

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE**

CRIMINAL WRIT PETITION NO.399 OF 2021

Zeeshan Abdul Malik Khot
(brother of Farhan Abdul Malik Khot)
Convict, confined at Kolhapur Central Prison,
Kalamba, Kolhapur,
age: 40 years, Occ.: Not known
r/at House No.198, Khot Mohalla,
Village Borivali, Post: Padgha
Tal.: Bhiwandi, Dist.: Thane

... Petitioner

Vs.

- 1) State of Maharashtra
- 2) The Superintendent
Kolhapur Central Prison, Kalamba, Kolhapur
- 3) Dy. Inspector General of Prisons
Western Region, Yerawada
Pune – 411 006
- 4) Inspector General of Prisons
State of Maharashtra
Central Building, Pune-411001

...
Respondents

Mr.N.N. Gawankar i/b Samay S. Pawar for the Petitioner

Ms.A.S. Pai, Public Prosecutor, for Respondents

**CORAM: S.S. SHINDE &
N.J. JAMADAR, JJ.**

**JUDGMENT RESERVED ON: AUGUST 5, 2021
JUDGMENT DELIVERED ON: SEPTEMBER 17, 2021**

JUDGMENT (PER S.S. SHINDE, J.):

1. This petition is filed seeking the following substantive reliefs :

“a) that this Hon'ble Court be pleased to issue appropriate writ, order or direction to quash and set aside the impugned order dated 06-10-2020 passed by Respondent No.4;

b) that this Hon'ble Court be pleased to issue appropriate writ, order or direction ordering and directing Respondent No.2 to release the brother of the petitioner, namely Farhan Abdul Malik Khot (the convict) on furlough leave on usual terms and conditions or on such terms and conditions as this Hon'ble Court deems fit and proper;”

2. The petitioner is the brother of the convict, namely, Farhan Abdul Malik Khot, who is presently lodged in Kolhapur Central Prison, Kalamba, Kolhapur. The petition challenges the order passed by Respondent No.4 – Inspector General of Prisons, State of Maharashtra, Pune dated 10th December, 2019 rejecting the furlough appeal filed by the brother of the petitioner. The convict was arrested on 1st May, 2003 and was sentenced to suffer R.I. for life under sections 4(b) of Prevention of Terrorism Act; 5(a) and 4(b) of the Explosive Substances Act by the learned Special Judge, POTA, Mumbai in POTA Special Case No.2 of 2003 vide judgment and order dated 6th April, 2016.

3. The convict had filed an application for furlough leave, which was rejected by Respondent No.3 – Deputy Inspector General of Prisons, Western Region, Yerawada, Pune vide order dated 13th June, 2019, on the basis of the adverse report submitted by Respondent No.2 – the Superintendent, Kolhapur Central Prison, Kalamba, Kolhapur. The convict preferred an appeal against the said order dated 13th June, 2019 before Respondent No.4 – Inspector General of Prisons, State of Maharashtra, Pune. Respondent No.4 vide his order dated 10th December, 2019 dismissed the appeal and confirmed the order dated 13th June, 2019. Thereafter, the convict had preferred Writ Petition No.6447 of 2019 before this Court. This Court vide its order dated 26th February, 2020 partly allowed the petition by directing Respondent No.3 to examine the contention of the petitioner that he was sentenced under POTA for 10 years and he had already completed that period and thereafter pass fresh orders on his application for furlough leave within six weeks from the date of communication of the said order. Pursuant to the said direction, Respondent No.3 passed a fresh order dated 14th March, 2020 and rejected the application of the convict for furlough leave. Being aggrieved with the said order dated 14th March, 2020, the

petitioner has preferred this Petition.

4. Learned Counsel appearing for the Petitioner submitted that the report which was relied upon by Respondent No.4 – Inspector General of Prisons was based more on the apprehensions of the police without any cogent material to support the same. He submitted that Respondent No.4 has grossly erred in applying Rule 4(13) of the Amended Rules inasmuch as the convict has already undergone the sentence of 10 years under the Prevention of Terrorism Act and, therefore, the provision of disqualification could not have been made applicable to him. He has also submitted that the authorities, without any material, have erred in relying on Rule 4(20) and come to the conclusion that the convict is likely to jump furlough leave. It is also submitted by the learned Counsel for the petitioner that, in the past, convict surrendered to the jail authorities on time upon completion of the interim bail periods. It is also submitted that the jail authorities have not taken into account that, although the petitioner has completed 14 years of imprisonment till date, he was never released on furlough leave. The learned Counsel has, therefore, prayed that the petition be allowed and the impugned order be quashed and set aside.

