

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

965 CRIMINAL WRIT PETITION NO.915 OF 2022

Sardar s/o Shahvali Khan (C-6608),
Age 60 years, Occ. Convict,
R/o. Room no. 10, Gowawala Chawl,
LBS road, Kurla (West) Mumbai
At present confined in Central Jail
Harsul, Aurangabad

... **Petitioner**

VERSUS

1) State of Maharashtra,
Through Secretary, Home Department,
Mantralaya Mumbai.

2) State of Maharashtra
Through Inspector General of Prison,
Pune.

3) State of Maharashtra,
Through Superintendent of Jail,
Aurangabad.

... **Respondents.**

...
Advocate for Petitioner : Mr. Jaiswal Rupesh A.
APP for Respondents/State : Mr. M.M. Nerlikar

**CORAM : MANGESH S. PATIL &
ABHAY S. WAGHWASE, JJ.**

DATE : 11.04.2023

JUDGMENT : (PER : MANGESH S. PATIL, J.)

Heard. Rule. The Rule is made returnable forthwith. Learned A.P.P waives service for the respondents. At the joint request of the parties, the matter is heard finally at the stage of admission.

2. The petitioner is a convict suffering a sentence of life imprisonment

having been punished under Section 3 (3) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter 'TADA') and Section 120-B of the Indian Penal Code. He is seeking transfer to an open prison under the provisions of the Maharashtra Open Prisons Rules, 1971 (hereinafter 'Open Prison Rules').

3. Learned advocate Mr. Jaiswal for the petitioner submits that the petitioner has been persistently putting up the request but it is being rejected from time to time and the Courts have remanded the matter back to the respondents-authorities to consider his claim. Lastly, against such rejection of the application he had preferred Criminal Writ Petition 1485/2020. It was dismissed by this Court. The order was challenged in Special Leave Petition No. 8282/2021. The Supreme Court remanded the matter back with a direction to the respondents-authorities to consider and decide his application afresh. By the impugned order dated 04.02.2022 the respondent No. 2-Inspector General of Prison, Pune has rejected the application once again on three counts :

(1) The petitioner is more than 66 years of age and being a senior citizen the Chief Medical Officer of the Central Prison Aurangabad having certified him to be physically infirm and unable to put in hard labour which is required to be discharged in the open prison while undertaking agricultural activities.

(2) The petitioner is a life convict in a Mumbai Bomb Blast 1993 matter.

(3) The Selection Committee has unanimously decided not to recommend his case for such transfer to open prison by resorting to provisions of Rule 4(i)(b) and Rule 4(ii)(n).

4. Mr. Jaiswal would submit that the first ground is factually untenable.

The petitioner had solicited information from the Public Information Officer of the Aurangabad Central Prison regarding the alleged opinion expressed by the Chief Medical Officer certifying him to be physically infirm and unable to put in hard labour. He would then submit that so far as the second ground is concerned, there is no bar in the Open Prison Rules depriving a prisoner from the benefit of the provisions of the Rules depending upon the nature of the crime. So far as the third ground is concerned, Mr. Jaiswal would submit that though Rule 4(ii) contains several exceptions and the categories of prisoners who are not entitled to selection for confinement in an open prison, there is no specific reference excluding the convicts under the TADA Act. He would further submit that though Rule 4(ii)(n) mentions that Inspector General of Prisons may consider fitness of a prisoner for being sent to an open prison, which gives him a blanket power it cannot be exercised arbitrarily or capriciously. Though the legislature has given him such a power to categorize the prisoners and decide about their fitness to be confined in an open prison, the powers are expected to be exercised judiciously. He would, therefore, submit that the respondents are hellbent in depriving the petitioner his legitimate right to be confined in an open prison. The order is unsustainable.

5. The learned A.P.P. Mr. Nerlekar strongly opposes the petition. He submits that a prisoner has no inherent right to be shifted to a confinement in an open prison. The petitioner's case was objectively considered and has been rejected in view of the opinion given by the Selection Committee. Though the convicts under the TADA Act have not been expressly excluded from the applicability of Rule 4(i) and does not appear in the list given in Rule 4(ii) of the category of prisoners who are expressly excluded from deriving the benefit Rule 4(ii)(n) gives a discretion to the Inspector General of Prisons to consider if a prisoner or category of prisoners is unfit for being sent to an open prison. Since the petitioner's repeated attempts have been turned down basically on the ground that he is convict in Mumbai bomb

blast 1993 case, it cannot be said that the discretion exercised by the Inspector of General Prisons in holding him unfit by resorting to this provision is arbitrary or capricious. He would further point out that petitioner was granted permission to challenge the virus of this clause but the Writ Petition preferred by him bearing Writ Petition No. 358/2012 decided on 07.09.2012 was dismissed and the decision having reached finality, once it is demonstrated that the Inspector General of Prisons has considered him as unfit which decision is based on the objective material as indicated in the impugned order, there is no error or illegality in rejecting the petitioner's request.

6. Mr. Nerlikar would also point out that the petitioner himself has produced the record of the case papers maintained at the dispensary in the Central Jail at Aurangabad. The history given therein clearly mentions that he is suffering from joint pains and even it is suspected that he has arthritis, besides being aged more than 60 years. He would further point out that the petitioner is blowing hot and cold at the same time. Now, that he wishes to be shifted to open prison, he is making an endeavor to demonstrate as to how he is fit to be shifted. But when he was before this Court claiming emergency parole leave under the exceptional circumstances of pandemic, he took a stand before this Court in Criminal Writ Petition No. 644/2021 decided on 28.10.2021 that he was aged and physically infirm and was suffering from arthritis. He would, therefore, submit that even for this reason, the petition be rejected.

