



2024:DMC:2878



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: April 10, 2024

+ **W.P.(CRL) 1130/2024**

BANARSI LAL @ GOBRA

..... Petitioner

Through:

Mr. Rajbir Singh Sagar and Mr. Rajiv Pratap Singh, Advocates.

versus

STATE OF NCT OF DELHI

..... Respondent

Through:

Ms. Nandita Rao, ASC with Mr. Amit Peswani, Advocate with SI Sonu Kumar, PS: Jagatpuri.

CORAM:

HON'BLE MR. JUSTICE ANOOP KUMAR MENDIRATTA

J U D G M E N T

ANOOP KUMAR MENDIRATTA, J.

1. Petition under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, 1973 ('Cr.P.C.') has been preferred on behalf of the petitioner with following prayer :

“Pass an order granting parole for a period of 1 month for attending marriage of real brother of petitioner and for reestablishing social ties etc.”

2. In brief, petitioner stands convicted vide judgment dated 09.06.2023 and sentenced vide order dated 07.08.2023 to undergo Rigorous Imprisonment (RI) for eight years and fine of Rs.20,000/- for offence punishable under Section 304 Part I IPC (in default of payment of fine to undergo SI for 03 months); and RI for six months and fine of Rs.2,000/- for offence punishable under Section 323 IPC (in default of payment of fine to undergo SI for 01 month), with benefit of Section 428 Cr.P.C.



2024:DMC:2878



3. A criminal appeal No.788/2023 preferred on behalf of the petitioner is pending consideration before this Court and is listed on 08.05.2024.
4. Learned counsel for the petitioner relying upon **Rahul Gupta v. State (NCT of Delhi)**, W.P.(CrI.) 996/2023 decided on 12.09.2023; **Rajesh Kumar v. Govt. of NCT of Delhi**, W.P.(C) 5128/2011 decided on 19.12.2011; **Basant Vallabh v. State**, W.P.(CrI.) 871/2020 decided on 07.07.2020, seeks parole for a period of one month for attending the marriage of brother of the petitioner on 13.04.2024 and for establishing social ties.
5. In **Rahul Gupta v. State (NCT of Delhi)** (supra) relied by learned counsel for the petitioner, the petitioner therein was convicted for offence under Sections 302/364A IPC and had sought parole for purpose of filing SLP before the Hon'ble Supreme Court and establishing social ties after his appeal had been dismissed. The parole therein was denied by Competent Authority on account of involvement of the petitioner in a case of murder and kidnapping after dismissal of the appeal. It was held by learned Single Judge of this Court that powers contained in Rule 1211 of the Delhi Prison Rules, 2018 are not absolute and the grant of parole for filing an SLP constitutes a special circumstance in terms of the said rule, which cannot be denied on the ground of commission of a serious offence. The aforesaid case is distinguishable on facts, since no appeal was pending in said case and the application for grant of parole was allowed by this Court, considering that filing of SLP is a special circumstance in terms of Rule 1211 of Delhi Prison Rules, 2018. The issue for consideration in the present case is, if the parole should be granted during pendency of appeal preferred by the accused, since an alternative remedy for seeking suspension of sentence and interim bail is available under Section 389 Cr.P.C.



6. On the other hand, the petition is vehemently opposed by learned ASC for the State and relying upon Delhi Prison Rules, 2018, it is urged that since an appeal preferred by the petitioner is still pending consideration before this Court, the petition for grant of parole is not maintainable as the relief should have been sought for suspension of sentence in pending appeal. It is also pointed out that power of the Executive to consider the representation of parole is also barred and eclipsed, during pendency of the appeal and appropriate remedy available to the petitioner is to apply for suspension of sentence and interim bail. Reliance is further placed upon *Vikas Yadav v. State NCT of Delhi*, 2016 SCC OnLine Del 3123; *Budhi Singh v. State NCT of Delhi* W.P.(Crl.) 697/2022 decided on 03.07.2023; and *Basant Vallabh v. State*, W.P.(Crl.) 871/2020 decided on 07.07.2020.

