

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/SPECIAL CRIMINAL APPLICATION NO. 7866 of 2023

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS. JUSTICE NISHA M. THAKORE

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
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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HASAN AHMED CHARKHA @ LALU THRO AFSA HASAN LALU
 Versus
 STATE OF GUJARAT

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Appearance:

M S BHADKI(8665) for the Applicant(s) No. 1
 MR MAKBUL I MANSURI(2694) for the Applicant(s) No. 1
 PUBLIC PROSECUTOR for the Respondent(s) No. 1
 RULE NOT RECD BACK for the Respondent(s) No. 2,3

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CORAM: HONOURABLE MS. JUSTICE NISHA M. THAKORE

Date : 14/07/2023

ORAL JUDGMENT

1. This petition is filed under Article 226 read with Article 14 and 21 of the constitution of India by the wife of the convict

seeking release of the convict on parole leave for a period of 60 days or for appropriate days from the date of release on any terms and conditions which may be imposed by this Court. The petitioner has also prayed for direction to keep in abeyance the notification issued by the State Government under Section 268 of Cr.P.C. in case of the petitioner during the period of parole leave.

2. The brief facts which has emerged on record are summarised as under:

2.1. The petitioner has been convicted in the offence punishable under Section 143, 147, 148, 302, 307, 323, 324, 325, 326, 322, 395, 397, 435, 186, 188 read with Section 120(B), 149, 153(A) of IPC as well as under Section 141, 150, 151 and 152 of Indian Railways Act and Section 3 and 5 of Prevention of Damage to the Public Property Act and under Section 135(1) of Bombay Police Act in respect of FIR bearing I-CR No. 9 of 2002 registered with Godhara Police Station, Panchmahal. The petitioner was convicted and awarded life imprisonment by the learned Additional Sessions Judge, Godhara in Criminal

Case No. 71 of 2009 by order dated 01.03.2011. The petitioner had approached this Court in appeal which was registered as Criminal Appeal No. 557 of 2011. The aforesaid appeal came to be dismissed vide judgement dated 09.10.2017 confirming the order of conviction and sentence of life imprisonment. Being aggrieved and dissatisfied, the petitioner has approached the Hon'ble Apex Court by way of Special Leave Petition on 02.04.2018. Pending the aforesaid appeal, the petitioner has applied for bail which is pending consideration before the Hon'ble Apex Court.

3. In background of this facts, the petitioner has approached this Court pending the appeal as well as bail application before the Hon'ble Supreme Court, invoking writ jurisdiction of this Court under Article 226 of the Constitution of India seeking parole leave on the ground that the son and daughters of his two sisters are getting married on 16.07.2023. The petitioner being maternal uncle of both bride and the groom and in absence of the father of the petitioner, the presence of the petitioner is required. In support of such averments, the marriage invitation card has been placed on record. It is

contended before this Court that the petitioner was released on various occasions on parole leave by this Court and he has surrendered in time before the jail authority without any untoward incident being reported. It is further contended that the jail conduct of the petitioner is good. Hence, it is urged to consider the present application for parole leave.

4. Considering the grounds raised in the petition, this Court by order dated 27.06.2023 had directed the learned APP who had appeared on advance copy to place on record the verification report. Ms. Monali Bhatt, learned APP had appeared on behalf of the respondent-State. On the next date of hearing, the verification report submitted by the concerned police station was placed for consideration of this Court. The fact of marriage being scheduled in the family has been confirmed. Along with the verification report, learned APP has placed on record the jail remarks. From the jail remarks, it had transpired that the co-accused in the same offence have been enlarged on bail by the Hon'ble Supreme Court by order dated 26.04.2023. Upon inquiry from the learned advocate of the petitioner, it was submitted by the learned advocate that the application for bail has been moved by the present petitioner

which is pending consideration before the Hon'ble Apex Court. The pendency of appeal before the Hon'ble Apex Court has been disclosed by the learned advocate for the petitioner. In absence of any reference of the aforesaid facts in the jail remarks, this Court had called upon the learned APP to confirm the aforesaid fact. This had further led to the issue of maintainability of the present petition seeking parole leave pending the appeal. The learned advocates appearing for the respective parties were heard. This Court had passed following order on 10.07.2023:

"1. Heard Mr. M. I. Mansuri, learned advocate on record for the applicant. Mr. M. I. Mansuri, learned advocate has relied upon the decision of this Court in the case of Bilal Abdullah Ismail Badam Ganchi through Nafisa B. Badam V/s. State of Gujarat reported in 2012 (1) GLH (NOC) 1 and has submitted that the order issued under Section 268 of Cr.P.C. cannot come in the way of exercise of power by this Court in releasing the accused on parole leave. He has further relied upon the order dated 03.03.2014 passed by the Co-ordinate Bench in Spl. Criminal Application (Parole leave) No.743 of 2014 wherein in case of co-accused Yusuf Dadu @ Yusuf @ Yasin @ Abdulla Gulam Husen Nalbandh, this Court had directed the competent authority to take decision of parole leave application even pending the appeal before the Hon'ble Apex Court. He, therefore, submitted that similar treatment is required to be given to the present petitioner. He also relied upon the

judgement of Full Bench of High Court of Bombay reported in 2006 CRI. L. J. 1515 in the case of S. Sant Singh V/s. Secretary Home Department, Government of Maharashtra and has submitted that the Full Bench had, in fact, after examining the issue held that decision in Jayant Shetty's case is no more a good law. He had invited attention of this Court to the facts of the case as reflected in the order and has submitted that the Full Bench had answered the issue in affirmative holding thereby that the authorities have power to entertain and grant an application for parole even though the appeal is pending before the appellate Court. He, therefore, urged this Court to consider his petition and pass an appropriate order.

2. Ms. Monali Bhatt, learned APP has relied upon the decision of Hon'ble Full Bench of this Court decided in the case of Latif Chhmtumiya Shaikh V/s. State of Gujarat and Ors. reported in 2000 (3) GLH 601 and has submitted that once the appeal is pending before the appellate Court, the judicial comity demands that the petitioner should be relegated to the jurisdiction of appellate Court. She objected to grant of parole leave. Ms. Monali Bhatt, learned APP has also submitted, by relying upon the judgement of the Division Bench in the case of State of Gujarat V/s. Jayantilal Maganlal Patel reported in 1995 2 GLH 260, that where the appeal is pending before the appellate Court, the release of convict is permissible under Section 389 of the Code by granting temporary bail. In such circumstances, the appellate Court alone can invoke such power. She, therefore, urged this Court that when the appellate Court is in seisin of the matter, this Court

should not generally invoke writ jurisdiction.

3. Having heard the learned advocates appearing for the respective parties, the issue requires to be examined closely. Let this matter be notified for further arguments on 11.07.2023."

5. Mr. MTM Hakim, learned advocate, had appeared with Mr. M. I. Mansuri, learned advocate on record for the applicant. Mr. M. I. Mansuri, learned advocate, had placed on record the list of authorities in support of his submissions. The same reads as under:

- 1. Sunil Fulchand Shah V/s. Union of India reported in (2000) 3 SCC 409.*
- 2. State of Haryana V/s. Nauratta Singh reported in (2000) 3 SCC 514.*
- 3. Latif Chhmtumiya Shiakh V/s. State of Gujarat reported in 2000 SCC OnLine Guj 197.*
- 4. Dadu V/s. State of Maharashtra reported in (2000)8 SCC 437.*
- 5. S. Sant Singh V/s. Secretary, Home Department, Government of Maharashtra reported in 2005 SCC OnLine Bom 1494.*
- 6. Roger Shashoua V/s. Mukesh Sharma reported in (2017) 14 SCC 722.*