5. In support of his arguments, the learned Counsel for the petitioner had relied on the following judgments

- i) Jafar s/o. Abdul Haq Shaikh vs. State of Maharashtra & others
(Writ Petition No.1293 of 2017, Bombay High Court Aurangabad Bench, decided on 24.11.2017)
- ii) Asgar Kadar Shaikh vs. Deputy Inspector General (Prisons) and another, (WP No.351 of 2018, Bombay High Court Nagpur Bench decided on 18.9.2018)
- iii) Aftab Saeed Ahmed Shaikh vs. The State of Maharashtra (WP No.975 of 2021, Bombay High Court, Mumbai, decided on 6th May, 2021)
- iv) Mohammad Moin Faridullah Qureshi vs. State of Maharashtra (Criminal Writ Petition No.446 of 2018, Aurangabad Bench decided on 4th July, 2018)
- v) Mohammad Moin Faridullah Qureshi vs. State of Maharashtra (Criminal Writ Petition No.33 of 2018, Aurangabad Bench, decided on 7th February, 2019)
- vi) The State of Maharashtra & others vs. Mohammad Moin (Special Leave Petition (Cri.) No.7192 of 2019 decided on 14th July, 2021)
- vii) Yogesh Daulat Gadakh vs. State of Maharashtra (Criminal Writ Petition No.5478 of 2018, Bombay High Court, Mumbai, decided on 8th March, 2019)

6. Learned APP appearing for the Respondents has opposed the petition and has submitted that the convicts of terrorist activities such as blasts case, cannot be granted furlough leave in

view of the amendment to the Maharashtra Prisons (Mumbai Furlough and Parole) rules on 16th April 2018 wherein sub-Rules (13), (18) and (20) of Rule 4 are introduced. In support of her arguments, the learned Public Prosecutor had relied on the following judgments:

- i) Bashir Ahmed Usman Gani Khairulla vs. State of Maharashtra & Ors.
(AIR Online 2019 Bom 285 Writ Petition No.1119 of 2019)
- ii) Bashir Ahmed Usman Gani Khairulla vs. State of Maharashtra & Ors.
(AIR Online 2018 Bom 910 Writ Petition No.3988 of 2017)
- iii) Sharad vs. State of Maharashtra, 2016 (4) Mh.L.J. 228
- iv) Ashfaq vs. State of Rajasthan & Ors.,
(2017) 15 SCC 55

7. We have given careful consideration to the rival submissions. With the assistance of the learned Counsel appearing for the petitioner and the learned Public Prosecutor appearing for the Respondent – State, we have perused the grounds taken in the petition, the annexures thereto and the grounds on which the application for furlough leave was made.

8. The application of the convict for furlough leave was rejected by Respondent No.3 – Deputy Inspector General of Prisons vide order dated 13th June, 2019 on the following grounds:

- i) The police report of the Dy.S.P. (Home), Thane (Rural) is adverse.
- ii) Under Rule 4(13) of G.R. dated 16-04-2018, those prisoners who are convicted for Terrorist activities, waging war against State, abduction for extortion are not entitled to furlough leave unless they serve out the sentence for the respective offences.
- iii) Release of the prisoner on furlough leave is not recommended by the Prison Superintendent.
- iv) In the event of release of the prisoner on furlough leave, he will definitely abscond.
- v) Furlough leave is not a right (as per Rule 17 of Chapter XXXVII of the Prison Manual)

9. It is pertinent to quote sub-Rules (13), (18) and (20) of Rule 4 of the Maharashtra Prisons (Mumbai Furlough and Parole) Rules, which read as under:

“4. Eligibility for furlough: - All Indian Prisoners except from following categories whose annual conduct reports are good shall be eligible for furlough: -

....
....

(13) Who is sentenced for offences such as terrorist crimes, mutiny against state, kidnapping for ransom (Prisoners may

be eligible for furlough after completion of stipulated sentence in the respective section);

(18) Prisoners whose release on leave is likely to have repercussions elsewhere in the country;

(20) Who in the opinion of police/prison authorities are likely to jump furlough;”

10. The Supreme Court in the case of ***Asfaq vs. State of Rajasthan & Others (supra)***, has held as under:

“21. To sum up, in introducing penal reforms, the State that runs the administration on behalf of the society and for the benefit of the society at large cannot be unmindful of safeguarding the legitimate rights of the citizens in regard to their security in the matters of life and liberty. It is for this reason that in introducing such reforms, the authorities cannot be oblivious of the obligation to the society to render it immune from those who are prone to criminal tendencies and have proved their susceptibility to indulge in criminal activities by being found guilty (by a Court) of having perpetrated a criminal act. One of the discernible purposes of imposing the penalty of imprisonment is to render the society immune from the criminal for a specified period. It is, therefore, understandable that while meting out humane treatment to the convicts, care has to be taken to ensure that kindness to the convicts does not result in cruelty to the society. Naturally enough, the authorities would be anxious to ensure that the convict who is released on furlough does not seize the opportunity to commit another crime when he is at large for the time-being under the furlough leave granted to him by way of a measure of penal reform.”

