



IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on:03.07.2023

+ **W.P.(Crl) 697 of 2022**

BUDHI SINGH Petitioner

Through: Mr. Aman Panwar and Mr.
Shivam Singh Baghel, Advs.

versus

STATE NCT OF DELHI Respondent

Through: Ms.Rupali Bandhopadhyia, ASC
for State.
Mr. Siddharatha Dave, Sr. Adv.,
amicus curiae with Ms. Vidhi
Taker, Adv.

+ **W.P. (Crl) 997 of 2022**

BASANT VALLABH Petitioner

Through: Mr. Shrutanjaya Bhardwaj, Mr.
Zeeshan Diwan and Mr.
Rishabh Yadav, Advs.

versus

STATE NCT OF DELHI Respondent

Through: Ms.Rupali Bandhopadhyia, ASC
for State.
Mr. Siddharatha Dave, Sr. Adv.,
amicus curiae with Ms. Vidhi
Taker, Adv.

+ **W.P.(Crl) 1044 of 2022**

SURESH CHAND SHARMA Petitioner



Through: Mr. Rohan J. Alva, Adv.

versus

STATE NCT OF DELHI

..... Respondent

Through: Ms.Rupali Bandhopadhyia, ASC
for State.

Mr. Siddharatha Dave, Sr. Adv.,
amicus curiae with Ms. Vidhi
Taker, Adv.

+ **W.P.(CrI) 1067 of 2022**

JAIPAL SINGH

..... Petitioner

Through: Mr. Arjun Malik, Adv.

versus

STATE NCT OF DELHI

..... Respondent

Through: Ms.Rupali Bandhopadhyia, ASC
for State.

CORAM:

HON'BLE MR. JUSTICE AMIT MAHAJAN

JUDGMENT

1. The present petitions have been filed under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, 1973 (hereinafter '**Cr.P.C.**') seeking 1st spell of furlough for the petitioners who are all co-accused in the same FIR.

2. The petitioners are in custody pursuant to order of conviction and the judgement passed by this Court on 31.10.2018, thereby setting aside the judgement passed by the learned Trial Court dated 21.03.2015, wherein all the petitioners were acquitted by the learned Trial Court.



3. The petitioners have been convicted by order dated 31.10.2018 passed by this Court in CrI. Appeal No. 884/2015 in FIR Nos. 110/1987 and 141/1987 under Sections 302, 364, 307, 201, 120B and 34 of the Indian Penal Code, 1860 ('IPC') and have been sentenced to undergo rigorous imprisonment for their natural life, along with a payment of fine of Rs. 30,000/- failing which they shall be sentenced to an additional period of 18 months of simple imprisonment.

4. Petitioners aggrieved by the judgment dated 31.10.2018, have preferred their Criminal Appeals before the Hon'ble Apex Court and the same are pending consideration. It is not disputed that an application for suspension of sentence was also filed in the said Criminal Appeals, however, the fate of the same has not been mentioned by the petitioners.

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5. The petitioner, Budhi Singh (76 years old) has been in incarceration since 3 years 2 months 12 days as on 19.03.2022, with a satisfactory jail and overall conduct as per the nominal role filed before this court.

6. The petitioner had approached the office of Director General of Prisons (hereafter '**DG Prisons**') for the grant of first spell of furlough for a period of three weeks. The DG Prisons through rejection letter dated 10.03.2022 had informed the petitioner about the consideration of his application by the competent authority and the rejection of request for the grant of furlough in view of the nature of crime as well as the portion of his sentence remaining.

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7. The petitioner Basant Vallabh (55 years old) has undergone a period of 3 years, 3 months and 25 days, as on 23.04.2022 from the



period of life sentence awarded to him. He has also been working as a *Vodafone Sahayak* during his sentence as labour allotted to him in jail. He approached the office of DG Prisons through letter dated 09.03.2022 for the grant of first spell of furlough. The same was rejected through letter dated 07.04.2022, sent by the Office of DG Prisons. The DG Prisons rejected his request for grant of furlough on the ground of pendency of his first appeal before the Hon'ble Supreme Court of India.

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8. The petitioner Suresh Chand Sharma (71 years old) has also undergone a period of 3 years 5 months and 1 day as on 27.04.2023 as per the nominal role. The petitioner herein against the labour allotted to him has been working as a *library sahayak* and has a satisfactory conduct in prison. He approached the DG Prisons through letter dated 07.01.2022 for the grant of first spell of furlough which was rejected by the DG Prisons by letter dated 08.04.2022, on account of pendency of his first appeal before the Hon'ble Supreme Court of India.

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9. The petitioner in the present case is Jai Pal Singh (56 years old). The petitioner has been sentenced to undergo life imprisonment and, as per the nominal role, he has undergone a period of 3 years 4 months 24 days in incarceration as on 25.04.2022 and has been working as a *Vodafone sahayak* as labour while serving his sentence. The petitioner had applied for the first spell of furlough to the office of DG Prisons through letter dated 07.01.2022 which was rejected by the office of the DG Prisons by letter dated 19.04.2022, on account of his first appeal being pending before the Hon'ble Supreme Court of India.



