IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CRIMINAL APPLICATION NO. 1403 of 2023

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE NIKHIL S. KARIEL

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	No
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

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MAHEBUBBHAI BHACHUBHAI BHATI

Versus

STATE OF GUJARAT & 1 other(s)

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Appearance:
THROUGH JAIL for the Applicant(s) No. 1
for the Respondent(s) No. 3
MR RC KODEKAR ADDITIONAL PUBLIC PROSECUTOR for the Respondent(s) No. 1

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CORAM:HONOURABLE MR. JUSTICE NIKHIL S. KARIEL

Date : 15/06/2023

ORAL JUDGMENT

1. By way of this application, the applicant challenges an order dated 07.01.2023 which is ostensibly passed by the Additional Director General of Police/Inspector General of Police and communicated by the

Administrative Officer(Jails), Gujarat State, whereby the authority concerned has rejected the application preferred by the present applicant for being released on furlough leave.

2 Perusal of order dated 07.01.2023 would reveal that two aspects have weighed with the authority concerned namely (1) The opinion given by the police officials where the offence had taken place is negative on the apprehension that if released the applicant might disturb the peace and tranquility of the area and (2) that the applicant is convicted of an offence punishable under Section 125(3) of the Code of Criminal Procedure.

3. At this stage before discussing on the issue any further, since it appears that stereotype order had been passed even in other matters which has come to the attention of this Court, this Court had called for the original files whereupon, the impugned decision had been taken.

4. Perusal of the file reveals that the notings had been provided by the officials subordinate to the Inspector General of Police and whereas it appears that four aspects had been mentioned namely ;

(1) about an opinion with regard to the first furlough leave of the applicant;

(2) that a person who was ready to stand surety for the applicant;

(3) police opinion is negative and

(4) the statement of the complainant is also negative.

5. Furthermore the file notings reveal that the fact of the applicant being convicted for a maintenance case has also been mentioned. It appears that the concerned Inspector General of Police has just mentioned A/B and

has stated rejected. The A/B, corresponds to point no. (3) and (4) mentioned hereinabove i.e. with regard to negative police opinion and negative statement of the complainant. It would further appear that based upon the points marked by the Inspector General of Police (Prison) a reasoned order is communicated by the Administrative Officer.

6. At this stage it would be relevant to refer to the extant provisions under which furlough is granted to a convict. Grant or refusal of furlough leave is governed by the provisions of the Prison (Bombay Furlough and Parole) Rules, 1959 and whereas Rule (2) of the said Rules specify about the authority competent to grant furlough. Rule 2 states about the Sanctioning Authority for grant of parole and furlough and whereas the said rule states that the Inspector General of Prisons or the Deputy Inspector General of Prisons (Head quarters) when the former i.e. the Inspector General of Prisons is out of headquarters shall be competent to grant furlough to convicted prisoners as mentioned.

7. Thus it appears that as per the Rules in question, the decision of whether furlough has to be granted to a prisoner or not, has to be taken by the Inspector General of Police, more particularly subject to the rights and restrictions as provided in rules in question.

8. Now comparing the said requirement with the present facts scenario it would appear that the Inspector General of Police having made an endorsement A/B rejected the application for grant of furlough leave and whereas the Administrative Officer of the office of the I.G. Prisons, vide impugned order, has communicated the rejection and has provided reasons for such rejection. As it appears, the Sanctioning Authority has treated the

aspect of giving of reasons as being absolutely irrelevant to the aspect of consideration and whereas since there does not appear to be any application of mind on part of the communicating authority more so, naturally since it is not the said person authority/ officer who was required to exercise the powers of the sanctioning authority as per the rules.

9. At this stage, this Court will examine the legality of the impugned order more particularly in corelation with the Rules applicable. The first aspect which has weighed with the authority concerned is a negative opinion of the police, that if the applicant is released the applicant might disturb the peace and tranquility of the area.

9.1 A perusal of the police opinion, inter alia reveals that while there are certain cases of theft and assault registered against the present applicant at Bhachau Police Station, in whose jurisdiction the present applicant was residing, and whereas it is stated that since the applicant is undergoing imprisonment for non payment of maintenance amount, therefore there would be a possibility that if released the present applicant would carry out theft and loot for arranging the said amount. In the considered opinion of this Court, such an opinion is as ambiguous as it can be. In the considered opinion of this Court, the police officials, more particularly when it comes to exercising a statutory right closely connected with the liberty of an individual, are required to exercise their duty, with due care and caution and whereas more particularly when the opinion submitted by such officers, has the result of impinging the liberty of an individual. The fact of the present applicant being involved or being named in FIRs, may be a relevant aspect but at the same time the apprehension that the applicant would possibly commit offences of theft or loot for raising the maintenance amount is

nothing but a fanciful apprehension raised by the police officials concerned, without any material whatsoever.

