

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

967 CRIMINAL WRIT PETITION NO.217 OF 2022

**ASHWIN BANSI SAPKALE THROUGH HIS WIFE JYOTI ASHWIN
SAPKALE
VERSUS
THE STATE OF MAHARASHTRA**

...
Advocate for Petitioner : Mr. Pratik Bhosle (appointed)
APP for Respondent nos. 1 to 4: Mr. S. J. Salgare
....

**CORAM : V. K. JADHAV AND
SANDIPKUMAR C. MORE, JJ.**

DATED : 9th MARCH, 2022.

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P. C. :

1. Heard finally with consent of the parties at admission stage.
2. This criminal writ petition arises out of communication received through post from wife of the convict. It is her case that she got married with the convict in the year 2014 and they have a daughter out of their wedlock. However, she desirous of having another child to complete the family. The learned appointed counsel Mr. Pratik Bhosale has placed his reliance on the following two cases :

1) Jasvir Singh and another vs. State of Punjab and others, 2014 SCC OnLine P&H 22479 and

II) Meharaj vs. State, represented by its Secretary to Government of Tamil nadu Home Department and others, 2022SCC OnLine Mad 381.

In the case of **Jasvir Singh vs. State of Punjab and others** (*supra*), the petitioner sought the enforcement of their perceived right to have conjugal life and procreate within the jail premises. After going through the decisions of the various courts across the globe in para no.94 of the judgment the ***Punjab and Haryana High Court*** has made following observations :

"94. Having held that, this Court cannot be oblivious of the fact that the cited decisions of various Courts across the globe voicing their opinion on the right of conjugal visits or artificial insemination of a convict may have some persuasive value in general but the jurisprudential principles expounded therein do not advance the petitioners' claim being vividly distinguishable, for the reasons that (i) the society, its fabric and pragmatic approach to allow or disallow certain events to happen in the case in hand are laid on entirely different foundations and thus no common pyramid can be structured; (ii) the circumstances which led to the petitioners' incarceration are far grave in nature and different from those where one of the spouse was totally

innocent and possessory of all human rights without any curtailment unlike the instant case where both of them are convicts and undergoing death sentence and life conviction, respectively; (iii) even the most liberal view taken by some of the European or American Courts would not justify the claim put forth by the petitioners; and (iv) the existing infrastructure and overall environment do not support emergent measures; I, therefore, decline to issue any direction with reference to the claim put-forth by the petitioners.

3. In para no. 95 the court has sum-up with the conclusions and answer the questions as formulated in the following terms :

"95. For the reasons assigned above, I sum up my conclusions and answer the questions as formulated in Para 9 of this order, in the following terms.-

Question -

- (i) Whether the right to procreation survives incarceration, and if so, whether such a right is traceable within our Constitutional framework?***

Yes, the right to procreation survives incarceration. Such a right is traceable and squarely falls within the ambit of Article 21 of

our Constitution read with the Universal Declaration of Human Rights.

- ii. Whether penological interest of the State permits or ought to permit creation of facilities for the exercise of right to procreation during incarceration?***

The penological interest of the State ought to permit the creation of facilities for the exercise of right to procreation during incarceration, may be in a phased manner, as there is no inherent conflict between the right to procreate and incarceration, however, the same is subject to reasonable restrictions, social order and security concerns;

- iii. Whether 'right to life' and 'personal liberty' guaranteed under Article 21 of the Constitution include the right of convicts or jail inmates to have conjugal visits or artificial insemination (in alternate)?***

'Right to life' and 'personal liberty' guaranteed under Article 21 of the Constitution include the right of convicts or jail inmates to have conjugal visits or artificial insemination (in alternate). However, the exercise of these rights are to be regulated by procedure established by law, and are the sole prerogative of the State.

- iv. If question No. (iii) is answered in the affirmative, whether all categories of convicts are entitled to such right(s)?***

Ordinarily, all convicts, unless reasonably classified, are entitled to the right to procreation while incarcerated. Such a right, however, is to be regulated as per the policy established by the State which may deny the same to a class or category of convicts as the aforesaid right is not an absolute right and is subject to the penological interests of the State.

