

WWW.LIVELAW.IN
(211) IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRWP-2526-2021
Reserved on: 27.01.2022
Pronounced on: 27.01.2022

Neha

... Petitioner

Versus

State of Haryana & another

... Respondents

**CORAM: HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASHI
HON'BLE MR. JUSTICE JASJIT SINGH BEDI**

Present: Mr. Baldev Singh, Advocate for the petitioner.

Mr. Ankur Mittal, Addl. Advocate General, Haryana.

(Through Video Conferencing)

JASJIT SINGH BEDI, J.

The prayer in the present petition filed by Neha W/o Gaurav @ Sonu Kataria is for the grant of parole to her convict husband to enable them to have conjugal relations for procreation with an alternative prayer to allow them to procreate/maintain conjugal relation within the jail premises.

The brief facts of the case are that the husband of the petitioner namely Gaurav @ Sonu Kataria was convicted in FIR No.298 dated 27.07.2016 registered under Sections 302, 307, 34 of IPC and Section 25 of the Arms Act at Police Station Rajendra Park, Gurugram vide judgment dated 31.05.2018 and sentenced to life imprisonment.

The said Gaurav @ Sonu Kataria was also convicted in FIR No.642 dated 16.07.2016 registered under Sections 392/34/120-B IPC and 25 of Arms Act, at Police Station City Gurugram, District Gurugram vide judgment

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dated 22.01.2020 and sentenced to life imprisonment till the remainder of his life without remission.

The petitioner got married to the said Gaurav @ Sonu Kataria on 17.04.2016 and on 10.08.2016, the husband of the petitioner was arrested and has been in custody ever since.

The application was moved for parole for consummation of the matrimonial relationship on 19.11.2020 and the same was rejected by respondent No.2 i.e. Jail Superintendent, District Jail, Gurugram vide order dated 09.12.2020 (Annexure P-2). As per the impugned order, the husband of the petitioner came under the hardcore criminal category and therefore was not entitled to grant of parole in terms of The Haryana Good Conduct Prisoners (Temporary Release) Amendment Act, 2013, keeping in view The Haryana Good Conduct Prisoners (Temporary Release) Amended Rules, 2015.

The petitioner has challenged the aforementioned order dated 09.12.2020 (Annexure P-2) by way of filing of the present petition.

The primary contention of the petitioner's counsel was that in terms of the judgment of this Court in "**Jasvir Singh & Anr. Vs. State of Punjab & others, 2015 (1) RCR (Criminal) 509**" a question was framed as to whether penological interest of the State permits or ought to permit creation of facilities for the exercise of right to procreation during incarceration and whether the said right is termed as 'right to life' and 'personal liberty' guaranteed under Article 21 of the Constitution of India. The *prima facie*, opinion of this Court at the time of preliminary hearing on 17.03.2021 was that the right to life and liberty under Article 21 extended to the right of the petitioner to procreate through conjugal

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relations with her convict husband. Therefore, notice of motion was issued on 17.03.2021, recording these reasons.

The matter was taken up from time to time and ultimately, a reply was submitted by the Additional Chief Secretary to Government of Haryana, Jails Department on 30.09.2021. The contention of the State was that the husband of the petitioner being a hardcore prisoner with multiple convictions and pending FIRs was not entitled to the relief as prayed for. The State further contended that in terms of Para 93 of the judgment in *Jasvir Singh's* case (supra), the right available for conjugal visit of a married and eligible convict was subject to those conditions as prescribed under the Statute and that in terms of the directions issued in *Jasvir Singh's* case (supra), the State of Haryana had constituted a Jail Reforms Committee on 27.09.2021. Thus, it was contended that the husband of the petitioner could avail parole for the purpose sought in terms of Para 93 subject to the conditions of The Haryana Good Conduct Prisoners (Temporary Release) Amendment Act, 2013 or he could await the instructions to be issued by the Jail Reforms Committee and could thereafter apply, if so eligible, as per the Scheme to be formulated by the Jail Reforms Committee. Thus, the State contended that the right to maintain conjugal relations by a convict was not an absolute right.

