

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

PRESENT:

THE HON'BLE JUSTICE ARINDAM MUKHEREJEE.

W.P.A 2594 of 2019

NOOR MOHAMMED @ SAHABAZ @ SIKENDAR

VS.

THE STATE OF WEST BENGAL & ORS.

For the petitioner	:	Mr. Muzahid Ahmed, Mr. Sahid Uddin Ahmed Advocates
For the State	:	Mr. Amitesh Banerjee, Sr. Standing Counsel, Mr. Suddhadev Adak Advocates
Heard on		07.06.2021 and 09.06.2021
Judgment on	:	7th July, 2021.

Arindam Mukherjee, J.:

- 1) The instant writ petition has been filed by Zahida Bashiruddin Ansari, the elder sister and Tadbirkar of the petitioner, inter alia, for release of the petitioner on parole for a period of 30 days to visit his family. The said Zahida Bashiruddin Ansari is a resident of Mumbai as stated in her affidavit verifying the writ petition. The petitioner's family also resides at Mumbai/Maharashtra and the petitioner intends to visit such places on being released on parole.

Facts of the case:-

- a) The petitioner Noor Mohammed @ Sahabaz @ Sikendar while was lodged at Thane Central Jail, Maharashtra in a POTA case being No.2/2003 and other cases was produced before the learned Additional Sessions Judge, 2nd Court, Alipore, on 17th July 2011 in connection with Sessions Trial no.14(10)/2012 corresponding to Sessions Case no.65(1)03 that is in Khadim Abduction case being Tiljala Police Case no.223 dated 25th July 2001. The petitioner on being convicted in the said case by the Sessions Judge at Alipore was sentenced to life imprisonment on 8th December, 2017.
- b) The petitioner has preferred a statutory appeal in CRA no. 144 of 2018 challenging the conviction order dated 8th December 2017. The petitioner has also made an application for bail in connection with appeal being CRAN 1448 of 2018. The appeal and the application for bail in connection with appeal are pending before this Court. The petitioner is languishing in jail since March, 2003.
- c) During pendency of the appeal, the petitioner on 27th November, 2018 made an application before the Superintendent, Central Jail, Alipore, Kolkata, West Bengal for being released on parole for 30 days. The main grounds cited in the said application for release on parole are – to meet the family members as the petitioner has not met them for long and the petitioner's mother and brother have died in the meantime while the petitioner has

been in custody since his arrest on 6th March, 2003. The petitioner is in jail for about 17 years and more and has never been released on parole.

- d) The petitioner says that his representation and/or application for release on parole has been kept pending without being considered by competent authority. The petitioner, therefore, has approached this Court by filing the instant writ petition on 30th January, 2019.
- e) The petitioner has also filed photocopy of the death certificate and other documents to demonstrate that one of his brother's Bashriuddin Vali Mohammed Ansari has died on 15th May 2021 to further demonstrate that he should be allowed parole to meet his family at Mumbai, Maharashtra

Submission of the petitioner:-

- a) The petitioner has heavily relied upon judgement reported in **2017 (15) SCC 55 (Asfaq vs State of Rajasthan & Ors.)**, in support of his prayer for release on parole. Relying on such judgment the petitioner says that his prayer for parole is squarely covered by the reasons given by the Hon'ble Supreme Court for release of a prisoner in parole. The petitioner has also cited several other orders passed by the Hon'ble Supreme Court and different High Courts which are as follows:-

- 1) Order passed by Supreme Court of India in W.P (Crl.) No.158 of 2018 (Mohammed Amin Vs. State of Rajasthan & Ors.)

- 2) Order passed by Supreme Court of India in W.P (Crl.) No.235 of 2018 titled as Mohammed Shamsuddin Vs. State of Rajasthan & Ors.
- 3) Order passed by Supreme Court of India in Criminal Appeal No.340 of 2019 titled as Fazlur Rehman Sufi @ Shamim Vs. State of Rajasthan & Ors.
- 4) Order passed by Supreme Court of India in W.P. (Crl.) No.284 of 2018 titled as Abre Rehmat Ansari Vs. State of Rajasthan & Ors.
- 5) Order passed by Supreme Court of India in W.P. (Crl.) No.250 of 2018 titled as Mohammad Afaq Khan Vs. State of Rajasthan & Ors.
- 6) Order passed by the Supreme Court of India in W.P (Crl.) No.186 of 2019 titled as Mohd. Aijaz Akbar Vs. State of Rajasthan & Ors.
- 7) Order passed by High Court of Judicature at Bombay Bench at Aurangabad in Criminal Writ Petition No.213 of 2009 titled as Mohammed Moin Faridulla Qureshi Vs. State of Maharashtra & Ors.
- 8) Order passed by High Court of Judicature at Bombay Bench at Aurangabad in Criminal Writ Petition No.446 of 2018 titled as Mohammed Moin Faridulla Qureshi Vs. State of Maharashtra & Ors.
- 9) Order passed by High Court of Judicature at Bombay Bench at Aurangabad in Criminal Writ Petition No.33 of 2019 titled as

Mohammed Moin Faridulla Qureshi Vs. State of Maharashtra & Ors.

