

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 1485 OF 2020

Sardar s/o Shahvali Khan

Petitioner

Versus

The State of Maharashtra & others

Respondents

Mr. M.S. Choudhari, Advocate for the petitioner.

Mr. S.J. Salgare, APP for all respondents.

**CORAM : V.K. Jadhav &
M.G. Sewlikar, JJ.**

DATE : 2nd March, 2021.

PER COURT : (Per M.G.Sewlikar, J.)

1. By this writ petition, petitioner is challenging the order dated 16.09.2020, whereby the petitioner has been refused to be transferred to open prison.

2. Facts leading to this petition are that the petitioner was involved in the Bombay Blasts case and was convicted under section 3 (3) of Terrorist and Disruption Activities (Prevention) Act, 1987 (hereinafter referred to as "TADA Act") and sentenced to imprisonment for life. The petitioner has suffered 18 years of imprisonment and he has been released 18 times on parole and

furlough and reported in time to jail. He has not breached any condition of liberty. He has been issued certificate of good character.

3. Since the year 2010, the petitioner has been applying for selection for open prison, but the respondents are not acceding to the request of the petitioner. The petitioner has been appointed as night watchman in the year 2013. The petitioner came to be promoted as warden and continued to serve as a warden.

4. According to the petitioner, despite issuing directions by this Court, the respondents are not selecting the petitioner for open prison only on the ground that the petitioner has been convicted under the TADA Act. The petitioner had preferred a contempt petition for disobeying the orders of this Court. Despite that, the respondents are not selecting the petitioner for open prison.

5. Heard Shri Chaudhari, learned counsel for the petitioner and Shri Salgare, learned APP for the State. Shri Chaudhari argued that the petitioner has made several representations to the respondent No. 2 but respondent No. 2 every time rejected the representations. In the year 2018, the petitioner had preferred

criminal petition No. 1613/2018, which was allowed by this Court on 10.04.2019. He submitted that the petitioner had preferred Writ Petition No. 358/2012 which was decided on 07.09.2012. He argued that by this writ petition he had challenged the legality, validity and correctness of rule (4)(ii)(n) of the Maharashtra Open Prison Rules, 1971. This writ petition was dismissed. Because of good conduct of the petitioner, the petitioner was appointed as a Night Watchman. Subsequently, because of the good conduct of the petitioner, he was appointed as a Warden. He argued that petitioner was not considered for being transferred to open prison on the ground that a case was pending against the petitioner. It was revealed later on that no case was pending against the petitioner. He argued that this clearly shows that the authorities are bent upon rejecting the claim of the petitioner for being transferred to open prison on one or the other count. He submitted that the petitioner had preferred Criminal Writ Petition No. 1613/2018 in which this Court issued certain directions. Since these directions were not complied with, petitioner had filed Contempt Petition No. 450/2019. On 17.06.2019, respondent No. 5 rejected the representation of the petitioner for his transfer to open prison. He argued that on 17.06.2020, respondent No. 5 rejected the representation of the petitioner on the ground that the petitioner is

TADA convict and that the conduct of the petitioner is not satisfactory. He argued that the petitioner had brought to the notice of the jail authorities about the misuse of the cell phones in the prison, but the authorities did not pay any heed to his complaints. He further argued that in the vigilance visit to the jail, it was found that some hardened criminals were using mobile phones with the blessings of jail authorities. To evade their responsibility, the petitioner has been made a scapegoat and he has been demoted from the post of Warden. He argued that these chronology of events clearly indicate that the jail authorities by hook or crook want the claim of the petitioner for open prison to be rejected. He argued that respondent No. 2 cannot delegate his powers to decide the representation of the petitioner to respondent No. 5. He argued that for this reason also the impugned order needs to be set-aside.

6. Learned APP Shri Salgare submitted that since the year 2010 the petitioner has been making representations after representations for being transferred to open prison. All his representations have been rejected and the writ petitions preferred by him have also been rejected. Still he continues to make the representation for being transferred to open prison. He submitted

that the petitioner was demoted from the post of Warden as hardened criminals were found using cell phones during his tenure. Therefore, conduct of the petitioner is not satisfactory. In terms of rule 4(ii)(n), the jail authorities are permitted to reject the representation of the petitioner on any other ground. He, therefore, prayed for rejection of the petition.

7. Rule 4(ii)(n) of Maharashtra Open Prison Rules reads as under:-

4 (ii) the following prisoners shall not normally be sent for confinement in an open prison:-

(a).....

(n) any other prisoner or category of prisoners whom the Inspector General of Prisons considers unfit for being sent to open prison.

8. This Court (Coram : A.H. Joshi & U.D. Salvi, JJ) in Criminal Writ Petition No. 358/2012 decided on the 07.09.2012, has held in paragraph 15 as under:-

5. Rule 4(i) of the Maharashtra Open Prisons Rules 1971 enlists categories of the prisoners who can be selected for sending to Open Prison. Rule 4(ii) enlists the category of prisoners who cannot be selected. Clause (n) of Rule 4(ii) reads as follows :-

“(n) any other prisoner or category of prisoners whom the Inspector General of Prisons considers unfit for being sent to an open prison.”

It is also observed in paragraph No. 15 of Criminal Writ Petition No. 358/2012 thus:-

15. It is also seen that the Committee is always entitled to invoke Rule 4 (iii) and recommend case of a prisoner who is otherwise found ineligible, for being considered for Open Prison and such cases can be considered by Inspector General of Prisons for special reasons. Such recommendation would always be on account of personal good behaviour and/or merit for such eligibility and any other special circumstance.

9. From the above observations of this Court, it is axiomatic that the recommendation by the Committee would depend upon the personal good behaviour of the prisoner.

10. Admittedly, the petitioner was convicted under TADA Act in the year 2007. The Government has passed a resolution dated 15.03.2010 by which, the prisoners convicted for offences against the State or in terrorist activities or organised crime will not be selected for open prison. The resolution makes it clear that it will not apply to the prisoners who were convicted before the date of passing of this resolution. The petitioner was convicted in the year 2007. Therefore,

the petitioner is out of the purview of this resolution. Therefore, rejection of claim of the petitioner on this ground cannot be sustained.

12. The representation of the petitioner was rejected also on on the ground that during the tenure of the petitioner as Warden, hardened criminals were found using cell phones. The Committee, therefore, found that the petitioner cannot be selected for open prison.

13. We do not find any error in the reasons assigned by the respondents. In this view of the matter, there is no substance in the petition. Hence, it stands rejected.

(M. G. SEWLIKAR)
Judge

(V. K. JADHAV)
Judge

dyb/d