10. It is not disputed that all the four petitioners were convicted by this Court. Therefore, even though the rejection letter passed against the petitioner in W.P.(Crl.) No.697/2022 whereby the application for the grant of furlough was declined by the DG Prisons, citing the reason as to the nature of offence committed, it is not denied by the State that the same is also liable to be rejected for the reason which led to the rejection of applications filed by the petitioners in W.P(Crl.) No. 997/2022, W.P(Crl.) No.1044/2022 and W.P(Crl.) No. 1067/2022, that is, the appeal filed by the petitioner against the conviction is pending before the Hon'ble Supreme Court.

11. Learned Additional Standing Counsel took the preliminary objection and opposed the present petitions on the ground of maintainability. She states that since the petitioners have preferred the appeal against order of conviction before the Hon'ble Apex Court, this court has no power to grant such relief and any such petition for release should be filed before the Hon'ble Apex Court. She submits that grant of furlough while their appeal is pending before the Supreme court would amount to derogation of power as laid down by the Apex court in ***K.M. Nanavati v. The State of Bombay: AIR 1961 SC 112.***

12. Learned counsel for the Petitioners on the other hand submitted that the decision rendered in ***KM Nanavati (supra)*** has no applicability to the facts of the present case. They submit that the Hon'ble Apex Court, in the said case, was considering the power of Governor to grant pardon when the appeal against the conviction was pending before the Hon'ble Supreme Court.



13. Considering the preliminary objection and the nature of dispute this Court vide order dated 02.12.2022 had framed the following issues for consideration:

“A. Whether the principle of ‘derogation of power’ as laid down in the judgment of the Hon’ble Supreme Court of India in K.M. Nanavati v. The State of Bombay, AIR 1961 SC 112 is applicable in cases where a prisoner seeks to apply for release on furlough under the Delhi Prison Rules, 2018 when an appeal against their order of conviction is pending adjudication in the Supreme Court of India?”

B. Whether Note 2 to Rule 1224 in the Delhi Prison Rules, 2018 should be strictly interpreted and thus the words High Court cannot be interpreted as including the Supreme Court of India, even in case of a statutory appeal before the Supreme Court?”

C. Is there a violation of Article 14 of the Constitution of India if Note 2 to Rule 1224 of the Delhi Prison Rules is interpreted as barring the right of a prisoner to apply for release on furlough, when an appeal against their order of conviction is pending adjudication in the Hon’ble Supreme Court of India?”

D. Whether the High Court under Article 226 of the Constitution has the power to grant furlough. If so, can this power be exercised during the pendency of an appeal in the Supreme Court of India?”

E. Is there a violation of Article 21 of the Constitution of India if Note 2 to Rule 1224 of the Delhi Prison Rules is interpreted as barring the right of a prisoner to apply for release on furlough, when an appeal against their order of conviction is pending adjudication in the Hon’ble Supreme Court of India?”

F. Whether denial of furlough, on account of pendency of an appeal in the Supreme Court of India, despite good conduct earned by the convict, would run contrary to the theory of reformative approach and thereby violating Rules 1199 and 1200 of the Delhi Prison Rules, 2018?”

G. Whether the jurisprudence on parole can be applied to furlough since furlough does not involve suspension of sentence?”

14. This Court also appointed Mr. Siddharth Dave, Senior Advocate as Amicus Curie to assist the court in the proceedings.

Submissions on behalf of learned Counsel for the Petitioners



15. It is submitted that the petitioners are eligible for grant of first spell of their furlough since they have completed three years in custody and have maintained good behavior/conduct, and have fulfilled the conditions stipulated in Rule 1220 and 1223 of the Delhi Prison Rules, 2018 (hereafter '**the Rules**').

16. The Petitioners after the rejection of their furlough applications from the DG Prisons, have preferred the present writ petitions since there is no other remedy available.

17. The concept of furlough and parole stem from the Rules. The two are conceptually different- there is no suspension of sentence in furlough and the sentence continues to run despite the convict being released from prison for a specified period of time whereas, when the convict is released on parole, the sentence is suspended and the quantum of sentence remains intact. Learned counsels relied upon the judgement of Hon'ble Apex Court in the *State of Gujarat v. Narayan: 2021 SCC OnLine SC 949*. The relevant paras of the said judgement relied upon by learned Counsel for the petitioners are set out below:

“20. The difference between bail, furlough and parole was also considered by a two-judge Bench of this Court in State of Haryana v. Mohinder Singh. Justice DP Wadhwa, referring to the Haryana Good Conduct Prisoners (Temporary Release) Act 1988 and the Punjab Good Conduct Prisoners (Temporary Release) Act 1962, observed that

17. “Furlough” and “parole” are two distinct terms now being used in the Jail Manuals or laws relating to temporary release of prisoners. These two terms have acquired different meanings in the statute with varied results. Dictionary meanings, therefore, are not quite helpful. In this connection we may refer to the Haryana Good Conduct Prisoners (Temporary Release) Act, 1988 which has repealed the Punjab Good Conduct Prisoners (Temporary Release) Act, 1962. The Punjab Act was earlier applicable in the State of Haryana. The language of both the Acts is



same and it may be useful to refer to Sections 3 and 4 of any of these two Acts to understand the difference between parole and furlough:

[...]

18. It would be thus seen that when a prisoner is on parole his period of release does not count towards the total period of sentence while when he is on furlough he is eligible to have the period of release counted towards the total period of his sentence undergone by him.”

