the State and the possibility

of an explosion of the virus, which could have resulted in increased mortality. Its purpose was only to reduce the density of prisoners in each prison, so that social distancing, which is the presently accepted norm for avoiding the spread of the virus could be achieved. As per the statistics given in para 37 of the judgment in ***National Alliance for People's Movements*** (Supra) as of 24/7/2020, the total number of prisoners released on emergency bail/parole to prevent spread of Covid-19 from State prisons was 10,338 and as of that date 26,279 prisoners were in prison. The official capacity of the prisons, was stated to be 23,217, however, for the purpose of reducing overcrowding the State is reported to have opened temporary prisons at about 36 locations and as on the said date about 2,597 prisoners were occupying such temporary prisons and the process of transferring some more prisoners to the temporary prisons was in progress. Thus, demonstrable steps were already taken and are also being taken for reducing overcrowding in prisons. As it is, various directions as contained in the judgment in the case of ***People's Union for Civil Liberties*** (Supra), are already in force and operative in the prisons, which have had an ameliorating effect on the situation, whereby the safety of the inmates in the prisons has

been considerably enhanced.

32. It is further material to consider that the entire clause (c) of Rule 19(1) of the Mah.Prison Rules 1959, actually addresses a situation of medical emergency and the provisions were enacted to address such a specific situation. The regular rights of the prisoners, convicted or otherwise, for parole and furlough, are not affected thereby, which continue to be governed by the relevant provisions of the Mah. Prison Rules, 1959. The rigor of Articles 14 and 21 of the Constitution, regarding equality, discrimination and reasonableness has to be considered in this background of the medical emergency which the spread of Corona Virus has created.

33. Thus the object of the distinction made, is to achieve the safety of the inmates of the prisons and considering what is stated above, to quite an extent the same appears to have been achieved, with steps and measures already in force to further improve the situation. The distinction therefore cannot be said to be either arbitrary, unreasonable or discriminatory, as the distinction made, clearly has a nexus and is meant to achieve the purpose for which

the provision was enacted, namely, to contain the spread of the virus in the various prisons, which is more so, in light of the lockdown clamped, which included a ban on public transportation and even on movement of private vehicles, at the relevant time.

34. The distinction made by the portion of the proviso to sub-clause (ii) of Clause (C) of Sub Rule 1 of Rule 19 of the Mah. Prison Rules, 1959 is clearly based upon characteristics, which are found in the convicted prisoners, grouped together on account of their having permanent place of residence outside the State of Maharashtra. The differentia therefore is intelligible and reasonable, based upon the exigencies of the present pandemic situation, which hopefully would be once in a lifetime event for all, as the object of the distinction made for the purpose of decongestion of prisons is achieved, even if the convicted prisoners resident within the State are let off for a specified time, which would create a position of ease and safety for those remaining behind.

35. For the reasons stated above, the challenge raised to the constitutional validity of the portion of the proviso to Clause (C) of

Sub Rule 1 of Rule 19 of the Mah. Prison Rules, 1959, making the provisions of Clause (C) of Sub Rule 1 of Rule 19 of the Mah. Prison Rules, 1959 inapplicable to the prisoners having permanent residence outside the State of Maharashtra, on the touchstone of Articles 14 and 21 of the Constitution of India is rejected and it is held that the proviso to Clause (C) of Sub Rule 1 of Rule 19 of the Mah. Prison Rules, 1959 is constitutionally valid.

36. It would also be material to note that the language of sub-clauses (i) & (ii) of Clause (c) Rule 19(1) of the Mah. Prison Rules 1959, as well as that of the proviso to sub-clause (ii) thereunder, is near identical to the language of guidelines (ii), (iii) and (iv) framed by the HPC on 25/3/2020, with a slight difference that the guidelines did not state as to which authority would be entitled to receive, consider and decide the application for emergency parole, which has been rectified in the amendment by authorising the Superintendent of Prisons, to be such authority. There is no other substantial deviation from or difference between the 25/3/2020 guidelines of the HPC and Clause (c) to Rule 19(1) of the Mah. Prison Rules, 1959. The, object, nature and purpose to

be effectuated by both remains the same, except the position that the guidelines have now been converted into statutory law. Thus what has been held in respect of the guidelines in ***National Alliance for people's movements*** (supra) both by this Court in its judgment dated 5/8/2020 and by the Apex Court in its judgment dated 22/09/2020, while rejecting the challenge to its constitutional validity on the anvil of Article 14 of the Constitution, would equally apply to the present case, for holding otherwise would render the entire purpose of enacting Clause (c), redundant, as the purpose is only to ensure social distancing to prevent spread of the virus, thereby protecting the lives of the inmates of prisons and not emptying prisons altogether.

37. As the virus travels its course, in the changing scenario, the guidelines by the HPC also meet the change by modifying themselves, which is indicated by the guidelines framed by the HPC on 11/5/2020 wherein, considering that the conditions of lockdown have been relaxed, from time to time, it has recommended the decision dated 25/3/2020, to be made applicable also to prisoners, whose place of residence is outside the State of Maharashtra as well.

However, these directions, are recommended to come into force only after the lockdown period is over and the public transportation is available. The manner in which these recommendations have to be considered and acted upon is for the State of Maharashtra to look into and we, do not make any comment on the same.

38. The criminal writ petitions are therefore dismissed. Rule stands discharged. No costs.

JUDGE

JUDGE

Wadkar