7. Rohan Dhungat V/s. State of Goa reported in 2023 SCC OnLine SC 16.

5.1. At outset, Mr. MTM Hakim, learned advocate had invited attention of this Court to the decision of the Full Bench of this Court in the case of *Latif Chhmtumiya Shaikh V/s. State of Gujarat* reported in 2000 SCC OnLine Guj 197. While referring to the questions framed by the Larger Bench in the aforesaid reference, he emphasised on the fact that the Court was called upon to decide as to whether the grant of parole, furlough or bail to an accused convicted of an offence under TADA/NDPS would amount to suspension of sentence. In light of the controversy involved, the Larger Bench had examined relevant provisions under NDPS Act, more particularly, Section 32A which deals with the subject that no suspension, remission or commutation in any sentence be awarded under the aforesaid Act. He further submitted that noticing the aforesaid mandate of the legislation, Larger Bench held that there is no question of releasing the convict on parole leave or furlough leave which would amount to suspension of sentence temporarily. With respect to the case under TADA Act, the Larger Bench was of the view that the erroneous exercise of powers by the

authority can always be interfered with by the High Court. However, the High Court while exercising its jurisdiction under Article 226 and 227 of the Constitution of India should be cautious of the fact that the Court is not sitting in appeal over the decision of the competent Court or the authority. Thus, when the decision is perverse or where no reasonable person could have arrived at such a decision, it is only then the High Court can intervene. While answering to question no.4, the Bench had taken into consideration the judgement of the Division Bench of the High Court of Bombay in the case of Jayant Veerappa Shetty V/s. State of Maharashtra and Ors. 1985 CLR Maharashtra 598 wherein the Division Bench held that the power of grant of parole cannot be exercised by administration where the appeals of convicts concerned are pending and such persons can be released on bail only by the appellate Court under Section 389(1) of Cr.P.C not by the administration. Thus, the Larger Bench had arrived at a conclusion that the only provision empowering the Court to release the convict pending the appeal is by way of bail under Section 389(1) of Cr.P.C.

5.2. Mr. MTM Hakim, learned advocate by referring to the

aforesaid decision submitted that the said decision is not a good law in view of the subsequent decision of Hon'ble Supreme Court in the case of Dadu alias Tulsidas V/s State of Maharashtra reported in (2000) 8 SCC 437. By inviting attention of this Court to the aforesaid decision, Mr. MTM Hakim, learned advocate submitted that the constitutional validity of Section 32A of the NDPS Act was under consideration. One of the issues which arose for consideration before the Hon'ble Apex Court was whether the grant of parole would amount to suspension of sentence. The Hon'ble Apex Court upon appreciation of the principle laid down in the case of Smt. Punam Lata V/s. M.L. Wadhawan and Ors. reported in (1987) 3 SCC 347 and the view reiterated thereafter in the case of State of Haryana V/s. Mohinder Singh reported in (2000) 3 SCC 394 analyse the concept of parole and the object behind the release of convicts on parole to be a part of reformatory process. The Court also noticed that rules are framed providing for supervision by the parole authorities of the convicts who are released on parole. In light of the aforesaid scheme, the Hon'ble Supreme Court further considered the distinction laid down between bail and parole by the Hon'ble Constitution Bench of the Hon'ble Supreme

Court in the case of Sunil Fulchand Shah V/s. Union of India reported in (2000) 3 SCC 409. Mr. MTM Hakim, learned advocate, therefore submitted that even in the case of conviction under NDPS Act where stringent provision in the form of Section 32A has been incorporated the Court having noticed the bar provided under Section 32A held that it does not in any way affect the powers of the authorities to grant parole. Having held so the Hon'ble Apex Court further permitted the writ applicant to apply for parole and directed the authorities to consider and dispose of in accordance with the statutory provisions including the jail manual or the Government instructions without implying such a bar under Section 32A of the Act.

