



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 524 OF 2023

Bandya Nilgorya Bhosale
Age: 47 years, Occu.: Nil,
R/o At Present in Central Prison, Aurangabad,
Dist. Aurangabad

..PETITIONER

VERSUS

1. State of Maharashtra
Through Under Secretary,
Home Department,
Mantralaya, Mumbai
2. The Inspector General of Prisons,
Maharashtra State, Pune
3. The Superintendent of Central Prison,
Aurangabad

..RESPONDENTS

....
Mrs. B.B. Gunjal, Advocate for petitioner
Mr. M.M. Neralikar, A.P.P. for respondents
....

CORAM : R.G. AVACHAT AND
SANJAY A. DESHMUKH, JJ
DATE : 08th NOVEMBER, 2023

ORAL JUDGMENT (PER : R.G. AVACHAT, J.) :

1. Heard finally at admission stage with consent of learned counsel for the parties. This petition, under Article 226 of the Constitution of India, has been filed for the following main reliefs :-

“B] By issuing appropriate writ or direction in like nature the order passed by the Respondent No.1 [i.e. through Under

Secretary, Home Department, Mantralaya, Mumbai] dated 05-08-2021 may kindly be quashed and set aside. Exh.“D”

C] By issuing appropriate writ or direction in like nature the Respondent No.1 [i.e. through Under Secretary, Home Department, Mantralaya, Mumbai] be directed to reconsider his proposal for premature release and place him in specific category i.e. 8(a) of Govt. Guideline dated 15-03-2010.

D] By issuing appropriate writ or direction in like nature the Respondent No.1 [i.e. through Under Secretary, Home Department, Mantralaya, Mumbai] be directed to release the Petitioner forthwith as he has undergone 23 years of actual imprisonment.”

2. The petitioner is a life convict. He was one of the accused in Sessions Case No. 100 of 2001. Following is the chart containing the details as to the offences for which he has been convicted and quantum of sentence imposed there against :-

Sections (I.P.C.)	Sentence	Fine	In default
376(2)(g)	R.I. for life	Rs. 10,000/-	R.I. for 3 years
395 r/w 120(B)	R.I. for 7 years	Rs.3,000/-	R.I. for 2 years
376 r/w 120(B)	R.I. for 10 years	Rs.3,000/-	R.I. for 2 years
354 r/w 120(B)	R.I. for 2 years	Rs.1,000/-	R.I. for 3 months
342 r/w 120(B)	R.I. for 1 year	Rs.1,000/-	R.I. for 3 months
324 r/w 120(B)	R.I. for 2 years	Rs.1,000/-	R.I. for 3 months

3. The trial Court has specifically directed that all the terms of sentences shall run consecutively with the further rider that no remission of

sentence or amnesty on any special occasion announced or to be announced either by the Central or the State Government shall apply to the sentence of imprisonment imposed. The petitioner had been unsuccessful in the appeal against conviction. It is however, not known as to whether the directions given by the trial Court that the petitioner shall not be entitled for any remission of sentence or amnesty on any special occasion announced or to be announced either by the Central or the State Government has been maintained by the appellate Court. The said direction is not under challenge in this writ petition.

4. Learned counsel for the petitioner would submit that on the date of filing of the writ petition, the petitioner had undergone twenty-three years of imprisonment without remission. The behavior of the petitioner in prison is good. The petitioner's application for premature release/remission has however been turned down by Respondent No.1 – Home Department, State of Maharashtra, inspite of the Superintendent of Prison had recommended petitioner's case for grant of remission. According to learned counsel, the guidelines dated 15th March, 2010 in relation to the premature release are applicable to the case of the petitioner. The authorities concerned ought to have placed the petitioner in the category of clause 8(a) of the said guidelines. The petitioner was not a habitual offender. He has been acquitted of the offence under M.C.O.C.A. There is no likelihood of the petitioner

indulging in criminal activities. Learned counsel relied on the following judgments to ultimately urge for allowing the petition :-

- 1) ***State of Haryana Vs. Jagdish, (2010) 4 SCC 216***
- 2) ***Muthuramlingam & Ors. Vs. State, (2016) 8 SCC 313***
- 3) ***Union of India Vs. V. Shriharan alias Murugan and Ors., (2016) 7 SCC 1***

5. An affidavit-in-reply has been filed on behalf of Respondent No.1 reiterating the reasons for turning down the petitioner's claim for premature release. It has been specifically averred therein that the report of police and the District Magistrate and the appraisal submitted by the learned Sessions Judge did not favour the petitioner's case. Case of the petitioner was categorized in a clause, whereunder the State Government has reserved its right to grant remission, considering individual case on its own merits. It has further been averred that considering the nature of offence committed by the petitioner, the proposal for grant of remission was turned down. Learned A.P.P. reiterated the averments in the affidavit-in-reply to ultimately urge for dismissal of the writ petition.