7. I have given considered thought to the contentions raised.

Parole and furlough are progressive measures for correctional services to enable the convicts to maintain social relations with the family and community. Parole is a temporary release of a prisoner for a short period and the period spent by the prisoner while on parole is no way a concession for his sentence and is not counted towards sentence, whereas in furlough, sentence continues to run during the period of release of the prisoner. It may further be noticed that regular parole is granted by the Competent Authority subject to fulfilment of conditions stipulated in Rule 1210 of Delhi Prison Rules, 2018, on an application filed by the convict. Rule 1209 clarifies that where an appeal of convict against conviction is pending before the High Court, regular parole will not be granted since the convict can seek appropriate orders from the High Court.

8. It is well settled that the State cannot be permitted to exercise the



powers to grant parole when this Court or Hon'ble Apex Court is seized of the matter in statutory appeal, as the same if permitted, would be derogatory to the appellate powers of the Court and may lead to a conflict in absence of specific permissive rule in this regard. Rule 1209 of Delhi Prison Rules, 2018 also clarifies the aforesaid legal position.

Reference in this regard may be made to ***Vikas Yadav v. State NCT of Delhi*** (supra), wherein a representation for grant of parole made on behalf of the petitioner in the nature of mandamus, during pendency of challenge against sentence before the Hon'ble Apex Court was declined by this Court. It was held that when a challenge against sentence awarded to the petitioner is pending determination before the Hon'ble Supreme Court in a criminal appeal, the power of the Executive to consider a representation for parole is eclipsed and cannot be exercised.

A similar issue also cropped up for consideration in ***Basant Vallabh v. State*** (supra), wherein after referring to observations in ***Vikas Yadav v. State NCT of Delhi*** (supra), it was reiterated that petition for parole cannot be entertained once the appeal is pending before the Hon'ble Apex Court.

Reference may also be made to ***Budhi Singh v. State NCT of Delhi*** (supra), wherein the right of petitioners for grant of furlough during the pendency of appeal against conviction before the Hon'ble Apex Court was considered and the questions framed for consideration were answered as under:

"Issue A.

81. I hold that the principle of derogation of power as laid down in the judgment of Hon'ble Supreme Court in ***K.M. Nanavati*** (supra), is not applicable in cases where the applicable prison rules do not forbid the executive from considering the application for furlough pending an appeal against conviction before an appellate court be it



High Court or Apex Court. [Ref: **Basant Vallabh** (supra)]

82. However, where the applicable Prison Rules forbid the Executive from considering the application for furlough pending an appeal against conviction before an appellate court and mandates seeking of appropriate direction by the convict from an appellate court in which the appeal of the convict against the order of his/her conviction is pending, the principle of derogation of power as laid down in the judgment of Hon'ble Supreme Court in **K.M. Nanavati** (supra), would be applicable with full vigour, as in case of Note 2 to Rule 1244 of the Rules.

Issue B.

83. The true and correct purport and import of Note 2 to Rule 1244 of the Rules, is to confer the power upon the Appellate Court to examine and consider convicts furlough application, where his/her appeal against the conviction is also pending. Any other interpretation, as canvassed by the petitioner would lead to absurdity and anomalous situation and hence is to be discarded. Accordingly, the word "High Court" appearing in Note 2 to Rule 1244 of the Rules would have to be interpreted to ipso jure mean and include Supreme Court of India, if an appeal against an order of conviction is pending consideration before the Supreme Court of India.

Issue D.

84. In view of the specific mandate of Note 2 to Rule 1244 of the Rules, the High Court even in exercise of its plenary powers under Article 226 of Constitution of India cannot interfere with the order refusing the furlough to a convict pending his/her appeal before the Hon'ble Apex Court. This restraint would apply notwithstanding the convict making out a strong case of overwhelming mitigating circumstances acting in his/her favour. Any such exercise of power vested in High Courts under Article 226 of the Constitution of India, pending an appeal before the Apex Court, would amount to derogation of appellate powers of the Supreme Court of India and would be violative of the principle laid down by the Apex Court in **K.M. Nanavati** (supra).