5.3. Mr. MTM Hakim, learned advocate had further relied upon the decision of Sunil Fulchand Shah V/s. Union of India reported in (2000) 3 SCC 409 and submitted that the decision of the Hon'ble Supreme Court in the case of Smt. Punam Lata (supra), holding that the period during which the detenu was released on parole cannot be said to be a period during which he has been held in custody pursuant to the order of detention, was held to be not a good law. He further submitted that the

matter pertains to COFEPOSA Act. While under detention law, the writ applicant was enlarged on parole leave, the issue which fell for consideration before the Hon'ble Supreme Court noticing Section 12 of the said Act viz. the prohibition expressed in Section 12 of the Act would have bearing on judicial intervention while examining the parole application. It was contended by the state that the status of the convict in view of Section 12 of the NDPS Act though release on parole for a temporary period has to be excluded from the maximum period of detention. It was further contended that in such a case extending the period of detention by excluding the period of parole would not amount to punishing the detainee as the Act contemplates continuous period of detention without any interruption and thus, the detenu must serve out the balance period of detention. The Hon'ble Court expressed that the ratio laid down in the case of Adam Kasam Bhaya (supra) and Ismail Juma (supra) to be the correct view. While answering the aforesaid issue, the Hon'ble Court had also delved into the provisions dealing with the question of grant of parole wherein the Court concluded that the bar of judicial intervention would not affect the jurisdiction of the High Court under Article 226 of the Constitution of India.

5.4. Mr. MTM Hakim, learned advocate has also relied upon the decision of Full Bench of Bombay High Court in the case of S. Sant Singh (supra) wherein similar issues had arisen for consideration before the Hon'ble Larger Bench. He further submitted that the Hon'ble Bench did not agree with the decision of the Division Bench in the case of Jayant Veerappa Shetty (supra). The Hon'ble Bench followed the ratio laid down by the Hon'ble Supreme Court in the case of Sunil Fulchand Shah (supra) which categorically observed that parole does not amount to suspension of sentence. He further submitted that the Bench had also examined the issue in light of the provision of Section 389 of Cr.P.C. which empowers the Court to suspend the sentence as well as Section 432 of Cr.P.C. which contains provisions regarding execution, suspension, remission and commutation of sentences and submitted that the Hon'ble Larger Bench clearly laid down that the powers of the State to grant parole are not fettered even if the appeal of the convict is pending before the Court.

5.5. Mr. MTM Hakim, learned advocate had lastly invited attention of this Court to the recent judgement of Hon'ble Supreme Court in the case of Rohan Dhungat (supra) wherein

the Hon'ble Supreme Court was called upon in special leave petition to examine the validity of the order passed by the High Court of Bombay in writ petition by which the High Court had dismissed the petitions of the applicant holding that the period of parole is to be excluded from the period of sentence while considering the 14 years of actual imprisonment for the purpose of premature release. The Hon'ble Apex Court had decided the issue in light of Rule 335 of Goa Prisons Rules, 2006, which provides that period of release on furlough and parole shall be counted as remission of sentence. Thus, noticing the aforesaid rule the Hon'ble Apex Court held that for the purpose of considering the actual imprisonment, the period of parole leave is to be excluded and thereby confirmed the view taken by the High Court of Bombay. Pointing out the aforesaid judgement, Mr. MTM Hakim, learned advocate submitted that unless the rule prescribes, the present case would be governed by the decision of the Hon'ble Constitutional Bench in the case of Sunil Fulchand Shah (supra) which has been subsequently followed by the Full Bench of Bombay High Court. He, therefore, urged this Court that in absence of any provision being made in the rules similar to the aforesaid rule of Goa Prisons Rules, 2006, the Court may

consider the case of the petitioner for releasing him on parole even pending the appeal before the Hon'ble Apex Court.

6. The attention of this Court was also invited to the order dated 30.11.2012 passed by the Hon'ble Apex Court in the case of co-accused Yusuf Dadu @ Yusuf @ Yasin @ Abdulla Gulam Husen Nalbandh wherein the Court had permitted the applicant therein to approach the authority for parole and the authority were permitted to take decision on merits in accordance with law. The reliance was also made to order dated 03.03.2014 passed in *Spl. Criminal Application (Parole leave) No.743 of 2014* in the case of the said co-accused.