10. At this stage, this Court seeks to rely upon observations of Hon'ble Division Bench of this Court in case of **Narsing N. Gamit vs. State of Gujarat** reported in **1989 (2) G.L.H. 163** paragraph no. 3, 4, 5 and 6 being relevant for the present purse are being quoted hereinafter for benefit:

> "3. At the outset it should be noted that I.G. Prisons, should not reject the prisoner's application for releasing him on furlough solely on the ground that there is adverse police opinion. The I.G. Prisons, before deciding the prisoner's application for releasing him on furlough should take into consideration the guidelines laid down under the relevant rules, i.e the Prisons (Bombay Furlough and Parole) Rules, 1959.
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> 4. Firstly if the prisoner is to be released on parole or furlough for the first time after his conviction, the I.G. Prisons, should consider the facts and circumstances and allegations against the prisoner for which he is convicted. For this purpose he should refer to the judgement and order passed by the Court convicting him. From that judgement he should try to find out whether the prisoner is hardened criminal, habitual offender or whether the offence took place all of a sudden or the offence took place because of some enmity or long standing dispute between the parties. From the aforesaid circumstances he can arrive at the conclusion that by releasing the prisoner on furlough whether the prisoner is likely to commit any offence when he is on furlough or whether there is likelihood of breach of peace during that period.
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> 5. Secondly, he should consider the criteria laid down under Rule 4 of the Furlough and Parole Rules, 1959 particularly whether the person is a habitual offender, his conduct in the prison and whether he has shown any tendency towards crime in the prison and whether at any time he has escaped or attempted to escape from lawful

> custody or has defaulted in any way in surrendering himself at the appropriate time after release on parole or furlough. Under Rule & sub-rule (5) if furlough is not recommended, the District Magistrate or the Commissioner of Police is required to mention adequate reasons therefor. Under sub-rule (6) of Rule 8 the Sanctioning Authority is required to consider the said recommendation and the Authority has not recommended it without any reason or for any insufficient reason, the Sanctioning Authority i.e the I.G. Prisons, should not release the prisoner on furlough.
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> 6. Thirdly, he should take into consideration whether the prisoner was previously released either on furlough or parole and at that time whether he committed any offence or whether any breach of peace took place."

10.1 From the above quoted observations, it would be clear that even approximately 24 years earlier, the Hon'ble Division Bench in similar scenario had observed that an adverse police opinion should not be sole ground for rejecting an application for furlough leave and whereas the application is required to be considered as per the guidelines as laid down in the Prisons(Bombay Furlough and Parole) Rules, 1959. The Hon'ble Division Bench has observed that in case of release on furlough leave for the first time the Sanctioning Authority should consider the facts and circumstances and allegations against prisoner as found in the judgement of conviction and to come to a conclusion that whether the prisoner is a hardened criminal or habitual offender or that the offence had taken place all of a sudden on account of some long standing dispute between parties. Based upon the said conclusion, the Hon'ble Division Bench had required I.G. Prisons to come to a conclusion as to whether the prisoner while he is released on furlough leave is likely to commit breach of peace and tranquility. Furthermore if the prisoner is habitual offender then the criteria laid down under Rule 4 of the above referred rules is to be considered and

more particularly conduct of the prisoner in prison inasmuch as whether the prisoner has escaped or attempted to escape or has defrauded in any way in surrendering himself after release on parole or furlough. The I.G. Prison is also required to consider whether the prisoner upon being released previously on parole or furlough had committed any offence or any breach of peace had taken place.

11. It would appear that none of the considerations as above had been taken into account by the authorities concerned more particularly as it appears that the decision appears to be taken in ritualistic manner as noted hereinabove.

12. Furthermore, as regards the aspect of the present applicant, having committed offence under Section 125 of Cr.P.C which has weighed with the authority in rejecting the application, it requires to be noted that Section 125 of Cr.P.C is with regard to amount of maintenance to the wife and whereas in the instant case it would appear that though the competent Courts have directed payment of maintenance by the present applicant to his wife/wives, the same has not been complied with, resulting in his conviction for a period of 480 days each. In the considered opinion of this Court, while Section 125 of Cr.P.C, compliance of order of Court for payment of maintenance, being an offence as provided under the statute, is undeniable but the fact remains that the said offence, cannot be classified as a serious offence, conviction under which, would automatically disentitle the prisoner for claiming the benefit of furlough leave.

