

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL WRIT PETITION NO. 1518 OF 2021
WITH
CRIMINAL INTERIM APPLICATION NO. 2442 OF 2021
WITH
CRIMINAL INTERIM APPLICATION NO. 2443 OF 2021
WITH
CRIMINAL INTERIM APPLICATION NO. 2444 OF 2021
IN
CRIMINAL WRIT PETITION NO. 1518 OF 2021**

Mohd. Raees S/o Shahzade Ansari ... Petitioner/Applicant
Versus
The State of Maharashtra and ors. ... Respondents.

**WITH
CRIMINAL WRIT PETITION NO. 3011 OF 2021**

Sandeep S/o Suresh Gaikwad
(Brother of Petitioner Sachin ... Petitioner.
S/o Suresh Gaikwad)
Versus
The State of Maharashtra and Anr. ... Respondents.

...
Mr. Rupesh Jaiswal for the Petitioners in both Petitions.
Mr. N. N. Gawankar, Advocate, Present.
Smt. A. S. Pai, PP a/w Mr. Arfan Sait, APP for the Respondent/State.
...

**CORAM : S. S. SHINDE,
PRAKASH D. NAIK &
N. J. JAMADAR, JJ.**

**RESERVED ON : APRIL 13, 2022.
PRONOUNCED ON : MAY 06, 2022.**

ORDER (PER PRAKASH D. NAIK, J.) :

The Petitioner in Criminal Writ Petition No.1518 of 2021 (Initially registered as Criminal Writ Petition No.1512 of 2020) had preferred the petition before the Aurangabad Bench of this Court with the prayer that the petitioner be released on furlough leave by setting aside orders dated 5th October, 2020, and 11th September, 2019, passed by respondent no.1, refusing furlough leave.

2 The factual matrix of the petition indicate as follows:

- (i) The petitioner was arrested on 7th April, 2014 and convicted for the offences punishable under Section 307 read with 34 of Indian Penal Code ("IPC", for short) Section 387 read with 34 of IPC, 506(II) read with 34 of IPC and Section 326 of IPC. The petitioner is further convicted for the offence under Section 3(1)(ii) of MCOC Act. He has been sentenced to suffer imprisonment and fine on each count.
- (ii) The petitioner preferred an application before respondent no.3 for releasing him on furlough leave. The application was rejected by respondent no.2 vide dated 11th September, 2019 on the ground that there is possibility of threat to life of witnesses. The said order was challenged before the respondent no.1 by

preferring Appeal. The Appeal was rejected by order dated 5th October, 2020, on the ground of negative police report and possibility of absconding.

- (iii) The petition was listed before the Division Bench of this Court at Aurangabad bench. Vide order dated 18th January, 2021, the Division Bench was pleased to refer the matter to the larger Bench on the following issue:

“ Whether the circumstance that the prisoner is behind bars for offence punishable under provisions of MCOC Act can be considered against him, in view of the furlough rules and whether that can be treated as exception, like other specific offences mentioned in Rule 4.”

- (iv) The petition was then transferred to the principal seat for constitution of a larger bench to decide the Reference. The papers were placed before the Hon'ble the Chief Justice to constitute a larger bench to decide issue under reference. Vide administrative order dated 25th January, 2021, the Hon'ble the Chief Justice was pleased to constitute the larger Bench. Subsequently, one of the member of the bench was not available at the principal seat, the larger Bench was reconstituted upon the directions of the Hon'ble the Chief Justice dated 29th July,

2021. In view of that, the petition is placed before us to decide the issue under reference.

- (v) It is necessary to note that the petitioner had preferred an application before this Court viz. Interim Application No.337 of 2021 in Criminal Appeal No.432 of 2016, for temporary bail on medical ground. The said application was allowed by this Court by order dated 29th March, 2022, and, the petitioner has been directed to be released on temporary bail for a period of six months from the date of his release.

3 We have perused the order dated 18th January, 2021, by which the Division Bench has referred the issue to the larger Bench.