7. Ms. Monali Bhatt, learned APP has appeared on behalf of the respondent-State. She has vehemently objected to the grant of parole leave application. Learned APP has placed heavy reliance upon the Full Bench decision of this Court in the case of Latif Chhotumiya Shaikh (*supra*). She has once again invited attention of this Court to the issues framed by the Larger Bench, more particularly, issue no.4. The Hon'ble Bench was called upon to answer the issue as to whether the High

Court can direct release on parole a convict undergoing sentence imposed by the competent Court when an appeal arising out of the said judgement of conviction and sentence is pending. She had invited the attention of this Court to the decision of the Hon'ble Division Bench in the case of Ishwarsinh Rajput V/s. State of Gujarat reported in 1992 GLR 1365. In the aforesaid matter, the Bench held that the convicts under the NDPS Act are not entitled to be released on parole or furlough leave during pendency of the appeal against the conviction and sentence, in view of language of Section 32A of the NDPS Act. The Bench was of the view that the mandate of the legislation is that no sentence awarded under the NDPS Act shall be suspended, remitted or commuted and therefore, there arises no question of releasing the convict on parole or furlough which according to the Hon'ble Court amount to suspension of sentence though temporarily. She further relied upon Section 389 of Cr.P.C. The reliance was also made on Section 432 of Cr.P.C. She further submitted that the Hon'ble Supreme Court in the Kartar Singh V/s. State of Punjab reported in (1994) 2 JT 423 had taken into consideration the overriding effect of the provisions of Section 25 of TADA Act as well as Section 20(7) of the said Act. The Hon'ble Apex Court

had held that even if the High Court is inclined to entertain any application under Article 226, that power should be exercised most sparingly and only in rare and appropriate cases in extreme circumstances. She, therefore, submitted that this Court should refrain from exercising its jurisdiction under Article 226 of the Constitution of India. As judicial comity demands where the appellate Court is seized of the matter in appeal. She had also placed reliance upon the recent decision of the Hon'ble Apex Court in the case of Rohan Dhungat (supra) as placed on record by the learned advocate for the petitioner. She further submitted that the aforesaid view of the Hon'ble Apex Court has been followed in subsequent the judgment in the case of Anil Kumar vs. State of Haryana , reported in 2023 SCC online SC 334. The learned APP has objected to the grant of relief.

8. Having heard the learned counsels appearing for the respective parties and having peruse the various authorities relied upon , the question which falls for consideration of this Court is that whether pending the appeal as well as bail application before the Hon'ble Supreme Court against the order of conviction, this Court in writ jurisdiction under Article

226 of the Constitution of India should enlarge the petitioner on parole leave ?

Analysis

9. The State has objected to entertaining of the present petition by highly relying upon the decision of Hon'ble Full Bench in the case of Latif Chhotumiya (supra), wherein the Hon'ble Bench having noticed relevant provisions of Prisons (Bombay Furlough and Parole) rules, 1959, while answering reference (per Hon'ble Chief Justice B.C. Patel) has held as under :

"32. Thus, powers under the provisions contained in the Bombay [Furlough and Parole] Rules, 1959 cannot be exercised by the executive in favour of a convict undergoing sentence whose appeal is pending before the Court. The Division Bench in case of State of Gujarat v/s Jayantilal M. Patel [1995 - 2 - G.L.H. 260] examined the Scheme of the Bombay [Furlough and Parole] Rules, 1959, and [section 389\[1\] of Criminal Procedure Code](#). The Division Bench following the decision of the Apex Court in case of K.M. Nanavati [supra] and agreeing with the views of Division Bench of Bombay High Court in case of Jayant Veerappa Shetty v/s State of Maharashtra [1985 Cr.L.R. Maharashtra

*page 598] held that the power of grant of parole cannot be exercised by the administration where the appeals of convicts concerned are pending and such persons can be released on bail only by the Appellate Court under [section 389\[1\] of the Code of Criminal Procedure](#) and not by the administration. The power of the administration will be exercisable only during the remainder of the period after conviction as held by the Supreme Court in *K.M. Nanavati's case [supra]*. In our opinion, the Court can order the suspension of execution of sentence or order appealed and can release the convict on bail u/s 389[1] of the Criminal Procedure Code, 1973. This is the only provision empowering the Court to release the convict on bail.*

33. In our opinion, a convict undergoing sentence imposed by the competent court cannot be released on parole or furlough by High Court when an appeal arising out of the said judgement of conviction and sentence is pending.”