13. As it is, it is required to be noted that Rule 4 of the Prison (Bombay Furlough and Parole) Rules, 1959, lays down categories of prisoners, who

shall not be entitled/ considered for furlough and perusal of the said Rule would reveal that three categories i.e persons who are convicted for offence under Section 392 to 402 both inclusive of Indian Penal Code and persons convicted of offence under the Bombay Prohibition Act, 1949, and persons convicted for offence under the NDPS Act have been excluded from the purview of grant of furlough. It would appear thus that the intent of the statute is that the persons who are involved in serious offences, more particularly with regard to offences, which have a direct bearing on the law and order situation of ordinary citizens, i.e for offences punishable under Section 392 to 402 of Indian Penal Code are excluded from grant for furlough leave and whereas in so far as Bombay Prohibition Act and the NDPS Act since it appears that the intent of the State to ensure that the restriction under the respective Act is strictly complied with,and to prevent a possible repeat of the crime, such kind of persons who have been convicted under the said Acts have also been excluded. Beyond the above there is no specific provisions mentioned in Rule 4, whereby, any other person having committed or convicted of any other offence, has been excluded from the purview of grant of furlough. In the considered opinion of this Court, had appropriate application of mind been done at the level of Inspector General of Police, the aspect of offence punishable under Section 125(3) of the Code of Criminal Procedure, not being an offence for conviction under which a person would not be entitled for furlough, would not have escaped the attention of the said official.

14. It further requires to be noted that as far as the applicant is concerned, the applicant is convicted of two different offences and under Section 125 of Cr.P.C and convicted for imprisonment for 480 days each. It would also appear that the present applicant as of now has completed

around one year and seven months in incarceration. It would also appear that a close relative of the applicant has agreed to stand a surety for the applicant and whereas the said relative had inter alia stated that the applicant would want to be released on furlough leave more particularly to try and arrange some amount which could be given to his wife, for fulfillment of the maintenance amount due. It would also appear that the jail conduct of the applicant is stated to be good.

15. Under the circumstances and for the reasons stated hereinabove, in the considered opinion of this Court, the impugned order dated 07.01.2023 suffering from the vice of non application of mind and also suffering from the vice of being passed by an authority, who was not the competent authority as per the rule in question is required to be quashed and set aside.

16. At this stage having observed hereinabove on facts, this Court deems it appropriate to observe as follows on the legality of the order in question in view of the process which had been followed by the authorities.

16.1 Rule (2) of the Rules inter alia states about the Sanctioning Authority for grant of furlough as per the Rules. The same being beneficial for the present purpose is quoted hereinbelow for benefit:

> 2. Sanctioning Authority:
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> The Inspector General of Prisons or the Deputy Inspector General of Prisons (Head quarters), when the former is out of headquarters (hereinafter referred to as the Sanctioning Authority) shall subject to these rules be competent to grant furlough to convicted prisoner as hereinafter mentioned.

16.2 A perusal of the above rule would make it clear that the rules envisages exercise of powers with regard to grant of furlough by the Sanctioning Authority and no-one else. The rule primarily enjoins that the Inspector General of Police is competent authority to grant furlough to convict the prisoners and when I.G. Prions is out of head quarter then Deputy I.G. Prison (headquarters) shall be competent to grant furlough to convicted prisoners. The use of the term "*shall subject to these rules be competent"* clearly envisages that the statute does not contemplate anybody else other than the two authorities exercising the power in question and whereas exercise of such powers by any other authority is necessarily ruled out.

17. At this stage this Court seeks to refer to observations of the Hon'ble Apex Court in case of **A.K. Roy vs. State of Punjab** reported in **1986 (4) SCC 326.** The observations of the Hon'ble Apex Court "*where a power is given to do certain thing in a certain way, the thing must be done in that way or not at all. Other modes of performance are necessarily forbidden*." Though the statute in the instant case does not use any negative language as used by the statue in the case before the Hon'ble Apex Court yet in the considered opinion of this Court, the words as noted hereinabove, *"shall subject to the rules be competent"* clearly envisage that the power is exercisable only by the I.G. Prison and Deputy Inspector General of Prison and noone else.