The reference order reads as follows:

“1 *Present proceeding is filed for relief of furlough leave and the order made by the respondents-authority dated 08/08/2019 by which furlough leave application is rejected, is also under challenge.*

2 *Heard both the sides for sometime.*

3 *The furlough application is rejected by respondents on following grounds:*

(i) *There is adverse police report against the petitioner;*

(ii) *The prisoner is likely to abscond, after getting released on furlough; and*

(iii) *Furlough is not vested right of the prisoner.*

- 4 *The other portion of the order shows that the petitioner is convicted for the offences punishable under Section 307, 506(II), 397 and 387 r/w 34 of the IPC and Section 3(1) (ii) of MCOC Act. The sentence of 10 years rigorous imprisonment and fine of rupees five lakh for the offence punishable under section MCOC Act is imposed. There is sentence for the offence punishable under Sections 307, 387 and 506(II) read with 34 of IPC also.*
- 5 *Learned counsel for the petitioner submitted that neither the special enactment of MCOC Act nor Section 387 of IPC are mentioned in Rule 4 of Prison (Bombay Furlough and Parole) Rules, 1959 and so the grounds given by the Prison Authority for rejection of furlough application are not convincing. Learned APP submitted that there is decision given by this Court, in respect of emergency parole under the Government Notification dated 08/05/2020, in which this Court has held that a person, who is convicted under the MCOC Act cannot be given the benefit of emergency parole under Notification dated 08/05/2020. Learned APP submitted that the conditions for emergency parole are also there in Notification which are also similar to the condition for grant of furlough leave. He submitted that the condition, that the prisoner ought to have availed furlough or parole in the past and at least on two occasions, he must have returned to jail in time on his own shows that the prisoner ought to have completed at least the minimum period of imprisonment for getting furlough and the same condition would be applicable for getting benefit of Govt. Notification dated 08/05/2020. He submitted that not only this*

circumstance but there are other circumstances, like the offence is mentioned in Rule 4(4), the circumstances mentioned in Rule 4(2), 4(4) 4(5), 4(6), 4(11) and 4(12). The provisions of some of aforesaid Rules are exceptions and they show that when a crime of particular nature mentioned in Rule 4(2) is committed, furlough leave is not to be granted. Similarly, when a person appears to be dangerous to society, furlough leave cannot be granted and due to the circumstance that, he is likely to jump furlough, furlough cannot be granted. The wording used in the Rules which involve the consideration of the opinion of police and jail authority shows that subjective satisfaction of the authority is involved in the matter in respect of those circumstances and for that the opinion of the police and jail authority is relevant. Learned APP submitted that in view of Rule 19, the grounds given in Rule 4 can be read at the time of giving benefit of Notification dated 08/05/2020.

- 6 *The provisions of aforesaid rules do show that the offence punishable under the provisions of MCOC Act is not specifically covered by Rule 4 as exception category. Learned counsel Shri. Jaiswal submitted that Nagpur Bench of this Court in Cri.Writ Petition No. 234 of 2019 (Ajit Chandrakant Rane V/s. Dy. Inspector General of Prison, Nagpur) has laid down that there is no restriction in granting furlough, when the petitioner/prisoner is suffering sentence due to conviction for the offence punishable under MCOC Act. He submitted that the said case was used by this court in Writ Petition no. 1673 of 2019 and by the order dated 11 th of March, 2020, this Court had granted furlough*

in favour of Sk.Mohammad, the petitioner of that proceeding. Though, such order was made by this Court in Writ Petition No. 1955 of 2020, this Court has stayed that order in the proceeding filed by the State for recalling the order in Writ Petition No. 1673 of 2019.

7 *The purpose behind putting aforesaid restrictions is to see that a person, who is unfit to come to the society due to reasons like, his previous activity and he may prove to be danger to society is not released on furlough leave. In Rule 4(2), it is made clear that a person convicted for offences punishable under Sections 392 to 402 of the IPC should not be granted furlough leave. It becomes clear that the authority is expected to consider the circumstance that the person was committing offences only to make money and for that he was using force or threats. If the purpose behind Section 3 of MCOC Act is considered, it can be said that the purpose is similar and the special provision is made to see that such persons are kept behind bars bail is not ordinarily granted and they are tried for their activity, like forming syndicate for commission of the offence for monetary gains. Further, the powers given to the authority under other rules, like Rules 4(4) and 4(5), also show that overall situation and the circumstances in which the crime was committed needs to be considered and authority is required to form opinion as to whether the prisoner will be threat to public peace and tranquility. A person who is kept behind bars for commission of offence punishable under MCOC Act can be presumed as a person from whom there is a threat to public at large as he had committed the offence only for*

making monetary gain. Due to the latitude given to the authority for consideration of the report of police and report of jail superintendent, it can be said that it is always open to the authority to reject the application filed for furlough by a person, who is suffering sentence for offence under MCOC Act.