Before we proceed in the matter, it would be relevant to examine the judgment of this Court in *Jasvir Singh's* case (supra). In the said case (supra), the husband and wife were convicted for offences under Sections 302/364-A/201/120-B i.e. kidnapping and murder for which they were awarded the death penalty, confirmed by this Court and the Supreme Court had also dismissed their appeal but commuted the death sentence of the wife to life

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imprisonment. The petitioners i.e. husband and wife sought enforcement of their perceived right to have conjugal relations and procreate within the jail premises for the sake of progeny. The relevant paragraphs of the said judgment are reproduced hereinbelow:-

“(9) The following, amongst others, are the issues which have emerged for determination:-

- i. Whether the right to procreation survives incarceration, and if so, whether such a right is traceable within our Constitutional framework?*
- ii. Whether penological interest of the State permits or ought to permit creation of facilities for the exercise of right to procreation during incarceration?*
- iii. Whether ‘right to life’ and ‘personal liberty’ guaranteed under Article 21 of the Constitution include the right of convicts or jail inmates to have conjugal visits or artificial insemination (in alternate)?*
- iv. If question No.(iii) is answered in the affirmative, whether all categories of convicts are entitled to such right(s)?*

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(93) It is directed that until the State of Punjab effectively addresses the issues either by way of appropriate legislation or through policy framework, the expression “any other sufficient cause” contained in Section 3(1)(d) of the 1962 Act shall treat the conjugal visits of a married and eligible convict as one of the valid and sufficient ground for the purpose of his/her temporary release on ‘parole’ or ‘furlough’ though subject to all those conditions as are prescribed under the Statute.

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(95) For the reasons assigned above, I sum up my conclusions and answer the questions as formulated in Para 9 of this order, in the following terms.-

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i. Question - (i) Whether the right to procreation survives incarceration, and if so, whether such a right is traceable within our Constitutional framework?

Yes, the right to procreation survives incarceration. Such a right is traceable and squarely falls within the ambit of Article 21 of our Constitution read with the Universal Declaration of Human Rights.

ii. Whether penological interest of the State permits or ought to permit creation of facilities for the exercise of right to procreation during incarceration?

The penological interest of the State ought to permit the creation of facilities for the exercise of right to procreation during incarceration, may be in a phased manner, as there is no inherent conflict between the right to procreate and incarceration, however, the same is subject to reasonable restrictions, social order and security concerns;

iii. Whether 'right to life' and 'personal liberty' guaranteed under Article 21 of the Constitution include the right of convicts or jail inmates to have conjugal visits or artificial insemination (in alternate)?

'Right to life' and 'personal liberty' guaranteed under Article 21 of the Constitution include the right of convicts or jail inmates to have conjugal visits or artificial insemination (in alternate). However, the exercise of these rights are to be regulated by procedure established by law, and are the sole prerogative of the State.

iv. If question No.(iii) is answered in the affirmative, whether all categories of convicts are entitled to such right(s)?

Ordinarily, all convicts, unless reasonably classified, are entitled to the right to procreation while incarcerated. Such a right, however, is to be regulated as per the policy established by the State which may deny the same to a class or category of convicts as the aforesaid right is not an absolute right and is subject to the penological interests of the State.

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(96) In the light of the above discussion, the instant writ petition is disposed of with the following directions:-

i. the State of Punjab is directed to constitute the Jail Reforms Committee to be headed by a former Judge of the High Court. The other Members shall include a Social Scientist, an Expert in Jail Reformation and Prison Management amongst others;

ii. the Jail Reforms Committee shall formulate a scheme for creation of an environment for conjugal and family visits for jail inmates and shall identify the categories of inmates entitled to such visits, keeping in mind the beneficial nature and reformatory goals of such facilities;

iii. the said Committee shall also evaluate options of expanding the scope and reach of 'open prisons', where certain categories of convicts and their families can stay together for long periods, and recommend necessary infrastructure for actualizing the same.

iv. the Jail Reforms Committee shall also consider making recommendations to facilitate the process of visitations, by considering best practices in the area of prison reforms from across jurisdictions, with special emphasis on the goals of reformation and rehabilitation of convicts and needs of the families of the convicts;

v. the Jail Reforms Committee shall suggest ways and means of enhancing the facilities for frequent linkage and connectivity between the convict and his/her family members;

vi. the Jail Reforms Committee shall prepare a long-term plan for modernization of the jail infrastructure consistent with the reforms to be carried out in terms of this order coupled with other necessary reforms;

vii. the Jail Reforms Committee shall also recommend the desired amendments in the rules/policies to ensure the grant of parole, furlough for conjugal visits and the eligibility conditions for the grant of such relief;