10. The other view expressed by the Hon'ble member of the bench (Hon'ble R.K. Abhichandani, J) following the ratio laid down in the case of *Supreme Court Bar Association vs. Union of India* reported in (1998) 4 SCC 409 which provides a sufficient guide to contain the power under Article 226 of the Constitution within the bounds of valid laws. The other member

of the bench also expressed his view (Hon'ble M.R. Calla, J) taking notice of word of caution by the Hon'ble Supreme Court in the case of Kartar Singh vs. State of Punjab , reported in (1994) 2 JT 423 and Usmanbhai Dawoodbhai Memon vs. State of Gujarat, reported in (1988) 2 SCC 271 and concluded that once jurisdiction under Article 226 is there with the High Court to entertain such applications, the exercise of such jurisdiction may be undertaken in appropriate cases only.

11. Now, the decision of the Constitutional bench of the Hon'ble Supreme Court in the case of K.M. Nanavati (supra) as relied upon by Larger Bench is concerned, the majority view which prevailed held that the Governor had no power to grant the suspension of sentence for the period during which the matter was sub-judice in this Court. The Governor's order suspending the sentence could only operate until the matter became sub-judice in this Court on the filing of the petition for special leave to appeal whereupon this Court being in seisin of the matter would consider whether O. XXI, r. 5 should be applied or the petitioner should be exempted from the operation thereof as prayed for. It would then be for the Appellate Court to pass such orders as it thought fit as to

whether bail should be granted to the petitioner or he should surrender to his sentence or to pass such other order as the court deemed fit in the circumstances of the case. The Hon'ble Constitutional Bench further applied the principle of harmonious construction to avoid a possible conflict between the powers given under [Art. 161](#) to the Governor and under [Art. 142](#) to the Supreme Court and concluded that both the powers are absolute and unfettered in their respective fields of operation and thus held that [Art. 161](#), does not deal with the suspension of sentence during the time when [Art. 142](#) is in operation and the matter is sub-judice in the Supreme Court. Thus, in the case of K. M. Nanavati (supra), the Hon'ble Court had decided that the pardoning powers of the Governor and the special leave petition cannot operate together.

12. Further, the Hon'ble Full Bench has taken into consideration the ratio laid down in the case of Jayant Veerappan shetty (Supra), wherein the Hon'ble Division Bench of High Court of Bombay followed the earlier constitutional bench decision in the case of K.M. Nanavati (supra), held that the power assumed unto itself by State Government under the Parole rules cannot be exercised so long as an appeal by a

convicted person is pending and the appellate court is in seisin of the case. The Parole rules cannot stultify or thwart the judicial process and even in the most emergent circumstances the courts will be open to grant relief in deserving cases to a convict.

13. It is in light of the aforesaid principles, the Hon'ble Full bench has arrived at conclusion that administration shall have no power to grant parole where the appeals of the convicts are pending. However, while holding so the Hon'ble Bench proceeded to observe that the convict can only be released on bail by the appellate court under section 389(1) of the Code of Criminal Procedure. It is this observation of the Hon'ble Bench which has been pressed for consideration to contend that the writ court would have no jurisdiction under Article 226 when the Hon'ble Supreme Court is in seisin of the appeal against the order of conviction. The whole genesis of the arguments is based on the applying of provisions , more particularly, section 389 of the Criminal Procedure Code. According to the State section 389 is the only provision which can be availed for releasing the convict pending the appeal. The other limb of argument is releasing convict on parole would amount to

suspension of sentence which is only permissible under section 389 of the Code and therefore exercise of powers under writ jurisdiction would amount to interference of the appellate court jurisdiction which is seized of the appeal against conviction order.