- 8 *The learned APP pointed out to this Court that in matters involving in MCOC Act, ordinarily, heavy fine is imposed. In the present matter, he submitted that fine of rupees five lakh has been imposed and this circumstance is sufficient to create a probability that the prisoner may jump furlough. This point also can be considered by jail authority and also by the police and that may affect the opinion which is required to be formed by the authority.*
- 9 *In the present matter, in the reasoning for rejection of application for furlough leave, though, the other circumstances are not mentioned, there is a mention of adverse police report. We need to go with the presumption that police must have considered aforesaid circumstances and that is why adverse report is given. There is no need to make more discussion about the right of the prisoner to get furlough. The prisoner has no vested right under Rule 17 to get furlough. In view of this circumstance, this Court holds that the following point needs to be considered by larger Bench :*
- (1) *“Whether the circumstance that the prisoner is behind bars for offence punishable under provisions of MCOC Act can be*

considered against him, in view of the furlough rules and whether that can be treated as exception, like other specific offences mentioned in Rule 4.”

10 *The Registry is to see that the present matter is kept before the Hon’ble the Chief Justice for referring the aforesaid point to larger Bench as there is contrary decision given by Nagpur Bench in the case cited (supra) and Principal Seat in Cri. Writ Petition No.1999 of 2019 (Ranvirsingh V/s. State of Maharashtra and others) decided on 04/06/2019.*

11 *Remove from board, till the decision of the larger Bench.”*

4 Rule 4 of the provisions of The Prisons (Bombay Furlough and Parole) Rules, 1959, reads as follows:

“4. Eligibility for Furlough:-

All Indian prisoners except from following categories whose annual conduct reports are good shall be eligible for furlough:-

- (1) Habitual prisoners;*
- (2) Prisoners convicted for offences under sections 392 to 402 (both inclusive) of the Indian Penal Code (Prisoners may be eligible for furlough after completion of stipulated sentence in the respective Section);*

- (3) *Prisoners convicted of offences under the Bombay Prohibition Act, 1949 (Prisoners may be eligible for furlough after completion of stipulated sentence in the respective section);*
- (4) *Prisoners release is not recommended in Police Commissionerate area by the Assistant Commissioner of Police and elsewhere, by the Deputy Superintendent of Police on the grounds of public peace and tranquility;*
- (5) *Prisoners who, in the opinion of the Superintendent of prison show tendency towards crime;*
- (6) *Prisoners whose work and conduct are, in the opinion of the Superintendent of the Prison, not satisfactory enough;*
- (7) *Prisoners confined in the Ratnagiri Special Prison (other than prisoners transferred to that prison for Prison services);*
- (8) *Prisoners convicted of offences of violence against person or property committed for political motives, unless the prior consent of the State Government to such release is obtained (Prisoners may be eligible for furlough after completion of stipulated sentence in the respective section);*
- (9) *A prisoner or class of prisoners in whose case the State Government has directed that the prisoners shall not be released or that the case should be referred to it for orders;*
- (10) *Prisoners who have at any time escaped or attempted to escape from lawful custody or have defaulted in any way in surrendering themselves at the appropriate*

time after release on parole or furlough;

- (11) Prisoners whose presence is considered dangerous or otherwise prejudicial to public peace and order by the District Magistrate and Superintendent of Police;*
- (12) Prisoners who are considered dangerous or have been involved in serious prison violence like assault, outbreak, riot, mutiny or escape, or who have been found to be instigating the serious violation of prison discipline, smuggling of narcotic and psychotropic substances including convicted under Narcotic Drugs and Psychotropic Substances Act, 1985(61 of 1985), rape or rape with murder, attempt to rape with murder and foreigner prisoners (Prisoners may be eligible for furlough after completion of stipulated sentence in the respective section);*
- (13) Who is sentenced for offences such as terrorist crimes, mutiny against state, kidnapping for ransom (Prisoners may be eligible for furlough after completion of stipulated sentence in the respective section);*
- (14) Who is sentenced with death;*
- (15) Prisoners convicted for failure to give surety for maintaining peace or good behaviour;*
- (16) Prisoners suffering from mental illness, if not certified by the Medical Officer to have recovered;*
- (17) Prisoners convicted of offence against any law relating to matters to which the executive power of the Union Government extends, unless approved by the Union Government;*