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viii. *the Jail Reforms Committee shall also classify the convicts who shall not be entitled to conjugal visits and determine whether the husband and wife who both stand convicted should, as a matter of policy be included in such a list, keeping in view the risk and danger of law and security, adverse social impact and multiple disadvantages to their child;*

ix. *the Jail Reforms Committee shall make its recommendations within one year after visiting the major jail premises and it shall continue to monitor the infrastructural and other changes to be carried out in the existing jails and in the Prison Administration System as per its recommendations.*

x. *the Jail Reforms Committee shall be allowed to make use of the services of the employees and officers of the State of Punjab, who is further directed to provide the requisite funds and infrastructure including proper office facilities, secretarial services, travel allowances and all necessary amenities and facilities, as required by the Jail Reforms Committee.”*

[emphasis supplied]

In a somewhat similar situation Mr. Ankur Mittal, Additional Advocate General, Haryana appearing for the respondents has brought to the notice of this Court a Judgment dated 20.01.2022 of the Full Bench of the High Court of Judicature at Madras in “**Meheraj Vs. State of Tamil Nadu & others, H.C.P. (MD) No.365 of 2018**” of which the relevant paragraphs are reproduced hereinbelow:-

*“A Division Bench passed an order on 25.2.2019 referring the following two questions for consideration by a Larger Bench:
(i) Whether the denial of conjugal rights to a convict prisoner would amount to denial of such a right to his/ her spouse and thereby, violative of Article 21 of the Constitution of India?
and*

(ii) Whether the State can be directed to favourably consider the request of a convict prisoner for emergency leave or ordinary leave for the purpose of having conjugal relationship with his/her spouse, though the Tamil Nadu Suspension of Sentence Rules, 1982 do not envisage this?

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20. The question for consideration would be as to whether the wife of the convict can seek leave to enable her and the convict husband undergo infertility treatment to beget a child and whether it would fall under the category of extraordinary reasons.

22. We find that the prayer of the petitioner to undergo infertility treatment in a circumstance when the convict has no child from the wedlock forms an extraordinary reason for grant of leave. In view of the above, we find that the case of the petitioner was falling under Rule 20(vii) of the 1982 Rules. It is, however, necessary to clarify that the Rule aforesaid cannot be invoked in all situations. It can be granted to undergo infertility treatment, that too, for a convict having no child from the wedlock. If the convict has child or children from the wedlock, then to seek leave for infertility treatment or on similar ground would not fall in the definition of "extraordinary reasons". It is also that leave cannot be sought repeatedly on one and the same ground under the category of extraordinary reasons. If leave for having conjugal relationship is recognized to be a right under Article 21 of the Constitution of India, the prayer of similar nature can be made by the accused or his/her spouse time and again to have conjugal relationship. The observation aforesaid has been made in reference to the provisions of the Code of Criminal Procedure as well as the Prisons Act, 1894. A convict cannot enjoy all the liberties as are available to a common person, otherwise there would no difference between a law-abiding citizen and a law-violating prisoner. The aforesaid would not

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mean that prisoners do not have any right or liberty, rather we had recorded our finding that the 1982 Rules take care of Article 21 of the Constitution of India. A word of caution in regard to conjugal rights has been put so that the liberty, if any, may not be misused by the convict or the spouse, rather it is used for the purpose it is meant or required.

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24. In view of the above, we need to answer the questions framed by the Division Bench. A conjugal right in common parlance is for maintaining marital status by husband and wife. The leave for a specific purpose which may be for undergoing infertility treatment, as such, may not be considered for having conjugal relationship in common parlance, but for extraordinary reason, thus we can safely hold that the 1982 Rules itself protect the rights of the prisoner guaranteed under Article 21 of the Constitution of India to the extent it is required.