21. *In Asfaq v. State of Rajasthan¹², Justice AK Sikri, speaking for the two-judge Bench observed that:*

11. There is a subtle distinction between parole and furlough. A parole can be defined as conditional release of prisoners i.e. an early release of a prisoner, conditional on good behaviour and regular reporting to the authorities for a set period of time. It can also be defined as a form of conditional pardon by which the convict is released before the expiration of his term. Thus, the parole is granted for good behaviour on the condition that parolee regularly reports to a supervising officer for a specified period. Such a release of the prisoner on parole can also be temporarily on some basic grounds. In that eventuality, it is to be treated as mere suspension of the sentence for time being, keeping the quantum of sentence intact. Release on parole is designed to afford some relief to the prisoners in certain specified exigencies.

[...]

14. Furlough, on the other hand, is a brief release from the prison. It is conditional and is given in case of long-term imprisonment. The period of sentence spent on furlough by the prisoners need not be undergone by him as is done in the case of parole. Furlough is granted as a good conduct remission.”

22. *Summarising the difference between parole and furlough, the Court noted that*

16. [...]

- (i) Both parole and furlough are conditional release.*
- (ii) Parole can be granted in case of short-term imprisonment whereas in furlough it is granted in case of long-term imprisonment.*
- (iii) Duration of parole extends to one month whereas in the case of furlough it extends to fourteen days maximum.*



(iv) Parole is granted by Divisional Commissioner and furlough is granted by the Deputy Inspector General of Prisons.

(v.) For parole, specific reason is required, whereas furlough is meant for breaking the monotony of imprisonment.

(vi) The term of imprisonment is not included in the computation of the term of parole, whereas it is vice versa in furlough.

(vii) Parole can be granted number of times whereas there is limitation in the case of furlough.

(viii) Since furlough is not granted for any particular reason, it can be denied in the interest of the society.

(See *State of Maharashtra v. Suresh Pandurang Darvakar* [State of Maharashtra v. Suresh Pandurang Darvakar, (2006) 4 SCC 776 : (2006) 2 SCC (Cri) 411] and *State of Haryana v. Mohinder Singh* [State of Haryana v. Mohinder Singh, (2000) 3 SCC 394 : 2000 SCC (Cri) 645].)”

18. Learned counsels further submits that the principle enumerated in *K.M. Nanavati* (*supra*), cannot be applied in relation to the consideration of application for the grant of furlough. The grant of furlough is neither a suspension nor remission of sentence and is not in conflict with the judicial powers in any manner.

19. The ‘parole’ amounts to suspension of sentence / bail and therefore if the High Court suspends the sentence pending the appeal of the convict before the Hon’ble Apex Court, the same would then amount to derogation of Appellate Power of the Hon’ble Supreme Court. It is submitted that in case of furlough, there would be no such derogation of power of the Hon’ble Apex Court as furlough does not amount to suspension of sentence / bail. They relied upon a judgement passed by division bench of this court in *Rajesh Kumar v. Govt. of NCT of Delhi: 2012 (2) Crimes 281 (Delhi)*; wherein it was held as under:



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

20. They thus contended that the authorities are not permitted to entertain the application for parole when the appeal is pending before the higher court, whereas, there cannot be any bar to entertain an application for grant of furlough since it does not amount to suspension of sentence.

21. The Learned counsel had also relied upon the judgment passed by the Bombay High Court in the case of ***Sharad Bhiku Marchande v. State of Maharashtra: 1990 SCC Online Bom 197***, wherein it was held that the petitioner is entitled to apply for furlough under the furlough rules despite the pendency of his appeal in the Hon'ble Apex Court.

22. It is further contended that the relevant rule, that is, Note 2 to Rule 1224 of the Rules, even otherwise limits the grant of furlough only when the convict's appeal is pending before the “High Court”, whereas,



in the present case, the appeals are pending before the Hon'ble Supreme Court and not the High Court. It is submitted that there is no ambiguity in the said provision. The language of the said note is plain and unambiguous and it is not open for the authorities to read such limitations which the legislature has in its wisdom omitted. The words "High Court" should be read literally and the filing of the appeal in Hon'ble Supreme Court cannot be read into the said rules. They further submitted that nothing prevented the drafters from including the words 'Supreme Court' in Note (2), which is evident from the perusal of the other rules contained in the Delhi Prisons Rules, where the words SLP and Supreme Court are repeatedly referred.

23. They had also relied upon the judgments passed in *Bhupinder Singh v. Unitech Ltd.*: 2021 SCC OnLine SC 320; *Rajendra Diwan v. Pradeep Kumar Ranibala & Anr.*: (2019) 20 SCC 143; *State of Maharashtra v. Suresh Pandurang Darvakar*: (2006) 4 SCC 776; *State of Haryana v. Mohinder Singh*: (2000) 3 SCC 394 and *Naresh Shridhar Mirajkar v. State of Maharashtra*: (1966) 3 SCR 711; in support of their contentions that the text is the best test of legislative intent unless, it is ambiguous. When the language of the provision is plain and unambiguous, it is not open for the Court to read into it, any limitations based on some probable intention of the legislature. Such intention has to be gathered only from words actually used in the statute.

24. Thus, it is submitted that the principle- the text is the best test for legislative intent unless it is ambiguous- if applied, the Rules do not bar the grant of furlough in cases where convict's appeal is pending before the Hon'ble Apex Court. It is stated that there is no ambiguity in Note



(2). The mention of 'High Court' in Note (2) of Rule 1244 of the Rules is clear and unequivocal and hence should be read literally.