- (18) *Prisoners whose released on leave is likely to have repercussions elsewhere in the country;*
- (19) *Prisoners whose release on leave is likely to have repercussions during the period of code of conduct of Local bodies, Legislature and Parliament elections;*
- (20) *Who in the opinion of police/prison authorities are likely to jump furlough;*
- (21) *Those involved in sexual offences against minor and human trafficking.”*

5 The Prisons (Bombay Furlough and Parole) Rules, 1959, are framed by State Government by virtue of powers conferred under Section 59(5) of Prisoners Act, 1894. The main object of the same are:

- (ii) To enable the applicant to maintain and continue with his family life and deal with the family matters;
- (ii) To save inmate from the evil effect from continue prison life;
- (iii) To enable the inmate to do activities in the light of Rule 4 quoted hereinabove. The prisoners convicted of offences under Section 392 to 402 of IPC, may not be eligible for furlough (Prisoners may be eligible for furlough after completion of stipulated sentence in the respective section). Rule 4(2) does not include the offence of MCOC Act.

6 The reference made by the Division Bench (Supra) raises a question whether the circumstance that the prisoner is behind bars for the offence punishable under provisions of MCOC Act can be considered against him, in view of the furlough rules and whether that can be treated as exception like other specific offences mentioned in Rule 4.

7 Learned advocate for the petitioner submitted that there was no occasion for referring the issue to the larger Bench as there are no conflicting decisions in the field. The decision in the case of Randhir Singh (Supra) was decided on facts of that case. The Reference could be made when there is an inconsistent view expressed by the decision of the Court on the point of law and not otherwise. Learned counsel relied upon the decision of the Full Bench of this Court in the case of ***Vinayak Hari Kulkarni Vs. State of Maharashtra and Ors.***¹

8 Learned P.P. Mrs.A.S. Pai submitted that there is no conflicting decisions in the field. The two decisions of this Court referred to in the Reference order were decided on the facts of the respective cases. The Court had no occasion in any of the decisions to

1 2010(4)ALL MR 355

interpret Rule 4 of The Prisons (Bombay Furlough and Parole) Rules, 1959, and, to hold that the convicts under the MCOC Act are not entitled for furlough. The petition in fact has become infructuous since the petitioner has been granted temporary bail on medical ground by learned Single Judge of this Court.

9 Learned advocate Mr.N.N. Gawankar, who was present in the Court submitted that there was no occasion to refer the issue to the larger Bench in absence of any conflicting decision. Rule 4 is very clear.

10 Undisputedly, there is no decision in the field which holds that Rule 4 of The Prisons (Bombay Furlough and Parole) Rules, 1959, excludes the prisoners who have been convicted under the provisions of MCOC Act for being eligible for furlough or in other words, the circumstance that the prisoner is behind bar for offence punishable under provisions of MCOC Act can be considered against him or that, the said circumstances can be treated as exception, like offences mentioned in Rule 4. It is pertinent to note that Rule 4 excludes prisoners convicted under Section 392 to 402 IPC and other categories stipulated therein. Rule 19 refers to the provisions of emergency parole and refers to the criteria for releasing the prisoner

on emergency parole. Recently, the Government of Maharashtra has issued a Notification dated 8th May, 2020, to amend the The Prisons (Bombay Furlough and Parole) Rules, 1959. The said Notification indicate that the directions shall not be applicable for convicted prisoners for certain offences.

11 It is pertinent to note that the Nagpur Bench of this Court in the case of Ajit Rane Vs. Deputy Inspector General of Prison and Ors.(Criminal Writ Petition No.234 of 2019) allowed the petition *vide* order dated 2nd May, 2019, and, granted furlough to the petitioner, who was convicted for the offence under provisions of MCOC Act. We have perused the said order. We find that the petition was allowed on the facts of the case. The Court noted that the petitioner therein was released on furlough earlier and his antecedents nowhere suggest that there is possibility of abscondence, in case of his release. The Court did not consider the interpretation of Rule 4 or whether the convicts under the provisions of MCOC Act are not entitled for furlough. The other decision referred to by the Division Bench in reference order was delivered in the case of Randhir Singh Vs. State of Maharashtra (Criminal Writ Petition No.1999 of 2019). The convict (Petitioner) therein was released on furlough. The Court observed that the apprehensions of not returning back or the possibility of indulging in

similar crime, is not based upon any factual matrix. The authorities can accept necessary undertaking/bond from the prisoner for releasing him on parole or furlough on suitable terms. Even in this decision, the Court was not called upon to adjudicate the issue whether the convict under the MCOC are entitled for furlough leave in accordance with Rule 4. Thus, both the aforesaid decisions could not be said to be in conflict with the view expressed by the Division Bench in order dated 18th January, 2021.