14. Considering the ratio laid down by the Hon'ble Supreme Court in the case of K. M. Nanavati (supra), undoubtedly held that the authorities cannot be permitted to exercise the powers of grant of parole when the Court is seized of the matter in statutory appeal. However, as discussed by the Hon'ble Constitutional Bench in the case of Sunil Fulchand Shah (supra), there is fundamental difference between grant of bail and parole. In case of parole, there is no suspension of sentence. Even as per rules applicable to State of Gujarat, more particularly, Rule 20 of the Prisons (Bombay Furlough and Parole) Rules, 1959, which is considered in later part of this order, clearly goes to suggest that period spent on parole is to be counted as part of sentence. Thus, the convict though released temporarily on parole continues to be subject to jail custody and is not "free" from conviction/sentence. In the opinion of this Court, in absence of any conflicting provisions

being demonstrated and by applying doctrine of harmonious construction, granting of parole would not amount to any intervention in pending proceedings under Section 389 of the Code. Thus, the principle of derogation of power as laid down in the decision of the Hon'ble Supreme Court in the case of K.M. Nanavati (supra) will not be applicable in a case where the applicable Prison Rules does not forbid.

15. Now, dealing with the second argument, the aforesaid issue has been answered by the Hon'ble Supreme court in the case of Sunil Fulchand Shah (supra). The Hon'ble Constitutional bench has succinctly analysed the concept of bail and parole, and has held that the bar of judicial intervention to direct the temporary release of the detenu, on parole, in cases covered by the express prohibition would not, however, affect the jurisdiction of the High Courts under Article 226 of the Constitution or of the Hon'ble Supreme Court under Articles 32, 136 or 142 of the Constitution to direct the temporary release of the detenu, where in the request of detenu to be released on parole for specified reason and/or for specified period , has been , in the opinion of the Court, unjustifiably refused or where in the the interest of justice such an order of temporary

release is required to be made. The Court further held that jurisdiction, however, has to be sparingly exercised by the Court and even when it is exercised it is appropriate that the court leaves it to the administrative or jail authorities to prescribe the conditions and terms on which parole is to be availed of by the detenu. The Court further held that parole does not interrupt the period of detention and, thus, that period needs to be counted towards the total period of detention unless the terms for grant of parole, rules or instructions, prescribe otherwise. As rightly pointed out by the learned advocate Mr. Hakim, for petitioner the aforesaid decision of Sunil Fulchand Shah (supra) of the Hon'ble Supreme Court would prevail over the decision of Hon'ble Full Bench in the case of Latif Chhotumiya (supra) as well as Hon'ble Division Bench of this Court in the case of Ishwarbhai Rajput (supra), in which it is observed that granting of parole would amount to suspension of sentence.

16. The attention of this Court was invited by the learned Additional Public prosecutor to the decision of Hon'ble Supreme Court in the case of Kartar Singh (supra) which has been relied upon by the Hon'ble Full Bench of this Court in the

case of Latif Chhotumiya (Supra). The Court notices that even while answering the issue, the Hon'ble Bench has taken into consideration the ratio laid down by the Hon'ble supreme court in the case of Kartar singh (supra) and then has admitted that there cannot be controversy that so far as writ jurisdiction of the High Courts under Article 226 and 227 of the Constitution to entertain such applications are concerned are not taken away but caution has been given.

17. Again, the aforesaid view of the Hon'ble Supreme Court in the case of Sunil Fulchand Shah (supra) has been relied upon and followed by the Hon'ble Supreme Court in the case of Dadu alias Tulsidas V/s. State of Maharashtra, reported in (2000) 8 SCC 437. The Hon'ble Supreme Court has not only over ruled the view of this Court in the case of Ishwarsinh Rajput (supra) which was relied upon by the Full Bench in Latif Chhotumiya(supra) but has reiterated that parole does not amount to suspension of sentence. The court further observed that the convict continues to be serving the sentence despite granting parole under the statute, rules, jail manual or the government orders.