25. In case Note (2) of Rule 1244 of the Rules is interpreted as barring furlough pending appeal in the Hon'ble Supreme Court, the same would be violative of Articles 14 and 21 of the Constitution of India. The furlough is integral to the concept of reformation and is a reward / incentive for good behaviour in the prison so that convict can eventually re-amalgamate into the society. Such interpretation would render Note (2) arbitrary and contrary to the very spirit of the Rules.

Submissions of behalf of Mr. Siddharth Dave, Senior Advocate, learned Amicus curie.

26. Learned Amicus submitted that Section 71(2)(xxix) of the Delhi Prisons Act, 2000 empowers the State Government to make rules for Temporary Release, Suspension and Remission of sentence of prisoners and the Rules are enacted by the State Legislature in exercise of powers under the above-mentioned provision. Chapter 19 of the Rules, comprising of Rule 1197 to 1233 pertains to "Parole and Furlough". Rule 1199 of the Rules provides that Furlough is the release of a prisoner for a short period of time, after a gap of certain qualified number of years of incarceration, by way of motivation for maintaining good conduct, and to remain disciplined in prison. Rule 1200 provides for the objects of Parole and Furlough. The Amicus further refers to Note 2 to Rule 1224 of the 2018 Rules reads thus:

"If an appeal of a convict is pending before the High Court or the period for filing an appeal before the High Court has not expired, furlough will not be granted and it would be open to the convict to seek appropriate directions from the Court"



27. He submitted that the principle enunciated by the Constitution Bench of Hon'ble Apex Court *in K.M. Nanavati (supra)*, would squarely apply while considering any application for grant of furlough. He submitted that the grant of furlough is an order which is incidental and ancillary to the powers which the Hon'ble Apex Court would exercise while deciding the pending appeals. He submitted that the convict is required to file an appropriate application in the pending proceedings before the Hon'ble Apex Court to seek the benefit of furlough or to seek any directions by the Hon'ble Apex Court directing the executive to decide such applications.

28. He further submitted that the principle of judicial discipline demands that the High Court ought not to entertain any such petition when the matter is pending before the Hon'ble Apex Court. Any application of such nature should be filed before the Hon'ble Apex Court where the appeals filed by the petitioners are already pending. It is stated that as it was held by the Hon'ble Apex Court that the Governor had no power to grant suspension of sentence in the case of *K.M. Nanavati (supra)*, for the period during which the matter was sub-judice in the Hon'ble Apex Court, any such consideration of the applications for grant of furlough would, in fact, amount to an over reach of the jurisdiction of the Hon'ble Apex Court.

29. Therefore, in a case where an appeal against conviction is pending before the Hon'ble Apex Court, the convict would have to file an appropriate application in the proceedings before the Hon'ble Apex Court to seek the benefit of furlough. The authorities under the Delhi Prison Rules [viz. the Director General (Prisons)], would not be



empowered to grant furlough to the convict, since the Hon'ble Apex Court is seized of the matter.

30. It is further submitted that even otherwise the furlough is not an absolute legal right. He relied upon the judgment passed by the Hon'ble Apex Court in *State of Gujarat Vs. Narayan @ Narayan Sai @ MotaBhagwanAsaram: 2021 SCC Online SC 949*; to contend that although furlough can be claimed without a reason, the prisoner does not have an absolute legal right to claim the same.

31. He further submitted that the Rules envisage a fair degree of discretion to be exercised by the authorities while deciding an application for grant of furlough. He further submitted that the rejection of an application for grant of furlough on the ground of pending appeal does not violate the Fundamental Rights under Article 14 and 21 of the Constitution of India. The rejection of an application on such ground emanates from the judicial principle enunciated by the Hon'ble Apex Court in *K.M. Nanavati (supra)*. He submitted that judicial decision cannot be said to affect the Fundamental Rights of the citizens.

32. The learned Amicus contended that once an appeal/ special leave petition is preferred by a convict before the Hon'ble Apex Court, judicial discipline would require all other Courts / authorities to refrain from exercising powers with respect to the subject matter pending before the Hon'ble Apex Court. He relied on the judgement passed by the Hon'ble Apex Court in *Bhupinder Singh v. Unitech Ltd.: 2021 SCC Online SC 320*; where the Accused persons, after denial of bail by the Hon'ble Apex Court, approached the High Court, which granted liberty to the Accused to approach the Magistrate. Upon grant of such liberty, the Accused persons applied for Bail before the Magistrate,



which directed that they be released. It was held that when an appeal / special leave petition is pending before the Hon'ble Apex Court, only that Court would be empowered to consider the prayer of bail, on account of the principle of judicial discipline.

33. The learned amicus further relied on the judgement passed by the Hon'ble Apex Court in *State of Gujarat v. Narayan a Narayan Sai @ MotaBhagwanAsaram: 2021 SCC OnLine SC 949*; wherein a convict who was convicted under Section 376 IPC applied for furlough, and the same was rejected by the DG Prisons., which was later overturned by the Hon'ble High Court. While setting aside the order of the High Court (which granted furlough to the convict), the Hon'ble Apex Court held that a prisoner does not have an absolute legal right to claim furlough. The grant of furlough must be balanced against the public interest and can be refused to certain categories of prisoners.