Issue C, E, F & G.

85. Since these issues may involve possible declaration of the rule as not a good law, in terms of the Clause (i) of sub-rule (xviii)(a) of Part B of Chapter 3 of the High Court Rules & Orders Volume V any challenge to the constitutionality or any prayer for striking down of Rule 1224 of the Rules is required to be placed before the Hon'ble Division Bench.

86. In view of the above, the matter be placed before Hon'ble the Chief Justice for assigning the same to the roster Bench for rendering decision on Issue -C, Issue E, Issue-F and Issue-G as framed by this Court by its order dated 02.12.2022.



87. *Subject to orders of Hon'ble the Chief Justice, list before the roster Bench on 10.07.2023."*

9. In view of aforesaid legal position, it is apparent that application for grant of parole/furlough cannot be considered in case of pendency of appeal before the Hon'ble Apex Court on principle of derogation of powers of the Appellate Court.

10. However, it cannot be ignored that appeal preferred by the petitioner in present case is pending before this Court. As such, the petitioner can also seek appropriate orders from this Court on the grounds available for regular parole in an application under Section 389 Cr.P.C., as there is nothing therein which bars the Appellate Court from considering the suspension of sentence and granting interim bail. Observations in para 7 in ***Rajesh Kumar v. Govt. of NCT of Delhi*** (supra), a Division Bench decision of this Court in this regard, may be beneficially quoted:

"7. We are however of the opinion that even when application for interim suspension of sentence or bail is filed by a convict in a pending appeal, it is always open to the convict to seek suspension/bail from this Court on the grounds as provided for regular parole and the High Court can always take those grounds in consideration while entertaining applications for suspension and/or interim suspension of the sentence. There is nothing in Section 389 or otherwise in law, barring the appellate Court from granting interim bail or suspending the sentence on considerations as for parole. Clause 10 very clearly stipulates that the "convict can seek appropriate orders from the High Court" which means that the convict can seek the order on parity of grounds for regular parole. Thus, the premise on which the petitioners impugn Clause 10, i.e. of grounds as for regular parole being not available while seeking "appropriate orders from the High Court" is erroneous and thus the challenge to the vires of Clause 10 has no merit. On the contrary, we are rather of the view that the Govt./Jail Authorities cannot be permitted to exercise the powers to grant parole when this Court is seized of the matter in statutory appeal and the same if permitted would be in derogation of the Appellate Powers of this Court and may lead to a conflict."



2024:DMC:2878



11. It has been held by this Court in ***Rakesh Kumar v. State Govt. of NCT of Delhi and Anr.***, W.P. (Crl.) 60/2024 decided on 13.02.2024 that the bar of judicial intervention to direct temporary release of a detenu would not affect the jurisdiction of the High Courts under Article 226 of the Constitution of India or the Hon'ble Apex Court under Article 32, 136 or 142 of the Constitution of India, to direct the temporary release of detenu, where request of detenu to be released on parole for a specified reason and / or for a specified period has been, in the opinion of the Court unjustifiably refused or where, in the interest of justice such an order of temporary release is required to be made. However, the said jurisdiction is to be exercised sparingly by the Court, wherein the facts and circumstance so deserve for passing of directions.

12. Since an alternative remedy is available to the petitioner for filing an application for suspension of sentence and interim bail in pending appeal under Section 389 Cr.P.C., this Court is not inclined to exercise the plenary powers under Article 226 of the Constitution of India for release on parole. Petition is accordingly dismissed with liberty to the petitioner to file an application for suspension of sentence and interim bail under Section 389 Cr.P.C. in the pending appeal, in accordance with law.

Pending applications, if any, also stand disposed of.

(ANOOP KUMAR MENDIRATTA)
JUDGE

APRIL 10, 2024/v/sd