18. In light of the aforesaid legal principles laid down, this Court is of the view that the writ court under article 226 of the Constitution has jurisdiction to examine such applications seeking parole leave.

19. Now, as far as granting of parole pending appeal against order of conviction as well as application seeking bail under section 389 of the Code is concerned, this court finds that in the case of Ashfaq vs. State of Rajasthan and others, reported in (2017) 15 SCC 55, the Hon'ble supreme Court was examining the order of the High Court which refused to entertain the petition seeking parole filed by the convict. The Court noticed that High Court had proceeded on the ground that the petitioner therein was convicted in serious and heinous offence which was upheld by the Hon'ble Supreme court and thus, if he desired he should have approached the Supreme Court. Discarding such remarks, the Court observed that such an approach of the High Court amounts to abdication of powers vested in the High Court. The Court is conscious of the fact that it was a case where conviction was confirmed and no appeal was pending , however, the court finds that there is no express legal bar being brought to the notice of this Court

which takes away the writ jurisdiction of this court under Article 226 of the Constitution to examine such applications for parole, pending the appeal.

20. Now, the reliance placed upon the recent decision of the Hon'ble Supreme court in the case of Rohan Dhungat (supra) as relied upon subsequently in the case of Anil Kumar (supra) are concerned, this Court finds that in the facts of the case the Court has held so. The Hon'ble Court attention was invited to the Goa Prisons rules, 2006 wherein Rule 335 provides that parole has to be counted as remission of sentence. It is in light of the aforesaid rules, the Hon'ble Court has observed that as under in para 15 :

"8. Now, so far as the reliance placed upon the decision of this Court in the case of Sunil Fulchand Shah (supra) relied upon by learned senior counsel for the respective petitioners – convicts / prisoners is concerned, the said decision shall not be applicable to the facts of the case on hand. It was a case of detenu under the provisions of the COFEPOSA Act. Even in the said decision, it is observed and held that the period of detention would not stand automatically extended by any period of parole granted to the detenu unless the order of

parole or rules or instructions specifically indicates as a term and condition of parole, to the contrary. In the present case the term 'imprisonment' is not included in the computation of term of parole. Rule 335 specifically provides that parole is to be counted as remission of sentence. Therefore, the said decision would not be applicable to the facts of the case on hand."

21. This Court has come across Rule 20 of the Prisons (Bombay Furlough and Parole) Rules, 1959 which reads as under :

*"Rule 20 : Parole out to be counted as remission of sentence
The period spent on parole shall not count as remission of the sentence."*

Even the instructions provided under Jail Manual, relevant Rule 832 note (i) provides that day on which a prisoner is released on parole and the day on which the prisoner surrenders back to Jail will be counted in period of sentence. The conjoint reading of the aforesaid provisions clearly indicates that grant of parole is not treated as suspension of sentence and on the contrary, it has to be read as part of sentence. Thus, in light of the aforesaid expressed provisions and settled legal position, I am of the firm view that the release of prisoner on parole

would not amount to suspension of sentence. This Court, therefore, has jurisdiction to entertain the present petition under Article 226 of the Constitution.

22. Having held so, taking into consideration the Jail record of the present convict and having verified the cause raised in the petition, the present application requires consideration. The petitioner is hereby directed to be released on parole leave for period of 15 days from the date of his actual release, on usual terms and conditions as may be deemed fit by the authorities. The notification issued by the State under section 268 of the Code of Criminal procedure, in case of petitioner, shall remain in abeyance, during the aforesaid period of parole leave. It is expected of the petitioner that he shall surrender forthwith on expiry of such period of parole leave before the Jail authority. He shall maintain law and order during the aforesaid period and shall not get involved in any kind of unlawful act. With these observations, the petition succeeds. Rule is made absolute.

23. Direct service is permitted today.

(NISHA M. THAKORE,J)

SSVohra