34. It is, therefore, submitted by the learned Amicus, that a prisoner is not entitled to an absolute right of furlough. The Rules envisages a degree of discretion to be exercised by the authorities, while deciding an application for grant of furlough. A convict is not deprived of the right to apply for furlough, since he/she may approach either the executive authorities, or the appropriate Court. However, a convict cannot claim furlough as an absolute right, which is ensured to him as a result of good conduct. A balance must be struck between the competing interests of a convict to obtain furlough on one hand, and the interests of society, on the other.

Analysis



35. Section 71 of the Delhi Prisons Act, 2000, empowers the State Government to make rules for the temporary release, suspension and remission of sentence of the prisoners. The Rules are enacted by the State Legislature in exercise of the powers conferred under Section 71 of the Delhi Prisons Act, 2000. The provisions for consideration of applications for grant of parole and furlough are contained in Chapter 19 of the Rules which comprises of the Rules 1197 to 1233.

36. Furlough is defined under Rule 2 (17) of the Rules as leave/ reward granted to a convicted prisoner who has been sentenced to rigorous imprisonment for a period of five years or more and has undergone three years thereof. The rules with regard to the consideration of application for the grant of furlough are prescribed in Rule 1220 to Rule 1243 of the Rules.

37. The Application for furlough is made by convicts who are eligible as per Rule 1220 and Rule 1223 of the Rules and the same reads as under:

“1220. A prisoner who is sentenced to 5 years or more of rigorous imprisonment and has undergone 3 years imprisonment after conviction with unblemished record become eligible for grant of furlough.

1223. In order to be eligible to obtain furlough, the prisoner must fulfill the following criteria: - I. Good conduct in the prison and should have earned rewards in last 3 Annual good conduct report and continues to maintain good conduct. II. The prisoner should not be a habitual offender. III. The prisoner should be a citizen of India.”

38. Note (2) of the said rules, which is relevant for the purpose of present petitions, states as under:

“If an appeal of a convict is pending before the High Court or the period for filing an appeal before the High Court has not expired, furlough will not be granted and it would be open to the convict to seek appropriate directions from the Court.”



39. The object of parole and furlough has also been adequately mentioned in the Rules. It is stated to be a progressive measure which not only saves the convict from evil of incarceration but also enables him to maintain social relations with his family and community. It helps him to maintain and develop a sense of self confidence and also motivates the prisoner to maintain good conduct and remain disciplined in the prison.

40. Rule 1200 of the Rules specifies the objectives of releasing a prisoner on parole and furlough. It reads as under:

“1200. The objectives of releasing a prisoner on parole and furlough are:

- i. To enable the inmate to maintain continuity with his family life and deal with familial and social matters,*
- ii. To enable him to maintain and develop his self-confidence,*
- iii. To enable him to develop constructive hope and active interest in life,*
- iv. To help him remain in touch with the developments in the outside world,*
- v. To help him remain physiologically and psychologically healthy,*
- vi. To enable him to overcome/recover from the stress and evil effects of incarceration, and*
- vii. To motivate him to maintain good conduct and discipline in the prison.”*

41. The application for parole is considered on the fulfilment of the conditions stipulated in Rule 1210 of the Rules.

42. Rule 1211 of the Rules specifies the cases in which the parole shall not be granted to the convict. In the case of parole, the sentence is suspended for the period the convict is released on parole. The prisoner in such case has to undergo the full period of sentence (unless remitted). Whereas, in the case of furlough, the sentence is not



suspended during the period the convict is released. Thus, even though the accused is released on furlough, such period of release is also counted for the purpose of sentence.

43. Rule 1209 of the Rules, however, clarifies that a convict will not be granted regular parole where an appeal against conviction is pending before High Court and the accused can seek appropriate orders from the High Court.

44. Even though both Parole and Furlough grants temporary relief to the convicts in the form of temporary release from prison as a progressive measure of correctional services and is aimed as an opportunity for a prisoner to maintain familial relations and to act as a motivation for maintaining good conduct while in prison, the basic difference between them is that Parole entails suspension of sentence during the period of release whereas in Furlough the sentence continues to run during the period of release. The Hon'ble Apex Court in the case of *Asfaq v. State of Rajasthan & Ors.: (2017)15 SCC 55*; has summarized the difference between parole and furlough which reads as under:

“16. This Court, through various pronouncements, has laid down the differences between parole and furlough, few of which are as under:

- (i) Both parole and furlough are conditional release.*
- (ii) Parole can be granted in case of short-term imprisonment whereas in furlough it is granted in case of long-term imprisonment.*
- (iii) Duration of parole extends to one month whereas in the case of furlough it extends to fourteen days maximum.*
- (iv) Parole is granted by Divisional Commissioner and furlough is granted by the Deputy Inspector General of Prisons.*



(v) For parole, specific reason is required, whereas furlough is meant for breaking the monotony of imprisonment.

(vi) The term of imprisonment is not included in the computation of the term of parole, whereas it is vice versa in furlough.

(vii) Parole can be granted number of times whereas there is limitation in the case of furlough.

(viii) Since furlough is not granted for any particular reason, it can be denied in the interest of the society.”

