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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 2073 OF 2020
IN
CRIMINAL WRIT PETITION NO.1362 OF 2020

The State of Maharashtra APPLICANT
Through, Superintendent,
Nashik Central Prison,
Nashik

VERSUS

Guddu @ Kansha Wahab Shaikh RESPONDENT
Age – 21 years, Occ – Labour
R/o Near Datta Temple,
Tambapura, Jalgaon
Taluka and District – Jalgaon
(C. No. 12403)

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Mr. Sachin S. Salgar, APP for applicant – State

Mr. Satej S. Jadhav a/w Mr. I. S. Godsay, Advocates for respondent

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[CORAM : DIPANKAR DATTA, C.J.
S. V. GANGAPURWALA, J. AND
SUNIL P. DESHMUKH, J.

RESERVED ON : 22nd JANUARY, 2021

PRONOUNCED ON : 25th JANUARY, 2021

JUDGMENT (PER SUNIL P. DESHMUKH, J.):

1. Events in the background which have led a division bench to frame the question for reference, would be pertinent to be referred to, succinctly.

2. The division bench, in its narration, has referred to that one Guddu *alias* Kansha Wahab Shaikh, respondent herein, had moved criminal writ petition No. 1362 of 2020 (upon conversion of criminal application in criminal appeal) in Bombay High Court, Aurangabad Bench aggrieved by an order rejecting his application for emergency parole passed by Superintendent of Central Prison, Nashik, on 28th September, 2020. Parole leave to said Guddu had been refused by the Superintendent, him having not availed parole or furlough leave on two occasions and that he had not completed three years in jail prior to his application for emergency parole under Rule 19 (1) (C) of the Prisons (Bombay Furlough and Parole) Rules, 1959 (the Parole Rules), introduced into Rule 19 under the Amendment Rules of 2020, in the wake of COVID-19 pandemic, finding that in the circumstances, he would not be eligible for release on emergency parole leave.

3. The criminal writ petition had been allowed, granting emergency parole leave to Guddu, pursuant to Rule 19 (1) (C) of the Parole Rules.

Subsequently, criminal application No. 2073 of 2020 had been moved by the State contending that Aurangabad Bench of high court would not have jurisdiction to entertain the criminal

writ petition, the order of rejection of emergency parole being passed at Nashik by the Central Jail Superintendent, having regard to orders passed by co-ordinate benches on 8th August, 2019 in criminal writ petition No. 1091 of 2019 and 22nd January, 2020 in criminal writ petitions No. 18 and 19 of 2020 *viz; "Baldev Baliram Lonari V/s State of Maharashtra"* and *"Samadhan Pandit Choudhary and Umesh Ishwar Patil V/s the State of Maharashtra and Others"*, respectively. It had been contended, in the orders passed in the matters of *"Baldev"* and *"Samadhan"* (*supra*), it had been considered by two division benches that when order impugned is passed by an authority of prison in a particular district not covered by jurisdiction of Aurangabad Bench of high court, aggrieved convict would not be able to file proceedings in Aurangabad Bench.

It appears that said Guddu had instructed to state that he would file a fresh application for emergency parole under Rule 19 (1) (C) of the Parole Rules, as soon as he completes three years in jail, while he had completed about two years and eight months.

The division bench, having regard to aforesaid, had thought it proper in the circumstances to recall order dated 26th October, 2020 in criminal writ petition No. 1362 of 2020 to the

extent of emergency parole and had observed that order allowing the criminal writ petition would be rendered infructuous.

It appears that learned advocate for the prisoner/convict had submitted before the division bench that convicts aggrieved by rejection of their application either for furlough/parole/ emergency parole leave should have no territorial limits/restrictions while it is within the powers of prison authorities/their discretion/administration to locate and re-locate the convicts to any jail in Maharashtra and had in justification referred to some instances. The division bench thought those to be logical, while furlough/parole been a kind of concession.