7. We have carefully considered the rival submissions and perused the papers. The provisions of Rule 4(i) of the Open Prison Rules lays down the categories of prisoners who are entitled to selection for confinement in an open prison. Whereas Rule 4(ii) is in the form of an exception to sub Rule (i) and lays down the categories of prisoners who are not entitled to the benefit of such selection under sub Rule (i). Rule 4(ii)(n) is in the form a residuary clause and Inspector General of Prisons has been conferred with

the power to consider a prisoner as unfit. Obviously, when the legislature has conferred such discretionary power on the Inspector General of Prisons, those cannot be arbitrary and are to be exercised cautiously and in a well reasoned manner. The discretion is not to be exercised as per the whims and fancies of the authority. Bearing in mind such principles if we examine, the impugned order, it *inter alia* mentions that the petitioner is a convict of Mumbai Bomb Blast 1993 case as one of the reasons. Though it has not been specifically categorized in any other clauses of Rule 4, this ground, in our considered view, can certainly fit in the residuary 4(ii)(n). We see no reason to observe that this ground purportedly resorted to by the Inspector General of Prisons is arbitrary or capricious. In our considered view, the convicts under special statutes like TADA would fall in the categories mentioned in sub Rule (ii) of Rule 4. The entire Rule 4 reads as under :

“4. (i) The following prisoners may be selected for confinement in all open prisons—

Convicted criminal prisoners who—

(a) are found to be of good behaviour, and are physically and mentally fit; and

(b) are willing to do hard work and abide by the rules and regulations of the open prison; and

(c) are sentenced to terms of imprisonment of one year or more and have undergone one-fourth of their sentence excluding remissions ; or

(d) are sentenced to imprisonment for life or more than 14 years in the aggregate and who have undergone five years of the sentence

excluding remission ;

(ii) The following prisoners shall not normally be sent for confinement in an open prison:—

(a) habituals classified as such by courts;

- (b) known habituals;*
- (c) prisoners who are awarded three or more major punishments for prison offences during the last two years, prior to the date of selection.*
- (d) prisoners having any case pending in a court,*
- (e) prisoners suffering from mental disease or any other serious disease,*
- (f) prisoners having previous history of serious mental illness,*
- (g) prisoners convicted and sentenced for offences under Sections 121,121-A, 122, 123, 124, 124-A, 125, 126, 128, 129, 130, 131, 132, 133,134, 135, 376, 392 to 402 of the Indian Penal Code or for offences under the Bombay Prevention of Gambling Act, 1887, or for offences under the Sea Customs Act,*
- (h) escapees and escape risks,*
- (i) hired and professional murderers,*
- (j) prisoners convicted of offences connected with narcotics,*
- (k) prisoners, who have been transferred from an open prison to a closed prison,*
- (1) Class I prisoners,*
- (m) women prisoners,*
- (n) any other prisoner or category of prisoners whom the Inspector General of Prisons considers unfit for being sent to an open prison.*
- (iii) Notwithstanding anything contained in sub-rule (ii) the Inspector General of Prisons, may on the recommendation of the Selection Committee, consider the cases of prisoners falling under sub-rule (2) for the purposes of confinement in an open prison.”*

8. Considering the category of prisoners mentioned in sub Rule (ii), the convicts for grave offences and habitual offenders are excluded from the benefit of selection for confinement in an open prison. The convicts under TADA, in our opinion can easily fit in such category of prisoners who have been excluded from such benefit. If the respondent No. 2 Inspector General of Prisons has found the petitioner unfit being a convict under Mumbai Bomb Blast 1993 case, we find that he has used the discretion appropriately.

9. So far as the ground of physical infirmity, it does appear that the petitioner had made some attempt to ascertain from the prison authorities the record regarding his certification as being unfit. But he was not provided anything on the ground that no such record was available about such certification. However, simultaneously, he has been provided with a diary maintained at the prison dispensary which mentions right from 01.01.2000 that every time he was taken to the doctor he was complaining about joint pains. He was in constant consultation with the doctors right up to 31.08.2020. Even in such visit the doctor suspected arthritis. The facts remain that even if there is no certificate as is mentioned in the impugned order regarding petitioner being physically unfit, this record gone into by the Inspector General of Prisons is sufficient to justify his conclusion that the petitioner is indeed physically unfit.

10. Besides, as has been pointed out by the learned A.PP, the petitioner seems to be blowing hot and cold at the same time. When he wanted emergency parole/furlough during pandemic as per the directions of the Supreme Court, while seeking such relief in Criminal Writ Petition No. 644/2021 he complained that he was an aged person and was even suffering from arthritis. Meaning thereby that he is changing his stance according to need. If in October 2021 he was claiming that he was more than 65 years of age and was suffering from arthritis and other illnesses, he cannot be heard to say that subsequently he became fit and he is entitled to the concession of being shifted to an open prison, where manual labour has

to be put in. Therefore, we find no illegality even in this ground assigned by the Inspector General of Prisons for rejecting the petitioner's claim.

11. In view of above state of affairs, we do not see any illegality in the order passed by the Inspector General of Prisons dated 04.02.2022.

12. The Writ Petition is dismissed.

13. The Rule is discharged.

(ABHAY S. WAGHWASE, J.)

(MANGESH S. PATIL, J.)

mkd/-