Interpretation of Note 2 and whether application for Furlough can be considered when appeal is pending before Hon’ble Supreme Court

45. Before going into the question as to whether the word ‘High Court’ appearing in the of Chapter XIX of the Rules would also mean and include the Hon’ble Supreme Court or not, this Court will first have to examine as to whether the principles laid down by the Hon’ble Apex Court in *KM Nanavati (supra)* judgment, which are in the context of suspension of sentence / bail and are also applicable in the cases of furlough in view of the peculiar statutory scheme which exist in National Capital Territory of Delhi.

46. The Constitution Bench of the Hon’ble Apex Court in *K.M. Nanavati (supra)* was considering whether the powers conferred upon the Governor of State under Article 161 of the Constitution of India, impinges upon the judicial power of the Hon’ble Apex Court enshrined under Article 142 of the Constitution of India. The appellant, K.M. Nanavati, was convicted by the High Court and even before the appeal could be filed before the Hon’ble Apex Court, the Governor exercising power under Article 161 of the Constitution of India was pleased to suspend the sentence. The Hon’ble Apex Court, in such circumstances,



held that the order of Governor, granting suspension of sentence could only operate till such time the matter became sub-judice before the Hon'ble Apex Court. However, once the appeal is filed, it is for the Hon'ble Apex Court to pass such orders as it deems fit, as to whether the convict should be granted bail or his sentence is to be suspended or any further order as the Hon'ble Apex Court deems fit. The Governor has no power to grant the suspension of sentence during the period when the matter is sub-judice before the Hon'ble Apex Court.

47. The rationale of the rule incorporated in the Rules which disentitles a prisoner from filing application for grant of Parole originated rightly from the decision rendered by the Hon'ble Apex Court in *K.M. Nanavati (supra)*.

48. It is not in doubt that the authorities cannot be permitted to exercise the power of grant of parole when the Appellate Court is seized of the appeal. The same would amount to derogation of appellate powers of the Court. The grant of parole has an effect of suspension of sentence/ bail for the period such parole has been granted. Allowing such application during the pendency of the appeal would amount to derogation of appellate powers of the Court.

49. It has specifically been held that the Executive cannot be permitted to exercise such powers when the Court is seized of the matter in a statutory appeal and the same, if permitted, would be in derogation of the appellate powers of the Court and may lead to a conflict. When the Court is considering the appeal against the conviction, it also considers along with the appeal, application for interim suspension of sentence or bail if filed by a convict in a pending appeal. It is always open to the convict to seek suspension/bail from the



Court on the grounds as provided for regular parole. There is nothing in the Code of Criminal Procedure or otherwise in law, barring the appellate Court from granting interim bail or suspending the sentence on considerations as for parole. The power to suspend sentence, therefore, is available to the Appellate court when the Appeal is pending and the Executive is not allowed to abrogate such appellate powers of the courts.

50. However, as discussed above, there is a fundamental difference between parole and furlough. In case of furlough the sentence is not suspended during the period for which the prisoner is released. There is merit in the argument advanced by the learned counsel for the petitioners that the furlough does not, in any manner, suspend the sentence and is not in conflict with the judicial powers of the Court.

51. Furlough is a reward which is granted to the convict on his good conduct while in prison. The same is a manner of motivation for maintaining the good conduct and to remain disciplined in the prison. The same, however, is subject to the criteria as prescribed in the Rules. The Courts have repeatedly held that the convicts too must breathe fresh air for some time, provided they maintain good conduct during the incarceration and show a tendency to reform themselves. Thus, the redemption and rehabilitation of such prisoners for the good of the society must receive due weightage.

52. Since the period for which the furlough is granted, is included in the computation of the term of the imprisonment, the same, in no manner, in my opinion, has the effect of overreaching the jurisdiction of the Appellate Court. The jurisprudence as enunciated by the Hon'ble Apex Court cannot be applied in relation to furlough, since it does not



entail suspension of sentence and passing of any order of such grant either by the Executive or by the High Court and would not amount to derogation of power when the appeal is pending before the Hon'ble Apex Court.

53. A similar view was taken by the Bombay High Court in case of *Sharad Bhiku Marchande v. The State of Maharashtra and Other: 1990 SCC OnLine Bom 197*; and I concur with the same to that extent.

54. Therefore, the principle enumerated in the case of *K.M. Nanavati (supra)*, in my opinion, does not apply in relation to consideration of application for grant of furlough, in the absence of any rule to the contrary.

55. As noted above, though there is jurisprudential difference between parole and furlough, as enunciated in *Asfaq judgment (supra)*, if the statutory scheme of Chapter XIX of the Rules is closely examined, there appears to be no distinction in the manner of disposal of an application for parole and furlough where an appeal preferred by the convict against his order of conviction is pending before the High Court.

56. Perusal of Rule 1209 and Note 2 of Rule 1224 of the Rules, reveal that under both the Rules with regard to consideration of Parole or of Furlough respectively, if an appeal has been preferred by the convict and the same is pending before the High Court then by operation of the statutory mandate, the executive authorities lose their jurisdiction to either grant parole or furlough to the convict and the accused is conferred with the remedy to approach the High Court to seek appropriate orders with respect to their application for Furlough or



Parole. Rule 1209 of the Rules mandates that the parole will not be granted “*since the convict can seek appropriate orders from the High Court*” and in case of Furlough, Note 2 to Rule 1224 of the Rules, prescribes that in case of pendency of an appeal against the conviction “*furlough will not be granted and it would be open to the convict to seek appropriate directions from the court*”.