10) Order passed by High Court of Judicature at Bombay Bench at Nagpur in Criminal Writ petition No.310 of 2020 titled as Mohd Iqbal Mohd. Hanif Shaikh Vs. State of Maharashtra & Ors.

11) Order passed by High Court of Punjab & Haryana at Chandigarh in CRWP No.4593 of 2020 titled as Manga @ Manga Singh Vs. State of Punjab & Ors.

12) Order passed by High Court of Judicature at Madras in Writ Petition No.8642 of 2020 titled as Mrs. T. Arputham Vs. State of Tamilnadu & Ors.

13) Order passed by High Court of Judicature for Rajasthan Bench at Jaipur in D.B. Criminal Writ Petition (Parole) No.700 of 2018 titled as Habib Ahmed Khan Vs. State of Rajasthan & Ors.

14) Order passed by High Court of Judicature for Rajasthan Bench at Jaipur in D.B Civil Writ Petition No.16042 of 2017 titled as Pappu @ Salim Vs. State of Rajasthan & Ors.

15) Order passed by High Court of Judicature for Rajasthan Bench at Jaipur in D.B Criminal Writ Petition (Parole) No.186 of 2019 titled as Pappu @ Salim Vs. State of Rajasthan & Ors.

16) Order passed by High Court of Judicature for Rajasthan Bench at Jaipur in D.B. Criminal Writ petition No.102 of 2020 titled as Pappu @ Salim Vs. State of Rajasthan & Ors.

17) Order passed by High Court of Judicature for Rajasthan Bench at Jaipur in D.B Criminal Writ petition No.533 of 2020 titled as Daya Singh Lahoriya Vs. State of Rajasthan & Ors.

18) Order passed by High Court of Judicature for Rajasthan Bench at Jaipur in D.B. Criminal Writ Petition No.515/2020, 542/2020, 609/2020 and 648 of 2020.

19) Parole granted to the co-convict Mojammil SK @ Akka who is undergoing the imprisonment of life in same case along with the petitioner. He got parole two times.

- b) The petitioner by citing these orders has urged that even a convict for life imprisonment has a right to be released on parole to meet his family particularly in view of the recent death of his brother on 15th May, 2021.

Submission on behalf of respondents:-

- a) On behalf of the respondents, two reports have been filed pursuant to the orders passed in the writ petition. The first report has been affirmed by Superintendent, Presidency Correctional Home (respondent no.3) and the other report is by the Officer-in-Charge, Law Cell, Director of Correctional Services, West Bengal. The second report was taken on record on 3rd June, 2021. Relying upon the first report, it is submitted on behalf of the State that the prayer for release on parole for a period of 30 days and allowing the petitioner to visit addresses situated at Mumbai, Maharashtra is not at all viable from the view point of security. The writ petitioner, yet was granted parole under Police guard for two days excluding journey time by the respondent no.2 on 28th November, 2019. The respondent no.3 in view of such order of the respondent no.2 had requested the Kolkata Police authorities to provide police escorts and/or

guards so that the writ petitioner, a life convict can avail parole. However, Kolkata Police authorities expressed their inability to provide police escorts and guards to the petitioner as Mumbai in Maharashtra does not fall within their jurisdiction. The petitioner therefor could not avail the parole granted on 28th November, 2019.

- b) Considering the stand of the Kolkata Police authorities, the respondent no.2 thereafter took an initiative to shift the petitioner from Presidency Correctional Home, Kolkata to Taloja, Central Jail, Khargar, Mumbai permanently. The petitioner's case was informed to the Maharashtra Government through the Additional Director General of Police and IG of Prisons, Maharashtra, vide a memo dated 11th November, 2019. The transfer was considered, according to the respondents to enable the petitioner to meet his family members, near relatives while in jail at Mumbai. So that the security issue for non-availability of escorts/guards does not stand in the way. The Addl. Director General of Police and Inspector General of Prisons and Correctional Services, Maharashtra State, Pune - 411 001 by a return memo has, however, stated the following:-

“1) With reference to above subject cited your office has sent the proposal of reciprocal transfer of Convict Prisoner namely Noor Mohammad @ Sahabaz @ Sikander from Presidency Correctional Home of Taloja Central Jail in Maharashtra State.