The division bench has further considered, with respect to the view emerging under orders dated 8th August, 2019 and 22nd January, 2020 in the cases of *"Baldev"* and *"Samadhan"* (*supra*), in the peculiar facts and circumstances of the cases under COVID-19 pandemic as under:

> " *though there could not be a choice for a convict to choose a Forum, cases in which the convicts were convicted by the Courts amenable to the jurisdiction of a particular Bench, should be granted the liberty to approach the same Bench or to the Bench at which place the order of rejection of furlough/parole leave has been passed, for challenging the order.* "

4. Aforesaid had been followed by illustration, if "A" is convicted by a competent court at Nandurbar and said convict is undergoing sentence at Kolhapur Central Jail and if his application for emergency parole leave is rejected by the jail Superintendent, he should have liberty to approach the high court either at the Principal seat at Mumbai or Aurangabad Bench of high court, as Nandurbar district falls within the area of jurisdiction of Aurangabad Bench of the high court, feeling that said prisoner should not be compelled to suffer rigours of litigation on the point of jurisdiction in the backdrop of an extraordinary situation of COVID-19. The division bench has observed that it had not been able to align itself with the view taken by the division bench under order dated 22nd January, 2020 in *"Samadhan's"* case (*supra*) and, as such, following question has been framed which is referred to full bench -

> " *Whether, a convict/prisoner can challenge the rejection of his parole application, only before the Forum of this Court having jurisdiction over the district in which the rejection order was passed and is precluded from approaching the bench having jurisdiction over the district in which the Trial Court convicting him/her is situated?* "

5. Matter accordingly is placed before us.

Before proceeding to deal with the question, it would be appropriate to take into account orders passed by two division

benches one in criminal writ petition No. 1091 of 2019 and the other in criminal writ petitions No. 18 and 19 of 2020.

The division bench in criminal writ petition No. 1091 of 2019 in *Baldev's case* (*supra*), which pertains to grant of furlough leave while the petitioner had been lodged in Nashik Central Prison, had considered that local jurisdiction of Aurangabad Bench of high court is prescribed and said jurisdiction could cover only the districts which are notified in this respect, whereas, the Parole Rules show that matter is to be processed by jail authority, which is to take decision after receipt of reports as contemplated under the Rules, since the prisoner is lodged in a particular jail, the matter arises from said jail. There is no vested right to prisoner to get furlough leave. The court is expected to go with the presumption that matter arises from local area of a particular jail. Since Nashik jail or Nashik district is not covered under the local jurisdiction of Aurangabad Bench, it purported to hold that Aurangabad Bench has no jurisdiction over the matter and had rejected application for modification of order passed by jail authority at Nashik dated 5th February, 2019.

Cases of "*Samadhan and Umesh*" in Criminal writ petitions No. 18 and 19 of 2020, (*supra*) are also in respect of rejection of furlough leave by prison authorities at Nashik, convicts being put

up in Nashik jail. The division bench in said matters had adverted to that prior to the decisions in *"Baldev"* and *"Samadhan"* (*supra*), it appears that this bench had dealt with matters arising out of orders passed by jail authorities at Nashik and had granted reliefs to some convicts/prisoners, probably in the circumstances that they were convicted and sentenced by the courts over which this bench has jurisdiction and/or the Inspector General (Prisons), Aurangabad being the authority having jurisdiction over Nashik Prison had also weighed. Albeit, it had been considered that point of jurisdiction was not considered in said proceedings.

The division bench in paragraph No.6 of the judgment has observed, thus,

> *" 6. The decision of the criminal case or the orders made during the pendency of criminal case by the courts over which this Court has territorial jurisdiction can be definitely considered by this Court in various proceedings. However, after decision of the matter, as provided in Criminal Procedure Code, it is up to the State to take decision as to where, in which prison the convict needs to be kept and that is the administrative matter of the State and ordinarily this Court does not interfere in the matters in which the State takes the decision for administrative reasons. When a prisoner is kept at Nashik Prison, form there he makes applications for furlough or parole and these applications are considered by the authority like Inspector General (Prison) as per the scheme given under Furlough and Parole rules of this State. For consideration of the application,*