57. Thus in both the cases of furlough and parole, where an appeal of the convict is pending before the appellate court, the Rules, has taken away the jurisdiction of the executive to consider the same and has vested the same upon the High Court where the appeal of the convict is pending consideration.

58. Insertion of Note 2 to Rule 1224 of the Rules, is a stark departure from the statutory scheme prevailing in the other states and is peculiar to the National Capital Territory of Delhi. For example, State of Maharashtra as is apparent from perusal of the judgment rendered by the Bombay High Court in *Sharad Bhiku Marchande (supra)*. Therefore, by inserting Note 2 to Rule 1224 of the Rules, legislature has taken a conscious decision to take away the jurisdiction vested in executive to even consider the application for furlough when the appeal of the convict is pending before the High Court and has made it at par with the statutory treatment which has to be meted to a convict who has applied for parole and where his appeal is pending before the High Court. Thus, in the opinion of this court Note 2 to Rule 1224 of the Rules, is manifestation of the legislature incorporating the principles of derogation of power enunciated in *K.M. Nanavati (supra)*.

59. Therefore, even though the furlough does not amount to any suspension of sentence, with the incorporation of Note 2 to Rule 1224,



the consideration of any application for grant of furlough by the executive would, in my opinion, amount to derogation of the powers of the Appellate Court.

60. Thus, having held that the principles of derogation of appellate powers as enunciated by the Hon'ble Apex Court in *K.M. Nanavati (supra)*, is applicable in cases of furlough which are to be considered under Note 2 to Rule 1224 of the Rules, I would now proceed to examine whether the term 'High Court' employed in Note 2 to Rule 1224 of the Rules would also mean to include Supreme Court of India or not?

61. In this context it is vehemently argued by the learned counsel for the Petitioners that relevant rule, that is, Note 2 to Rule 1224 of the Rules, refers to pending appeal before 'High Court', the language is clear and unequivocal and, hence, should be read literally. It is therefore contended that the appeal in the present case being pending in the Hon'ble Supreme Court should not bar the Executive or the High Court from considering the applications for grant of furlough. Alternately, it has been contended that since Note 2 to Rule 1224 of the Rules prescribes the forum of 'High Court' to consider the application for furlough, therefore, notwithstanding the pendency of the appeal from an order of conviction by the High Court before the Hon'ble Supreme Court, the High Court under Note 2 to Rule 1224 of the Rules, would possess the requisite jurisdiction to decide the application for furlough. The principle on which such an argument is premised appears to this Court to be the principle enunciated by the Apex Court that 'when a statute creates a right and provides a forum for adjudication of such rights, remedy has to be sought only from that forum and none other'.



62. In the opinion of this court, though Note 2 to Rule 1224 of the Rules, prescribes ‘High Court’ as the forum to consider the application of furlough, however, the said forum of ‘High Court’ is prescribed only in the context of High Court being an Appellate Court. This becomes clear from the language employed by the legislature in Note 2 to Rule 1224 which states “*if an appeal of a convict is pending before the High Court furlough will not be granted and it would be open to the convict to seek appropriate direction from the court*”. Thus, in my opinion the designation of forum of “High Court” in Note 2 to Rule 1224 of the Rules is only in the context of an appellate court and none other.

63. Further, the High Court under the Constitutional Scheme of India is not the final court and an appeal from its order of conviction lies to the Hon’ble Apex Court which is the final court of the land. Also, it is well settled law that an appeal is a continuation of the original or intermediate proceedings. Once a superior court admits an appeal, it exercises all the powers as are statutorily vested in the courts below for the reason that all the proceedings of the courts below get merged with the appeal and all the powers of the subordinate court gets vested in the appellate Court.

64. Thus, where an appeal from an order of conviction passed by the High Court has been preferred by the convict before the Hon’ble Apex Court and the same is pending before it, then *ipso jure*, the word High Court as appearing in the Note 2 to Rule 1224 of the Rules, would mean and include Supreme Court being the appellate court before which the appeal of the convict is pending. In such situation any direction for



furlough as contemplated under Note 2 to Rule 1224 of the Rules would have to be necessarily be taken from the Hon'ble Apex Court.

65. If the argument advanced by the Learned counsel for the Petitioners is accepted, then that would lead to a situation where the application for furlough will not be entertained by the Executive if the appeal against the conviction is pending before the High Court but such application will be considered in case of pending appeal before the Hon'ble Apex Court and further High Court would have exclusive jurisdiction to entertain the application for furlough, irrespective of the fact that whether the appeal of the convict is pending before it or before the Hon'ble Apex Court. That, in my opinion, would lead to an absurdity.

66. The intention of the framers is apparent from the bare perusal of the Rules that the application of furlough will not be entertained in cases where appeal against conviction is pending. The power to consider the application for grant of furlough, thus, has been statutorily been vested upon the appellate court which in my opinion can be either the High Court or the Supreme Court.

67. Any other interpretation, in my opinion will lead to absurdity and anomalous results, which cannot be said to be the intent of the legislature and certainly no such absurd and anomalous results can be arrived at by way of an interpretative process adopted by the Court.

68. It is a settled law that the provisions are to be construed in reference to the context in which it is being drafted. The Courts are within their powers to ascertain the intention of the draftsmen and does not have to merely look at the words used but has to interpret the same



by looking at the entire statute. If the literal interpretation gives rise to an anomaly or absurdity, the same has to be avoided.