12 It is well settled that a co-ordinate Bench of the High Court cannot take a different view from that taken by earlier Bench and if the latter Bench wanted to take a different view, than, that taken by earlier Bench, the proper course would be to refer the matter to a larger Bench (*State of Tripura Vs. Tripura Bar Association and Ors*²).

13 In the case of Vinayak Hari Kulkarni Vs. State of Maharashtra and Ors (Supra), the Full Bench had observed that it is well settled that a Co-ordinate Bench of the High Court cannot take a different view from that taken by the earlier Bench and if the latter Bench wanted to take a different view, than that taken by the earlier Bench, the proper course for the latter Bench would be to refer the

2 (1998) 5 SCC 637

matter to a larger Bench. We find that the two orders of the Co-ordinate Bench referred to in the reference order had not dealt with the opinion expressed by the Reference Bench. Thus, there is no conflicting decision of the Co-ordinate Bench. In fact, it was open to the Division Bench to take a view by interpreting Rule 4 of The Prisons (Bombay Furlough and Parole) Rules, 1959.

14 The Full Bench in the aforesaid decision further observed that it is also equally well settled that when there is a difference of opinion on the interpretations, scope, ambit or meaning of any order, Rule or statutory provision between two Division Benches, the proper course would be to make a Reference to a larger Bench to settle the controversy.

15 In the case at hand, the Division Bench has expressed that the matter be kept before the Hon'ble Chief Justice for referring it to the larger Bench as there is contrary decision given by Nagpur Bench in the case of Randhir Singh Vs. State (Supra). The Bench did not express that the matter can be advantageously heard by larger Bench. With great respect to the Division Bench, we did not find any conflict of law in the decision referred by Division Bench, which was adjudicated purely on the facts and not on interpretation indicated by

Division Bench in reference order.

16 The Division Bench is normally required to refer the matter to the Full Bench when there is inconsistent view expressed by the decision of the Court on the point of law and not otherwise.

17 In the case of ***Shikshan Prasark Mandal and Ors. Vs. Laxmikant Balkrishana Joshi and Ors.***³, the Full Bench, in paragraph 21, had observed as follows:

“21. The power under Rule 7 is distinct and separate than one under Article 226 of the Constitution and can generally be invoked for the limited purpose to resolve the inconsistency on the point of law. The Division Bench, therefore, refers the matter to the Larger Bench only for the limited purpose to have a final legal opinion to end the inconsistency and, therefore, by necessary implication the subject matter on which the Full Bench is required to adjudicate and decide being distinct and separate, cannot be equated with the subject matter in the writ petition, which the Division Bench has to adjudicate and decide under the original jurisdiction under Article 226 of the Constitution by applying the law laid down by the Full Bench to the facts and circumstances involved in the said writ petition. Therefore, on the backdrop of these aspects, by necessary implication, the jurisdiction which the Full

3 2004(1)ALL MR 719(FB)

Bench exercise is advisory and consultative, which is separate and distinct than the one under Article 226 of the Constitution."

18 In the circumstances, we are of the opinion that there is no conflict in the decisions on the issue referred by the Division Bench of this Court, and, hence, the Reference is returned back to the Division Bench of the Court for deciding the petition in accordance with law.

19 Hence, we pass the following order:

:: ORDER ::

- (i) Reference made by the Division Bench of this Court vide order dated 18th January, 2021, in Criminal Writ Petition No.1512 of 2020, is returned, for deciding the petition in accordance with law;
- (ii) The proceedings in Criminal Writ Petition No.1518 of 2021, be sent back to the respective Court at Aurangabad Bench;
- (iii) Criminal Writ Petition No.3011 of 2021, tagged along with this Petition be separated, and, placed before the appropriate Bench;

(iv) Reference stands disposed of.

(S.S. SHINDE, J.)

(PRAKASH D. NAIK, J.)

(N.J. JAMADAR, J.)