4. In the light of the above, ***Punjab and Haryana High Court*** has issued certain directions to the State of Punjab.

5. In the case of ***Mehraj*** (supra) the Full Bench of Madras High Court had an occasion to deal with the following two questions :

(i) Whether the denial of conjugal rights to a convict prisoner would amount to denial of such conjugal rights to his/her spouse and thereby, violative of Article 21 of the Constitution of India ? and

(ii) Whether the State can be directed to favourably consider the request of a convict prisoner for emergency leave or ordinary leave for the purpose of having conjugal relationship with his/her spouse, though the Tamil Nadu Suspension of Sentence Rules, 1982 do not envisage this ?

6. In para no. 26 of the judgment, the Full Bench of the Madras High Court has concluded the issues which reads as under :

"26. *If we hold that deprivation of conjugal right to a convict offends Article 21 of the Constitution of India, it would mean to give right to a convict for conjugal right, which in common parlance is for maintaining the marital relationship of husband and wife in continuity with companionship. The same cannot be permitted for a convict, as a difference has to be made between the law abider and violator. If the case in hand is also taken note of, the petitioner's first petition was allowed with grant of leave for two weeks for undergoing infertility treatment and immediately after availing it, the second petition was filed in continuity. The facts aforesaid cannot be ignored by the court because after the judgment by the court holding conjugal right to be a fundamental right, the convict would come out with an application to secure his fundamental rights guaranteed under Article 21 of the Constitution of India without any restraint and, therefore, we need to take a cautious decision so that the ratio propounded by us is used for the purpose and*

accordingly, we answer the questions in the following terms :

(i) The denial of conjugal relationship of the convict for specific purpose may amount to denial of the fundamental right guaranteed under Article 21 of the Constitution of India. The specific purpose may be infertility treatment or some similar reason, but it should not be construed to be a fundamental right for having conjugal relationship as a course. This would make a difference between the law abider and violator in regard to rights guaranteed under Article 21 of the Constitution of India.

(ii) The state can be directed to consider the request of convict for emergency leave or ordinary leave for the purpose given while answering the question No (i). The emergency leave or ordinary leave would be for the purpose given under the 1982 Rules and if any extraordinary reason exist, then the State need to consider the aforesaid as and when a request is made by the convict or his relative for grant of ordinary leave for extraordinary reasons. The emergency leave or ordinary leave cannot be claimed as a right for having conjugal relationship without an exceptional reason. This demarcation is

necessary as the curtailment of some rights of a prisoner on account of his conviction to the extent indicated above does not offend Article 21 of the Constitution of India."

7. It is clear from the above conclusions drawn by the Full Bench of the Madras High Court that the denial of the conjugal relationship to the convict for specific purpose may amount to denial of the fundamental rights guaranteed under Article 21 of Constitution of India. For example the specific purpose may be infertility treatment or some similar reason. However, the Full bench has further, but it should not be construed to be a fundamental right for having conjugal relationship as a course. The Full Bench has further directed to consider the request of the convict for emergency leave or ordinary leave for the purpose given given while answering the question no.(i).

8. In the instant case the petitioner got married with the convict in the year 2014 and they have a daughter of the said marital wedlock. Though the petitioner is desirous of another child to complete the family, however, the learned APP has rightly pointed out that so far as the parole leave is concerned, the convict can avail the parole leave for a period of 45 days in a year and similarly furlough leave to the extent of 28 days in a year. In the instant

case, the learned appointed counsel Mr. Pratik Bhosale fairly accepts that there is no specific purpose for which this peculiar relief can be granted.

9. In view of the same and in terms of ratio laid down by the Full Bench of the Madras High Court which can be appropriately applicable to the facts and circumstance of the present case, we find no substance in this writ petition. Writ petition is hereby dismissed and disposed of accordingly.

10. We appreciate the efforts taken by the learned appointed counsel Mr. Pratik Bhosale to assist us resolving this peculiar issue. We quantify the fees of the learned appointed counsel at Rs.4000/- to be paid by the High Court Legal Services Sub-Committee, Aurangabad.

11. At the request of learned appointed counsel Mr. Pratik Bhosale, the fees which we have quantified, shall be paid to the Library, Advocates Association of High Court Bombay, Bench at Aurangabad.

(SANDIPKUMAR C. MORE, J.)

(V. K. JADHAV, J.)

vsm/-