police report is also called and the police of the concerned district where the prisoner would live or where the prisoner was ordinarily residing before his imprisonment, make enquiry with the witnesses. These circumstances also cannot have any relation to the cause of action. Even if, the same authority like D.I.G. has jurisdiction over the Prison from Nashimk and Prison from Aurangabad, his jurisdiction for the purpose like the present one over Nashik prison needs to be considered separately for the present purpose. Only because, the officers is designated as Inspector General (Prison), Aurangabad, all orders made by him in respect of the prisoners kept outside of the local jurisdictions of this Court cannot be challenged in this Court. If that approach is used by the Court, many matters like the challenges against the detention orders or orders made on furlough application, which have arisen from Aurangabad would go to principal seat so, as per the aforesaid Rules, when application is made by the prisoner from Nashik jail which is not within the territorial jurisdiction of this Court and due to procedure the application is considered by the officer who has office in Aurangabad, that order cannot be challenged, in this Court. This Court holds that the orders made by the Inspector General (Prison) in respect of the prisoners kept in the prison which are not within territorial jurisdiction of this Court, cannot be challenged in this Court, at Aurangabad Bench. By giving exhaustive reasons in aforesaid matter of Baldev this Court has already given such decision on the jurisdiction of this Court. So this Court holds that it is not possible to consider and decide these two proceedings, in the result, both the proceedings are dismissed. The fees of the appointed counsel in both the matters is quantified as Rs.5000/- (Rs. Five Thousand) which is total fees in both the matters and it is to be paid through High Court Legal Services Sub Committee, Aurangabad. ”

6. Mr. Satej Jadhav, learned advocate has offerred valuable

assistance to the court in dealing with the question under reference, with flair submitting that furlough or parole are creation of rights under the rules and if rights are to be meaningful, the construction on rules may so be placed, as would carry forward the underlying purpose. Rights accrued to the prisoners under the Rules, if are to be practically fruitful, inconvenience to the extent of making their realization impossible should in all cases be avoided lest it would do harm to the purpose for which access is being afforded. He submits that it is not in control of prisoners as to prison they are to be lodged in and it is surely administrative convenience/discretion of the authorities. However, in such a case, if they are aggrieved by an order passed by an authority at a particular place, prisoners should not be shut out to have resort to remedy which would ordinarily be available to them at place they come from or where their conviction has taken place. He submits that necessarily, one is a prisoner because of the conviction and it cannot be said that on his imprisonment though he bears appellation as a prisoner, it would sever ties with the conviction. Ostensibly, conviction may not have any relation to the reasons for parole, yet, it may have to be taken into account that very purpose of rules would be frustrated if matter of said limited liberty made available is pedantically approached. He submits, in many cases

it would be virtually impossible for the prisoners even if are aggrieved by order passed by jail authority, to approach a proper Bench, *viz:* at principal seat / at Nagpur / at Aurangabad or at Panaji, Goa, if the order is passed at a far distance from the place, where his conviction has taken place or where he is supposed to be on parole or where he hails from. Their economic condition as well as that of their relatives would not let them afford/have recourse to resort against order passed rejecting application for parole. He particularly emphasizes that when prisoner has no control, a stickler's approach should better be eschewed.

7. On the other hand, Mr. Salgar, learned APP, refers a few decisions of the apex court and this court and refers to Criminal Manual and Maharashtra Classification of Parole Rules, 1970, particularly rules 2 and 3 thereunder. He as well refers to Article 226 (2) of the Constitution of India and submits that having regard to the same, recourse will have to be had to a place of high court within jurisdiction of which order has been passed since the cause of action is the order passed. If it falls within the jurisdiction of principal seat or a particular bench, proper and appropriate resort would be to the principal seat or the proper bench and not for the reason that prisoner hails from or for that

he wants to be at a particular place or his conviction been at place not in the place where cause of action has arisen. Emergency parole under rule 19 (1) (C) is indeed distinct from other parole and the reasons are also quite apart. He, therefore, submits that the question may be answered accordingly.