2) As per descriptive roll of the prisoner his appeal is pending at Hon'ble High Court, Kolkata.

3) As per Maharashtra Prison Manual Rules 1979, Chapter No.35, Removal of prisoner, Rule No.10(b)(3), “No prisoner should be transferred under reciprocal arrangements till his appeal period is over and if he has filed an appeal till the appeal is decided.”

4) Therefore the proposal of the said prisoner may be forwarded to this office after the decision of the appeal which is pending in the Hon’ble High Court, Kolkata.”

This letter from Addl. Director General of Police, Maharashtra State has been placed before the Court by way of the second report.

c) The respondents say that they have no difficulty in releasing the petitioner on parole but in view of the practical difficulty in arranging for security for the petitioners travel to Maharashtra and stay thereat while on parole is the main impediment. The idea of permanent transfer to a jail at Mumbai has also whittled down in view of the letter received from Add. Director General, Maharashtra State. The State respondents submit that the petitioner cannot, therefore, be released on parole for these reasons.

Petitioner’s Reply:-

The petitioner says that from the various orders and judgments passed by the Hon’ble Supreme Court and relied upon by the petitioner it will be apparent that even a convict like the petitioner serving life sentence can be transferred to a jail in another State and released therefrom in parole. The petitioner is ready to abide by any terms and conditions that may be imposed for being released on parole. The petitioner is also ready and

willing to cooperate with the police authorities in Maharashtra for availing parole to meet his family.

Decision with reasons:-

- a) The application of the petitioner for release in parole has not yet been formally disposed of by the Authority concerned. On a formal disposal it would have been clear whether the petitioner's prayer is allowed or rejected. However, from the reports filed by the State respondents and the submission made on their behalf it is clear that the State respondents are not opposed to the petitioner's release on parole but keeping in mind the difficulties encountered in implementing the release on parole when the petitioner was granted parole for two days excluding the travel time in 2019 the respondents are not inclined to release the petitioner on parole. Moreover, keeping in mind the security factor, the respondents are not inclined to release the petitioner on parole for a long period of 30 days as prayed for. This stand of the State respondents pose a question as to a practical difficulty in giving effect to the release of the petitioner in parole to travel from Kolkata to Mumbai to visit his family in Maharashtra. Even if the police authorities in West Bengal provide escort during the transit from Kolkata to Mumbai it will be the responsibility of Mumbai/Maharashtra Police to keep track over the petitioner's activities while he stays at Mumbai/Maharashtra. The Hon'ble Supreme Court in Asfaq (supra) has laid down the reasons for which it is important to release a prisoner on parole irrespective of the seriousness of the

crime committed and sentence awarded. In the said Supreme Court judgment on one hand the well-being of the prisoner has been considered and on the other the safety and security of the society upon release of the prisoner and the prisoner's personal safety and security while he is on parole has also been considered. In fact, in paragraph 29 of the said judgement the Hon'ble Supreme Court has taken into account the threat of injury to a prisoner released on parole from outsiders who may have been affected by the offence committed by such prisoner. Taking into account all these factors the moot question which falls for consideration in this case is not only the release of the petitioner on parole but also giving effect to such release to allow the petitioner to visit Maharashtra to meet his family.

- b) Release on parole was governed by the provisions of the Prisoners Act, 1900 read with the West Bengal amendment by the Prisoners (West Bengal Amendment) Act, 1955 by way of incorporating Section 31A wherein sub-Section (1) provided for Temporary Release of prisoners. The West Bengal amendment brought to Section 31A of the Prisoners Act, 1900 in sub-section 3 of Section 31A provided for *"Every prisoner shall when released under sub-section (1), remain within West Bengal during the period of such release"*. In West Bengal release on parole is now governed by the provisions of Sec. 62 of the West Bengal Correctional Services Act, 1992 (hereinafter referred to as the said Act). Sec. 62 (1) of the said Act provides that the Inspector General of Correctional Services may release a prisoner

sentenced to imprisonment for a period of 2 years or more on parole for such period not exceeding one month excluding the period required for journey from and to the correctional home on the conditions stated in the said Section. The stipulation under Section 31A(3) of the Amendment Act, 1955 to the effect that the prisoner on being released temporarily has to remain in West Bengal has, however, been removed from the said Act or in particular Section 62 thereof. This removal has to be construed as a conscious removal of the provision from the said Act. At the present, there is as such no need for a prisoner on parole to stay in West Bengal during the period of release. The released prisoner is free to travel anywhere in India to visit his family or relatives. The question of scrutiny again comes in the way for prisoner to travel outside the State of release on parole as the Police Authorities are not only different but governed by different State administration following the State law and rules of a particular State.