11. The Division Bench of this Court in the case of ***Bashir Ahmed Usman Gani Kairullah vs. The State of Maharashtra & others***, has held as under:

“13. Thus, the Supreme Court in the case of Asfaq has clearly stated that the decision in the cases of parole is to be taken in accordance with the guidelines framed. As per the rules and notifications which are applicable to the present petitioner, the prisoners who are convicted for terrorist activities are not eligible to be granted parole. The Supreme Court further observed that guidelines of some of the states stipulate two kinds of paroles, namely, custody parole and regular parole. However, as far the State of Maharashtra is concerned, we have rules which provide for release of prisoners on furlough and emergency and regular parole. An application for furlough is made without giving any reason as it is understood that furlough is granted to maintain family and social ties, to solve personal and family problems and to maintain links with society whereas parole, as per Rule 19 of the Prisons Rules, can be granted in case of serious illness or death of nearest relative such as father, mother, brother, sister, spouse, children or marriage of brother, sister and children of prisoner or pregnant woman prisoner for delivery (except high security risk prisoner) or in case of natural calamity such as house collapse, floods, fire, earthquake. Thus, parole cannot be granted for any other reason other than that stated in Rule 19. No doubt, for being released on furlough, the prisoner does not need to state any reason but for parole, the prisoner has to state the reason for being released on parole and if he is seeking parole on the ground of illness of a close relative, he has to annex the necessary medical certificate which we have adverted to above. Thus, unless and until the prisoner has document in support of serious illness of close relative, his application cannot be considered.

14. ...

Lastly in paragraph 18 of the said decision, the Supreme Court has observed thus:-

18. To sum up, in introducing penal reforms, the State that runs the administration on behalf of the society and for the benefit of the society at large cannot be unmindful of safeguarding the legitimate rights of the

citizens in regard to their security in the matters of life and liberty. It is for this reason that in introducing such reforms, the authorities cannot be oblivious of the obligation to the society to render it immune from those who are prone to criminal tendencies and have proved their susceptibility to indulge in criminal activities by being found guilty (by a Court) of having perpetrated a criminal act. One of the discernible purposes of imposing the penalty of imprisonment is to render the society immune from the criminal for a specified period. It is, therefore, understandable that while meting out humane treatment to the convicts, care has to be taken to ensure that kindness to the convicts does not result in cruelty to the society.....

Thus, the Supreme Court has observed that the interest of society has also to be kept in mind while releasing a prisoner on parole or furlough.

18. Relying on the above fact, the Division Bench of this Court at Aurangabad in the case of Jafar s/o. Abdul Haq Shaikh, granted furlough to the petitioner who was a bomb blast convict. However, the main issue which was involved in the case of Altaf Ali Mushtaq Ali Sayed was that his application for furlough was dated 16.3.2016, i.e., much prior to the Notification dated 26.8.2016 and in that case obviously, the Notification dated 26.8.2016 could not have been made retrospectively applicable to Altaf Ali Mushtaq Ali Sayed and as the said Notification could not have been made applicable to Altaf Ali Mushtaq Ali Sayed, the conduct of the said convict in jail and when he was earlier released on parole was kept in mind and he was released on parole. In case of Altaf Ali Mushtaq Ali Sayed, the only ground or reason for rejecting the application for parole was that he was convicted in a bomb blast case and if he is released on parole, he will not report back to the prison in time and the other reason was that if he is granted parole, the surety may not be able to keep a check on him. As the first ground of rejection that he was convicted in a case related to the bomb blast could not be made use of as the Notification dated 26.8.2016 was much after his application for furlough and

hence the notification could not be said to be attracted in the case of Altaf Ali Mushtaq Ali Sayed because his application was much prior to the Notification and hence, the court had to look to the other grounds for rejecting the application of Altaf Ali Mushtaq Ali Sayed for parole. In view of the fact that he had been released on many occasions on furlough/parole and he had reported back on the due date to the prison and the fact that during the period that he was on parole/furlough, he had not misused the liberty granted to him, the court was of the opinion in the case of Altaf Ali Sayed (supra) that the other grounds were also not good grounds to reject the application for parole. Hence, the main point in the case of Altaf Ali Mushtaq Ali Sayed was that his application for parole was much prior to the Notification dated 26.8.2016, hence, the fact that he was a bomb blast convict would not have come in the way of Altaf Ali Mushtaq Ali Sayed to be granted parole. It is very clear from the very first para of the decision in Altaf Ali Mushtaq Ali Sayed that his application for parole was prior to the Notification dated 26.08.2016. This important distinction in the case of Altaf Ali Mushtaq Ali Sayed was not brought to the notice of the court when the case of Jafar s/o. Abdul Haq Shaikh was decided on 24.11.2017 by the Division Bench of the Court at Aurangabad. The Division Bench of this Court in various decisions prior to Altaf Ali has held that if the application of the convict is prior to the notification, the rigours of the notification would not apply to the said convict. This was also held in two reported decisions by the bench presided over by one of us (V. K. Tahilramani,J.) who had rendered the decision in Altaf Ali. The decision in Altaf Ali is dated 21.6.2017, however, the decision in the two reported decisions is 5.5.2016 in the case of Santosh Bhukan (supra) and decision dated 28.4.2016 in Sharad Shelke (supra). In these two decisions also, the judgment was rendered by the bench presided over by V.K. Tahilramani, J. Thus, once the legal position was clarified that if the application is prior to the Notification dated 26.8.2016, the notification cannot be made retrospectively applicable to the prisoner and such decisions were even reported, it was not felt necessary in matters thereafter to go on reiterating the same position and in matters which came up for consideration later only the date of application for