17.1 In the instant case while it could be contended that the power had in fact beeng exercised by I.G. Prison himself, in the considered opinion of this Court, the manner and method in which the exercise is contemplated as described hereinabove clearly reflect that the Inspector General has only

decided whether furlough leave is to be granted or not more particularly on basis of file notings and whereas the actual application of mind including giving of reasons and communicating the decisions has been taken by the Administrative Officer in the office of the I.G. Prisons. In the considered opinion of this Court such an exercise of power is not what is envisaged under the Rules.

17.2 At this stage, this Court also seeks to refer to observations of the Hon'ble Apex Court in case of **J.Ashoka vs University of Agricultural Sciences and others** reported in **(2017) 2 SCC 609**. Paragraph No. 24 of the said judgement being relevant for the present purpose is reproduced hereinbelow for benefit:

> *"24. Reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject matter for a decision whether it is purely administrative or quasi judicial. They should reveal a rational nexus between the facts considered and the conclusions reached. Only in this way can opinions or decisions recorded be shown to be manifestly just and reasonable."*

17.3 The law laid down by the Hon'ble Apex Court as above would clearly reveal as to how the exercise contemplated under Rule (2) has not been complied with. When the power of granting furlough is fixed by the statute with the I.G. Prisons or D.I.G. Prisons as the case may be then it was also incumbent upon the said authorities to have applied their mind independently and given reasons in support of the final conclusion. Only upon reasons, as noted by the Hon'ble Apex Court as above which are links between materials on which the conclusion are based and the actual conclusion itself are provided, would the fact of the application of mind by the authority concerned be complete.

17.4 In the instant case while the requirement of taking a decision vested with the authority named hereinabove, it appears that by taking the decision in a truncated manner as noted hereinabove, and the onus of providing reasons being placed on the Administrative Officer, it would clearly appear that the mandate of the rule is being followed it its breach.

18. Furthermore having regard to the fact that grant of furlough envisages an important right which is available to a prisoner i.e. to be released on leave for a particular period upon completing the a particular number of years in prison and also considering the fact that period of furlough leave as per Rule 16 is to be counted as a remission of the sentence, therefore, in the considered opinion of this Court, the process of grant or refusal of furlough has to be done strictly in conformity with the mandate of the Rules and whereas the authorities as envisaged in the Rules are required to take an independent decision and whereas the reasons for such decision whether grant or refusal thereof should be provided by the authorities taking the decision themselves.

19. In view of the above, it is directed that the Inspector General of Police, as the sanctioning authority under Rule (2) of the Prisons (Bombay Furlough and Parole) Rules, 1959, is expected to take decision himself and communicate the said decision under his sign and seal. It is also expected that the reasons for rejection, should weigh with the said authority and the said reasons should not weigh with an administrative officer of the office of the authority concerned.

20. Under such circumstances it is directed that henceforth insofar as the

aspect of grant/rejection of furlough as per the provisions of the Prison (Bombay Furlough and Parole) Rules, 1959, are concerned, the Inspector General of Police or the Deputy Inspector General of Prison as the case may be, shall take a decision themselves and whereas the said decision, should clearly reflect the application of mind by the authority concerned taking the decision. It is directed that henceforth the procedure of the Inspector General of Police taking a decision on the file, and reasons for rejection being communicated by the Administrative Officer of the office of the Inspector General of Police shall be forthwith discontinued.

21. It is further clarified that at the request of learned APP that such procedure as prescribed hereinabove i.e. the decision to be taken by the Inspector General of Police (Prisons) or the Deputy Inspector General of Police (Prisons), shall be taken in case, the authorities would be rejecting an application for grant of furlough leave by the applicant and whereas in case the furlough leave application being granted, then the same could be communicated under the signature of the Administrative Officer.

22. Furthermore insofar as the present case is concerned, the appropriate Sanctioning Authority, shall take a decision afresh as regards grant of furlough leave to the present applicant and whereas such decision shall be taken by the authority concerned, within a period of 15 days from date of receipt of this order, strictly in accordance with law and not being influenced by the fact that the present application being preferred or present order being passed.

23. Needless to clarify that in case the order passed by the authority is in the nature of rejecting the application then it would be open for the

applicant to challenge the same before the appropriate forum in accordance with law.

24. With these observations and directions application stands disposed of as allowed. Rule is made absolute to the above extent.

A a copy of this order shall be sent to the Home Department, State of Gujarat as well as Director General of Police (Prisons) for appropriate compliance.

(NIKHIL S. KARIEL,J)

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