- c) Section 62 (4) of the said Act, however, has imposed a new embargo on a prisoner to be released on parole under sub-Section 1 of Section 62. If the said prisoner has been convicted for an offence punishable under Chapter XII or chapter XVII (excluding the offence of criminal breach of trust and mischief) or for an offence of forgery punishable under sec. 465 of the Indian Penal Code (45 of 1860) or for an offence involving violation of provisions of the Imports and Exports (Control) Act, 1947 (18 of 1947) or of any other law regulating or controlling the essential

service and supplies or regulating or prohibiting the adulteration of food and medicine cannot be released on parole in view of the provisions of Section 62(4)(c) of the said Act.

- d) The petitioner in the instant case as appears from the statements made in the writ petition has been convicted and sentenced to life imprisonment in connection with Khadim Abduction case. The specific nature of offence for which the petitioner has been convicted is not provided either specifically or in details in the writ petition. "Abduction" and "Kidnapping" are offences which fall under Chapter XVI of India Penal Code, 1860 (in short IPC) and as such are not covered either under Chapter XII or XVII of IPC as stipulated in Sec. 62 (4) of the said Act. However, whether the petitioner has committed any offence under Chapter XII or XVII of IPC is not known to this Court since the same has not been pleaded in the writ petition or pointed out by the State Respondents. I take it that when the respondents have not disputed the petitioner's release on parole and having released the petition in 2019 for at least two days, the petitioner has not been convicted for having committed any offence under Chapter XII or Chapter XVII of IPC as stipulated in Sec.62(4) of the said Act. There is as such no other embargo upon the petitioner being released on parole and allowed to travel outside West Bengal during his period of release on parole if he is so released save and except the security factor. The concern of the State respondents in releasing the petitioner for such long period of 30 days can be taken care of if the period is reduced or an

assurance from Maharashtra/Mumbai Police to take care of the security aspect while the petitioner is at Mumbai/Maharashtra. The State Respondents have also expressed their concern as to keeping track over the movement of the petitioner once he goes out of West Bengal and his security during the release period while he is out of West Bengal. This aspect also gets resolved once there is an assurance from the side of Mumbai/Maharashtra Police.

- e) Section 62(1) of the said Act provides for release on parole for a maximum period of one month excluding the travel time while Sec. 62 (3) provides for release of any prisoner in case of any emergency such as severe illness of near relative or friend or marriage of his son, daughter, brother or sister or funeral of his near relative, friend or son or daughter or brother and sister or any ceremony in which his participation according to prevailing custom is essential for a period not exceeding five days. The competent authority while deciding the petitioner's case for release on parole can always strike a balance between the time period provided in Section 62(1) and 62(3) if the said authority finds that the release of the petitioner on parole for the maximum period of one month or 30 days as prayed for may be a security threat.
- f) Section 62 (8) (b) provides that a prisoner released on parole under Sec. 62 (1) or Sec. 62 (3) shall report to the police station of the place of stay during the period of release on parole to enable the local police to keep a watch on his activities. The

practical difficulty submitted by the respondents relate to this provision as the petitioner intends to visit his family at Mumbai in Maharashtra. The jail authorities or the police authorities in West Bengal have no control over the police authorities in Maharashtra and as such can only request the local police station where the petitioner intends to stay during the parole to keep a watch on his activities so that the petitioner does not turn out to be a threat to the society or that his life is also not endangered. This also brings us to the concern expressed by the Hon'ble Supreme Court in Asfaq (supra) particularly in paragraph 29 thereof. A coordination is therefor necessary in the instant case between the jail authorities, the police authorities in West Bengal as also the police authorities in Maharashtra. Unless there is a proper coordination, the release of the petitioner in parole will pose questions to the security issue both for the society as also for the petitioner. Security issue being of prime consideration and keeping in mind the restrictive functioning of administrative authorities pan India owing to pandemic the release of the petitioner in parole unless the security issues are resolved for the present is not called for.