25. If we hold that deprivation of conjugal right to a convict offends Article 21 of the Constitution of India, it would mean to give right to a convict for conjugal right, which in common parlance is for maintaining the marital relationship of husband and wife in continuity with companionship. The same cannot be permitted for a convict, as a difference has to be made between the law abider and violator. If the case in hand is also taken note of, the petitioner's first petition was allowed with grant of leave for two weeks for undergoing infertility treatment and immediately after availing it, the second petition was filed in continuity. The facts aforesaid cannot be ignored by the court because after the judgment by the court holding conjugal right to be a fundamental right, the convict would come out with an application to secure his fundamental rights guaranteed under Article 21 of the Constitution of India without any restraint and, therefore, we need to take a cautious decision so that the ratio propounded by us is used

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for the purpose and, accordingly, we answer the questions in the following terms:

(i) The denial of conjugal relationship of the convict for specific purpose may amount to denial of the fundamental right guaranteed under Article 21 of the Constitution of India. The specific purpose may be infertility treatment or some similar reason, but it should not be construed to be a fundamental right for having conjugal relationship as a course. This would make a difference between the law abider and violator in regard to rights guaranteed under Article 21 of the Constitution of India.

(ii) The State can be directed to consider the request of convict for emergency leave or ordinary leave for the purpose given while answering the question No.(i). The emergency leave or ordinary leave would be for the purpose given under the 1982 Rules and if any extraordinary reason exist, then the State need to consider the aforesaid as and when a request is made by the convict or his relative for grant of ordinary leave for extraordinary reasons. The emergency leave or ordinary leave cannot be claimed as a right for having conjugal relationship without an exceptional reason. This demarcation is necessary as the curtailment of some rights of a prisoner on account of his conviction to the extent indicated above does not offend Article 21 of the Constitution of India.”

[emphasis supplied]

Clearly, the State of Haryana has constituted the Jail Reforms Committee on 27.09.2021 after notice had been issued by this Court and as such the Committee would make its recommendation within one year after visiting the major jail premises. However, Para 93 of the judgment in *Jasvir Singh's* case (supra) makes it apparent that the right of a convict to have conjugal relations is subject to all those conditions as prescribed under the Statute. Therefore, the

right is not an absolute one and is subject to 'reasonable restrictions', 'social order', 'security concerns', 'good behaviour' in the jail etc.

The Full Bench of High Court of Judicature at Madras has also quite categorically opined that the right to have conjugal relations is not an absolute right and what is available to a convict is his right to obtain infertility treatment. It has gone on to state that a convicted person cannot enjoy the same rights those available to a common man because there must be a distinction drawn between a law-abiding citizen and law-violating prisoner.

We may, however, add that the right of convict to avail parole would be governed by Para 93 of the Judgment in *Jasvir Singh's* case (supra) upto the time the Jail Reforms Committee does not formulate a scheme for creation of an environment for conjugal and family visit for jail inmates in the light of the instructions dated 28.09.2021.

The petitioner/her husband are, therefore, at liberty to apply for parole in terms of the instructions dated 28.09.2021 which, in turn, emanate from Para 93 of *Jasvir Singh's* case (supra) and if, they so apply for the same, the application shall be considered in accordance with the provisions contained in Section 3(1)(d) of the 1962 Act subject to those conditions as prescribed under the Statute. In the alternative, the petitioner or her convict husband could await the formulation of a Policy by the Jail Reforms Committee, in terms of the order dated 27.09.2021 (R-1) and apply thereafter. This we say in the light of the stand taken by the State in their reply and the fact that the prayer for parole was rejected by the authority on 09.12.2020 (Annexure P-2) which was prior to issuance of instructions dated 28.09.2021 (Annexure R-3).

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We may also add here that the Jail Reforms Committee may consider the judgment of the Hon'ble Madras High Court (supra) while making its recommendations.

We direct Shri Ankur Mittal, Additional Advocate General, Haryana to provide the copy of judgment of the Hon'ble Madras High Court (supra) to the Jail Reforms Committee as also to the Additional Chief Secretary to Government of Haryana, Jails Department, Haryana Civil Secretariat, Chandigarh for necessary action.

In view of the aforesaid discussion, we dismiss this petition with the observations, as aforesaid.

(AUGUSTINE GEORGE MASHI)
JUDGE

(JASJIT SINGH BEDI)
JUDGE

27.01.2022
JITESH

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No