parole / furlough was mentioned in the first paragraph of subsequent decisions and only if the application was after the Notification, the Notification was held to be attracted. In view of all these facts, it was not felt necessary to keep on reiterating the same legal position and only the date of application for parole / furlough was mentioned in the first paragraph of the order. In Altaf Ali also, in the first paragraph itself, the date of application for parole is mentioned i.e 16.3.2016, thus, it was much prior to notification dated 26.8.2016, in such case, the Notification would not be attracted. Hence, it cannot be said that the decision in Altaf Ali Mushtaq Ali Sayed can be relied upon to hold that even if the application of the prisoner for parole/furlough is after Notification dated 26.8.2016, he can still be granted parole/furlough. In view of the Notification dated 26.8.2016, any application for furlough or parole after the notification by a person indulging in terrorist activities cannot be granted.

12. In an unreported judgment of this Court (Coram: B.P. Dharmadhikari & Prakash D. Naik, JJ.) in the case of *Bashir Ahmed Usman Gani Khairulla vs. State of Maharashtra & ors* **(Criminal Writ Petition No.1119 of 2019 decided on 11.4.2019)**, after considering the earlier pronouncements, in paragraphs 14 and 15, it held thus:

“14. Division Bench at Bombay on 7th august, 2018, has considered the request for release on parole made by this petitioner (Bashir Ahmed) in judgment in the case of Bashir Ahmed Usman Gani Kairullah Vs. State of Maharashtra and Ors. In that judgment, in paragraph no.17, it has considered the judgment of Aurangabad Bench in case of Jafar s/o. Abdul Haq Shaikh (Supra) and in paragraph 19, it has considered the earlier judgment of Aurangabad Bench in case of Mohammed Moin s/o Faridulla Qureshi (Supra). After considering these judgments, which basically apply

parity, and therefore, Article 14 of the Constitution of India, that Division Bench has found it necessary to follow the statutory prescription i.e. mandate of Rule 4(13) of Maharashtra Parole and Furlough Leave. This law is laid down in case of present petitioner only.

15. The fact that Rule 4(13) does not empower or enable respondents to release a convict like petitioner on furlough, is not in dispute. Thus, respondents do not have power with them to take a particular decision. In this jurisdiction, therefore, we cannot overlook that statutory bar. The judgment and order, which permit release on the ground of parity, cannot come to the rescue of present petitioner, as per law has been clarified by Division Bench of this Court in his own case of Bashir Ahmed Usman Gani Kairullaha (Supra).

13. The convict was granted interim bail by the Apex Court on 8.5.2017 and also by this Court vide order dated 11.4.2018. However, the reason for granting interim bail by the Apex Court was that the mother of the convict was detected with cancer and his wife had met with an accident whereas the reason before the High Court was that the mother of the convict had expired and, accordingly, the interim bail was granted to the convict by the Apex Court as also this Court. However, this petition challenges the rejection of the application of the petitioner for regular furlough leave. The same is rejected by the prison authority on the basis of adverse police report, Rule 4(13) of G.R. dated 16-04-2018 stating that those prisoners who are convicted for Terrorist activities,

waging war against State, abduction for extortion are not entitled to furlough leave unless they serve out the sentence for the respective offences. It was also mentioned in the impugned order that release of the prisoner on furlough leave is not recommended by the Prison Superintendent. It is also observed that in the event of release of the prisoner on furlough leave, he will abscond. We are in agreement with the said observations.

14. In that view of the matter and in view of the aforesaid decisions including the case of *Bashir Ahmed Usman Gani Khairulla vs. State of Maharashtra & others (supra)*, the application of the petitioner for furlough cannot be granted. Hence, this petition is dismissed.

(N .J. JAMADAR, J.)

(S.S. SHINDE, J.)