- g) It is correct that in Mohammed Shamsuddin (supra), Fazlur Rehman (supra), Mohammad Afaq Khan (supra), Mohd. Aijaz Akbar (supra) cited by the petitioner, the Hon'ble Supreme Court of India has allowed inter-state transfer of the petitioner and thereafter release on parole from the transferee jail but the authority and jurisdiction available to the Hon'ble Supreme

Court under Article 142 of the constitution of India is not available with the High Courts. Reliance in this context may be placed on the judgement reported in **2017(4) SCC 397 [Asha Ranjan vs State of Bihar] (particularly paragraphs 70-87)**. Unless there is a consent from the Government of Maharashtra as required under Section 3 of the Transfer of Prisoners Act, 1950 which is absent in this case in view of the memo issued by the Additional Director General of Police & Inspector General of Correctional Services, Maharashtra a prisoner cannot be transferred from one State to the other. Although in Asha Ranjan (supra), it was held in paragraph 86.5 as SCC page 447:-

“86.5. Section 3 of the 1950 Act does not create an impediment on the part of the court to pass an order of transfer of an accused or a convict from one jail in a State to another prison in another State because it creates a bar on the exercise of power on the executive only”

The observation therein has to be construed in the light of Article 142 only that the power of transfer is available with the Hon'ble Supreme Court and not with the High Court in exercise of powers under Article 226 of the Constitution of India. This Court has no territorial jurisdiction over the State of Maharashtra to direct transfer of the petitioner from the jail at Alipore, West Bengal to a jail in Maharashtra and thereafter release of the petitioner from the transferor jail in parole. The judgements/orders of various High Courts, also do not deal with the issue of release of a prisoner in parole for visiting another State/union territory or inter-state transfer of a prisoner and thereafter release from the transferee jail

on parole. The High Court judgements are related to release in parole for the prisoner remaining within the State during his parole. I am, therefore, not inclined to direct any transfer of the petitioner to a jail in Maharashtra and subsequently be released therefrom.

h) The issue of transfer as attempted by the respondents also does not fall for consideration of this Court as no such prayer for transfer been made before this Court. Moreover in view of the memo issued by Addl. Director General of Police and Inspector General of Correctional Services, Maharashtra State disclosed in the second report filed by the State wherein he has clearly stated that as per the existing rules prevalent in Maharashtra the transfer is not possible.

Moreover, the appeal filed by the petitioner is pending before this Court under the provisions of Section 391 of the Code of Criminal Procedure, 1973. This Court may direct further evidence to be taken by the Court of Session wherein the trial of the petitioner had taken place. In such event the petitioner's presence may be required by the Trial Court. If the petitioner is transferred permanently to Taloja Central Jail, Khargar, Mumbai, it will be difficult for the authorities to present the petitioner before the Sessions Court for such additional evidence if occasion so arises. Even though in Asha Ranjan (supra) the Hon'ble Supreme Court has held that evidence through video conference can be a course that may be adopted in case of trial when an under trial prisoner is transferred to a jail in another

State, adopting such procedure may not be fruitful in the instant case.

Conclusion:-

The respondent no.2 in order to resolve the security issue and dispose of the petitioner's application dated 27th November, 2018 for release on parole is given the following directions:-

- i) The respondent no.2 shall within a week from date collect the details of specific place or places where the petitioner intends to stay in Maharashtra on being released on parole;
- ii) The respondent no.2 shall within a week from the date of receiving such information seek a confirmation from his counterparts in Maharashtra wherein the petitioner intends to stay on being released on parole for keeping a watch on the petitioner's activities thereat by forwarding a copy of this order.
- iii) The respondent no.2 shall wait for four months from the date of seeking confirmation from his counterparts in Maharashtra and shall thereafter within three months formally dispose of the petitioner's application dated 27th November, 2018 for release on parole by passing a reasoned order by taking into consideration of all relevant factors.
- iv) The respondent no.2 shall be free to decide on the time period for which the petitioner may be released on parole and the terms and condition for his release.
- v) The respondent no.2 shall also take into consideration the developments subsequent to the filing of the writ petition i.e., death of the petitioner's brother on 15th May, 2021.

vi) In the event there is no confirmation from the side of the Maharashtra Police Authorities within three months from the date of respondent no.2 seeking confirmation from his counterparts in Maharashtra, the respondent no.2 shall dispose of the petitioner's application dated 27th November, 2018 by a reasoned order giving all details as expeditiously as possible but not beyond seven months from date.

Writ petition is accordingly disposed of. There shall, however, be no order as to costs.

Urgent photostat certified copy of this judgment and order, if applied for, be supplied to the parties on priority basis after compliance with all necessary formalities.

(ARINDAM MUKHERJEE, J.)