8. It may not be out of place to refer to that liberty of a person under the Constitution, upon his conviction, being under due process of law, is not ordinarily enjoyable to fullest extent. While conviction and imprisonment deprives a person of his liberty otherwise available, furlough and parole leave make available curative facility and generation of kindness, behavioral maturity and values a good life under controlled conditions may be possible. The facility of furlough / parole leave is an indication of humanistic approach towards the prisoners, letting / affording opportunity to solve their personal or family problems and to maintain link with the society.

9. Parole Rules create access to seek provisional limited liberty to a convict/prisoner. Furlough/parole leave has been made available to convicts/prisoners with various purposes underlying. The rules open vistas for action by a convict/prisoner. Such provisional liberty coming the way of a prisoner pursuant to the rules is accrued to him under the rules

and is governed and regulated by said rules. Such a liberty is circumscribed with the criteria and restricted according to provisions thereunder and is conditioned by the same. But for the rules, such a facility would not have been possible and permissible to a convict/prisoner.

10. The rules also provide for and empower competent authority to grant or refuse parole to convicted prisoner and in case of refusal of regular parole, an appeal has been provided to higher authority.

11. The provisions under Parole Rules may have to be looked into, having regard to language in which question under reference has been couched.

12. Rule 18 thereunder refers to competent authorities to grant parole and under clause (ii) refers to commissioner of division where the prisoner is lodged and in case of refusal by him, an appeal is provided to Director General Correctional Services, Maharashtra State, Mumbai, making his decision final.

13. Rule 19 of the Parole Rules refers to, when a prisoner may be released on parole. Sub rule 1 thereunder concerns emergency parole and sub rule 2, regular. Under clause 19 (1) (A) (B) and (C), a prisoner is eligible for emergency parole of 14

days for, death of near relative and marriage of near relative without possibility of any extension. Clause (B) authorizes, Superintendent of prison to grant emergency parole for death of a close relative and Deputy Inspector General for marriage of son/daughter/brother/ sister, with conditions as may be considered appropriate.

14. Rule 19 (2) with regard to regular parole, refers to that prisoner eligible for furlough would be eligible for parole for serious illness of near relatives, delivery of child or natural calamity with a rider that prisoner shall not be released on emergency or regular parole for a period of one year after expiry of his last emergency/regular parole, except in case of death of near relative, further regulating limits of parole days in case of regular parole as referred to under clauses A, B and C of sub rule 2 of Rule 19. Rules 21 to 28 prescribe procedure to be followed while considering application for parole.

15. We may have to examine the aspect as to whether there is any nexus between conviction by trial court in a district and grant or refusal of parole. In this respect, it would be seen that conviction of a person for an offence committed has different considerations, is an absolutely different context and dominion. Whereas, parole, as can be seen from the rules, would be

occasioned on the specific reasons as have been enumerated under the Parole Rules, *viz:* death or marriage of close relatives or pandemic, illness, delivery of child, natural calamity etc. and would be circumscribed by the eligibility criteria referred to thereunder. It appears that there is seldom any nexus between a conviction and a parole. Place of court convicting has no significance and does not appear to play any role in the matter of granting or refusal of parole.

16. It would, thus, emerge that parole is to be considered on different parameters, which hardly have anything to do with the conviction of a prisoner or place of court convicting him. There is no mutuality between place of court convicting and grant or refusal of parole. Conviction occurs in entirely different dominion and the dominion of operation of rules for parole is separate and apart and does not appear to be related in any way save that parole is available under the rules to a convict pursuant to the criteria referred to; beyond that, conviction or for that matter place of court convicting the prisoner has no role. Conviction does not influence granting or refusal of parole nor does place of trial court.

17. When access to provisional limited liberty is created by the rules, incidentally remedial measures on refusal to grant parole,

for a prisoner/convict would also be regulated and governed under operation of rules.