69. Further, the statute has to be read in a reasonable manner by the Court by placing itself in the chair of a reasonable legislature / author. [Ref: *New India Assurance Company Ltd. v. Nusli Neville Wadia and Another* : (2008) 3 SCC 279]. At the same time, the Court is required to interpret the provision in a manner to avoid absurd, unworkable, inconsistent or impracticable results.

70. Therefore, in my opinion, Note 2 of Rule 1224 of the Rules, which refers “High Court” has to be read to also mean and include “Supreme Court”.

71. It is also significant to note that such rule which prevents jail authorities from considering the application pending appeals to High Court exists both in relation to Parole and Furlough. Rule 1209 of the Rules disentitles the convict of regular Parole in case appeal is pending before the High Court. The refusal of parole on the ground of pending appeal before the Hon’ble Apex Court even though the rule envisages such refusal only in case the appeal is pending in the High Court came up for consideration before this Court in the case of *Basant Vallabh v. State*: 2020 SCC OnLine Del 723. The coordinate bench of this Court, dismissed the petition on the ground that the appeal was pending consideration before the Hon’ble Apex Court and any such grant would amount to derogation of powers. In my opinion, the ratio laid by the coordinate bench of this Court in *Basant Vallabh v. State* (*supra*) will squarely apply to the case in hand and any exercise of powers under Note 2 to Rule 1224 of the Rules by this Court for the purpose of grant of furlough, pending an appeal before the Hon’ble Apex Court, would



amount to derogation of appellate powers of the Apex Court, which precisely has been frowned upon the Constitution Bench of the Apex Court in *K.M. Nanavati (supra)*.

72. Further, strong reliance has been placed on behalf of learned counsel for the petitioners on the judgment passed by the Bombay High Court in the case of *Sharad Bhiku Marchande v. The State of Maharashtra and others : 1990 SCC OnLine Bom 197*.

73. In the said case, the petitioner's application for grant of furlough was rejected on the ground that the appeal challenging the order of conviction is pending in the Hon'ble Apex Court.

74. The Bombay High Court, after going through the Prison Rules applicable in State of Maharashtra in relation to the grant of furlough, came to a conclusion that the petitioner was entitled to apply for furlough despite the pendency of its appeal before the Hon'ble Apex Court.

75. The judgment passed by the Bombay High Court, in my opinion, does not advance the case of the petitioner.

76. No rule which is *pari materia* to the rule, that is, Note 2 to Rule 1224 of the Rules, applicable in the present case, was pointed out to be existing in Bombay Prison Rules. From the perusal of the judgment passed by the Bombay High Court it is apparent that no rule which bars the grant of furlough when the appeal is pending before the High Court was in consideration or was on the statute books.

77. I, therefore, agree with the decision of the Bombay High Court to the extent that in the absence of any such rule, the authorities ought not to have dismissed the application for furlough for the reason of pendency of appeal before the Hon'ble Apex Court. However, no relief



to the petitioners can be given in the present case based on the aforesaid decision of the Bombay High Court due to difference in the statutory scheme existing in the two states.

Furlough, not an absolute right

78. Learned Amicus Curiae is right in contending that the furlough is not an absolute legal right. The prisoner can claim release on furlough provided the necessary requirements provided in the rules are complied with. Since such right of release is claimed under the Rules, necessary requirements under the rules have to be adhered to. The Rules envisage a degree of discretion which can be exercised by the authorities while deciding an application for grant of furlough. The Rules specifically provides that in case an appeal of a convict is pending before the High Court, the furlough will not be granted and it will be open for the convict to seek appropriate directions from the Court.

79. As discussed above, Note 2 of Rule 1224 of the Rules which refers 'High Court' has to be read to also include 'Supreme Court'. Therefore, the respondent, to that extent, is not wrong in rejecting the applications of the petitioners for grant of furlough when the appeal against the conviction is pending before the Hon'ble Apex Court.

Is Note 2 to Rule 1224 in the Delhi Prison Rules, 2018 in violation of Article 14 and 21 of the constitution of India

80. Even though, no prayer is sought in the writ petitions, challenging the validity of Note 2 to Rule 1224 of the Rules. However, during the course of arguments, the questions were framed on 02.12.2022 with the consent of the parties which have an effect of



declaration of Note 2 to Rule 1224 of the Rules as ultra vires to Articles 14 and 21 of the Constitution of India. If the arguments advanced on behalf of petitioner are accepted, the same would have an effect of declaration of Note 2 as ultra vires and the same would have to be struck down. However, as per Clause (i) of sub-rule (xviii)(a) of Part B of Chapter 3 of the High Court Rules & Orders Volume V, any challenge to the constitutionality or any prayer for striking down of Rule 1224 of the Rules, is required to be placed before the Hon'ble Division Bench and this court in exercise of powers vested under Article 226 of the Constitution of India, cannot entertain the said issue.

In view of the above, the issues framed in order dated 02.12.2022 are answered as follows;

Issue A.

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

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



be applicable with full vigour, as in case of Note 2 to Rule 1244 of the Rules.

Issue B.

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

Issue D.

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

Issue C, E, F & G



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

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

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

JULY 3, 2023

SK / KDK / RS / HK / UG / "SS"

AMIT MAHAJAN, J

अत्यमेव जयते