6. Considered the submission advanced. Perused the documents relied on. Clause 'E' of Chapter XXXII of Code of Criminal Procedure ('Cr.P.C.') speaks of execution, suspension, remission and commutation of sentences. Sections 432 and 433 of Cr.P.C., relevant for the purpose of deciding this writ petition, are reproduced below :-

“432. Power to suspend or remit sentences. -

(1)

(2) Whenever an application is made to the appropriate Government for the suspension or remission of a sentence, the appropriate Government may require the presiding Judge of the Court before or by which the conviction was had or confirmed, to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists.

(3)

(4)

(5)

(6)

(7) In this section and in section 433, the expression “appropriate Government” means, -

(a) in cases where the sentence is for an offence against, or the order referred to in sub-section (6) is passed under, any law relating to a matter to which the executive power of the Union extends, the Central Government;

(b) in other cases, the Government of the State within which the offender is sentenced or the said order is passed.

433. Power to commute sentence.- The appropriate Government may, without the consent of the person sentenced, commute -

(a)

(b) a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine;

(c)”

7. Undisputedly, the guidelines dated 15th March, 2010 are applicable to the case of the petitioner. It is also true that Superintendent of Prison and Deputy Inspector General of Prison had recommended the petitioner's case for grant of premature release. The reports of other authorities viz. Superintendent of Police, District Magistrate, Advisory Board and the Sessions Judge were adverse to the claim of the petitioner. Close reading of Annexure I of the guidelines indicate the petitioner's case falls in the residuary clause thereof viz.

Category No.	Categorisation of Crime	Period of imprisonment to be undergone including remission
8.	Any such offences which are of exceptional/heinous nature and not specifically covered in the above categories	The State Government will decide individual cases on merit.

8. The petitioner was twenty-two years of age when he was convicted. He is forty-five years of age by now. The Apex Court in case of Jagdish (supra) has observed thus :-

“32. Pardon is one of the many prerogatives which have been recognised since time immemorial as being vested in the sovereign, whoever the sovereignty might be. Whether the sovereign happened to be an absolute monarch or a popular republic or a constitutional king or queen, Sovereignty has always been associated with the source of power — the power to appoint or dismiss public servants, the power to declare war and conclude peace, the power to legislate and the power to adjudicate upon all kinds of disputes etc. The rule of law, in contradiction to the rule

of man, includes within its wide connotation the absence of arbitrary power, submission to the ordinary law of the land, and the equal protection of the laws. As a result of the historical process aforesaid, the absolute and arbitrary power of the monarch came to be canalised into three distinct wings of the Government, (Vide K.M. Nanavati v. State of Bombay AIR 1961 SC 112).

33. *Articles 72 and 161 of the Constitution provide for a residuary sovereign power, thus, there can be nothing to debar the concerned authority to exercise such power, even after rejection of one clemency petition, if the changed circumstances so warrant. (Vide G. Krishta Goud & J. Bhoomaiah v. State of Andhra Pradesh & Ors. (1976) 1 SCC 157).*

34.

35. *In view of the above, it is evident that the clemency power of the Executive is absolute and remains unfettered for the reason that the provisions contained under Article 72 or 161 of the Constitution cannot be restricted by the provisions of Sections 432, 433 and 433-A Cr. P.C. though the Authority has to meet the requirements referred to hereinabove while exercising the clemency power. To say that clemency power under Articles 72/161 of the Constitution cannot be exercised by the President or the Governor, as the case may be, before a convict completes the incarceration period provided in the short-sentencing policy, even in an exceptional case, would be mutually inconsistent with the theory that clemency power is unfettered. The Constitution Bench of this Court in Maru Ram (supra) clarified that not only the provisions of Section 433-A Cr. P.C. would apply prospectively but any scheme for short sentencing framed by the State would also*

apply prospectively. Such a view is in conformity with the provisions of Articles 20 (1) and 21 of the Constitution. The expectancy of period of incarceration is determined soon after the conviction on the basis of the applicable laws and the established practices of the State. When a short sentencing scheme is referable to Article 161 of the Constitution, it cannot be held that the said scheme cannot be pressed in service. Even if, a life convict does not satisfy the requirement of remission rules/short sentencing schemes, there can be no prohibition for the President or the Governor of the State, as the case may be, to exercise the power of clemency under the provisions of Article 72 and 161 of the Constitution. Right of the convict is limited to the extent that his case be considered in accordance with the relevant rules etc., he cannot claim pre-mature release as a matter of right.