18. While we are dealing with the question framed, in this respect, Chapter XXXI of the Bombay High Court Appellate Side Rules, 1960 would have a significant role to play, prescribing presentation of proceedings at the offices of high court at Nagpur, Aurangabad, Panaji (Goa), requiring presentation of appeals, applications, references and petitions, including petitions in exercise of powers under Articles 226 and 227 of the Constitution arising in judicial districts as have been referred to, to respective high court benches/seat at Nagpur, Aurangabad and Goa. Under said Rules, chief justice may, in his discretion, order that case and/or class of cases arising in any district may be heard at Bombay or even vice versa.

19. In a hypothetical case, if the authority does not pass order on an application for parole and keeps it pending, a mandamus necessarily will have to be sought from a forum of this court having jurisdiction over the place where the relevant competent authority/prison is situated. Having regard to Chapter XXXI of Bombay High Court Appellate Side Rules, 1960, corollary would be, a prisoner would not be able to have a writ of mandamus under Article 226 of the Constitution from a forum of this court

not having jurisdiction over the area where the authority/prison is located which does not pass order on application for parole.

20. From the provisions, it clearly surfaces that (regard being had to the question posed) so far as order of rejection of parole, other than for under Rule 19 (1) (A), (B) and (C) of Parole Rules is concerned, it would be an order against which appeal would be available and in such a case, if appellate authority is situated outside notified jurisdictional districts, such an order would always be amenable to challenge before the bench having jurisdiction over area where appellate authority is situated and/or also before a bench in jurisdiction of which original order had been passed. To illustrate, suppose an order has been passed by an authority in Aurangabad refusing parole and appeal therefrom has been preferred at Mumbai and if a prisoner is aggrieved by the appellate order, he would have option to challenge it before Aurangabad Bench or at the principal seat.

21. Under amended rules, it appears that the Superintendent of prisons has been empowered to grant emergency parole, if application is pursuant to Rule 19 (1) (A), (B) and (C) of the Parole Rules. In such a case, it appears, there is no appeal provided against order of rejection and the reason for the emergency parole being not linked with conviction, it does not

appear, only for the reason that conviction being from a particular place and if that place is falling within the territorial jurisdiction of a particular bench, resort can be had to that bench by prisoner whose application pursuant to Rule 19 (1) of the Parole Rules has been rejected.

22. As such, while the procedure regulates presentation of matters, according to cause arising in the judicial districts, for a cause arising outside the jurisdiction so emerging from Chapter XXXI of the Bombay High Court Appellate Side Rules, resort would have to be before the proper bench, while place of conviction would not be of any significance. Any nexus between refusal to grant parole and conviction has neither been shown nor hinted at.

23. Grant or refusal of parole does not appear to have anything to do with either the conviction or the place of court convicting. Conviction appears to be of little concern so far as grant or refusal of parole is concerned. Conviction is not a nexus for parole. However, for a party which finds it extremely difficult and hardship would be caused to it, access can be had to the Chief Justice’s powers under proviso under rules in Chapter XXXI of the Bombay High Court Appellate Side Rules, 1960.

24. Foregoing discussion leads us to consider that while there does not appear to be any nexus between grant or refusal of parole and place of court convicting, ordinarily a prisoner/convict would have to approach a forum of this court having jurisdiction over the district in which order of rejection is passed. But a convict/prisoner is not precluded from approaching the bench having jurisdiction over the district in which trial court has convicted him, if the order of rejection of parole is passed in the area of jurisdiction of forum whereunder conviction has taken place or if a nexus between refusal to grant parole and conviction could reasonably and validly be said to exist. However, in the latter case, it could always be open in rare and exceptional cases for the Bench before which the proceeding is presented to examine the plea at the threshold and decide whether to receive the proceedings or not.

25. The question under reference is answered accordingly.

CHIEF JUSTICE

S. V. GANGAPURWALA, JUDGE

SUNIL P. DESHMUKH, JUDGE

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