36.

37. *Liberty is one of the most precious and cherished possessions of a human being and he would resist forcefully any attempt to diminish it. Similarly, rehabilitation and social reconstruction of life convict, as objective of punishment become of paramount importance in a welfare state. "Society without crime is a utopian theory". The State has to achieve the goal of protecting the society from convict and also to rehabilitate the offender. There is a very real risk of revenge attack upon the convict from others. Punishment enables the convict to expiate his crime and assist his rehabilitation. The Remission policy manifests a process of reshaping a person who, under certain circumstances, has indulged in criminal activity and is required to be rehabilitated. Objectives of the punishment are wholly or predominantly reformatory and preventive. The basic principle of*

punishment that “guilty must pay for his crime” should not be extended to the extent that punishment becomes brutal. The matter is required to be examined keeping in view modern reformatory concept of punishment. The concept of “Savage Justice” is not to be applied at all. The sentence softening schemes have to be viewed from a more human and social science oriented approach. Punishment should not be regarded as the end but as only the means to an end. The object of punishment must not be to wreak vengeance but to reform and rehabilitate the criminal. More so, relevancy of the circumstances of the offence and the state of mind of the convict, when the offence was committed, are the factors, to be taken note of.

38. *At the time of considering the case of pre-mature release of a life convict, the authorities may require to consider his case mainly taking into consideration whether the offence was an individual act of crime without affecting the society at large; whether there was any chance of future recurrence of committing a crime; whether the convict had lost his potentiality in committing the crime; whether there was any fruitful purpose of confining the convict any more; the socio-economic condition of the convict’s family and other similar circumstances.*

39. *Considerations of public policy and humanitarian impulses – supports the concept of executive power of clemency. If clemency power exercised and sentence is remitted, it does not erase the fact that an individual was convicted of a crime. It merely gives an opportunity to the convict to reintegrate into the society. The modern penology with its correctional and rehabilitative basis emphasis that exercise of such power be made as a means of infusing mercy into the justice system. Power of*

clemency is required to be pressed in service in an appropriate case. Exceptional circumstances, e.g. suffering of a convict from an incurable disease at last stage, may warrant his release even at much early stage. 'Vana Est Illa Potentia Quae Nunquam Venit In Actum' means-vain is that power which never comes into play."

9. Moreover, the Apex Court in case of ***Rajan Vs. The Home Secretary, Home Department of Tamil Nadu and Ors.***, Writ Petition (Criminal) No. 321 of 2018, has observed as under :-

"18. Thus understood, we cannot countenance the relief claimed by the petitioner to direct the respondents to release the petitioner forthwith or to direct the respondents to remit the remaining sentence and release the petitioner. The petitioner, at best, is entitled to the relief of having directions issued to the respondents to consider his representation dated 5th February, 2018, expeditiously, on its own merits and in accordance with law. We may not be understood to have expressed any opinion either way on the merits of the claim of the petitioner. The fact that the petitioner's request for premature release was already considered once and rejected by the Advisory Board of the State Government, in our opinion, ought not to come in the way of the petitioner for consideration of his fresh representation made on 5th February, 2018."

10. Furthermore, the Constitution Bench of the Apex Court in case of ***Shriharan*** (supra) has observed thus :-

"Convict undergoing life imprisonment can always apply to the authority concerned for obtaining remission either under Arts. 72

or 161 of the Constitution, or, under S.432 Cr.P.C. and the authority would be obliged to consider the same reasonably subject to the principles laid down in Swamy Shraddananda (2), (2008) 13 SCC 767 – Right to apply and invoke the powers under these provisions does not mean that he can claim such benefit as a matter of right based on any arithmetical calculation – All that he can claim is a right that his case be considered – Decision whether remissions be granted or not is entirely left to the discretion of authorities concerned, which discretion ought to be exercised in a manner known to law – Convict only has right to apply to competent authority and have his case considered in a fair and reasonable manner – Constitution of India, Arts. 72 and 161.”

11. Considering the nature of offence committed by the petitioner and the reasons given by Respondent No.1 in its order dated 05th August, 2021, turning down the petitioner’s claim for grant of premature release is not being interfered with in this writ petition. However, relying on the Constitution Bench judgment of the Apex Court in Shriharan’s case (supra) it is observed that whenever the petitioner would make an application or successive application for grant of remission, the appropriate authority would decide the same on its own merits. With these observations, criminal writ petition stands disposed of.

(SANJAY A. DESHMUKH, J.)

(R.G. AVACHAT, J.)

SSD