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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 29th April, 2025
Date of Decision: 15th July, 2025

\+ **CRL.REF. 1/2025 in W.P.(CRL) 697/2022**

BUDHI SINGH .....Petitioner

Through: Mr. Mohit Mathur, Sr. Adv. With Mr. Aman Panwar, Mr. Akash Panwar & Mr. Abhinav Kumar, Advs.
Mr. Sarthak Maggon, Advocate (M:7045645395).

versus

STATE OF NCT OF DELHI .....Respondent

Through: Mr. Rahul Tyagi, ASC (Crl.) with Mr. Jatin, Mr. Mathew M. Philip & Mr. Sangeet Sibou, Advs. for State.

WITH

\+ **CRL.REF. 2/2025 in W.P.(CRL) 1044/2022**

SURESH CHAND SHARMA .....Petitioner

Through: Mr. Rohan J. Alva, (DHCLSC) with Mr. Anant Sanghi, Adv. (M: 9810365703)

versus

STATE OF NCT OF DELHI .....Respondent

Through: Mr. Rahul Tyagi, ASC (Crl.) with Mr. Jatin, Mr. Mathew M. Philip & Mr. Sangeet Sibou, Advs. for State.

WITH

\+ **CRL.REF. 3/2025 in W.P.(CRL) 1067/2022**

JAI PAL SINGH .....Petitioner

Through: Mr. Arjun Malik, Adv. (M: 9873503295)

versus

STATE OF NCT OF DELHI .....Respondent
Through: Mr. Rahul Tyagi, ASC (Crl.) with Mr. Jatin, Mr. Mathew M. Philip & Mr. Sangeet Sibou, Advs. for State.

WITH

+ **CRL.REF. 4/2025 in W.P.(CRL) 997/2022**

BASANT VALLABH .....Petitioner

Through: Mr. Zeeshan Diwan & Mr Harsha & Mr. Akshat Jain, Advs. (M: 9911627354)

versus

STATE OF NCT OF DELHI .....Respondent
Through: Mr. Rahul Tyagi, ASC (Crl.) with Mr. Jatin, Mr. Mathew M. Philip & Mr. Sangeet Sibou, Advs. for State

WITH

+ **CRL.REF. 5/2025 in W.P.(CRL) 2835/2024**

RAMESH @ GUDDU .....Petitioner
Through: Mr. Arjun Malik, Adv.
versus

STATE OF NCT OF DELHI .....Respondent
Through: Mr. Rahul Tyagi, ASC (Crl.) with Mr. Jatin, Mr. Mathew M. Philip & Mr. Sangeet Sibou, Advs. for State. (M:9818460146) with SI Sahil PS Binda Pur.

WITH

+ **CRL.REF. 6/2025 in W.P.(CRL) 299/2024**

LOKESH .....Petitioner
Through: Ms. Tanya Agarwal & Mr. Gaurav Kalra, Advs. (M: 7988916573)

versus

STATE (G.N.C.T. OF DELHI) .....Respondent
Through: Mr. Rahul Tyagi, ASC (Crl.) with Mr. Jatin, Mr. Mathew M. Philip & Mr.

Sangeet Sibou, Advs. for State with SI Raj Kumar PS Lodhi Colony.

\+ **CRL.REF. 7/2025 in W.P.(CRL) 1861/2023**

KARAMBIR .....Petitioner

Through: Mr. Rohan J. Alva, (DHCLSC) with Mr. Anant Sanghi, Adv.

versus

STATE OF NCT OF DELHI .....Respondent

Through: Mr. Amol Sinha, ASC, Criminal with Mr. Kshitiz Garg, Mr. Nitish Dhawan, Mr. Ashvini Kumar and Ms. Sanskriti Nimbekar, Advs.
Mr. Rahul Tyagi, ASC (Crl.) with Mr. Jatin, Mr. Mathew M. Philip & Mr. Sangeet Sibou, Advs. for State

WITH

\+ **CRL.REF. 8/2025 in W.P.(CRL) 18/2024**

KISHAN LAL .....Petitioner

Through: Mr. Biswajit Kumar Patra, Adv.

versus

STATE .....Respondent

Through: Mr. Rahul Tyagi, ASC (Crl.) with Mr. Jatin, Mr. Mathew M. Philip & Mr. Sangeet Sibou, Advs. for State.
with Insp. Jitender Rana PS Civil Lines and SI Mohit PS Alipur.

WITH

\+ **CRL.REF. 9/2025 in W.P.(CRL) 2257/2024**

HAMBIR SINGH .....Petitioner

Through: Mr. Rohan J. Alva (DHCLSC) with Mr. Anant Sanghi, Adv.

versus

STATE OF NCT OF DELHI .....Respondent

Through: Ms. Rupali Bandhopadhya, ASC with Mr. Abhijeet Kumar, Adv. for State.

\+ **CRL.REF. 10/2025 in W.P.(CRL)2363/2024 & CRL.M.A.23063/2024**

INDERJEET .....Petitioner

Through: Mr. Archit Upadhyay, Adv. (M: 9990323136)

versus

STATE NCT OF DELHI .....Respondent

Through: Ms. Rupali Bandhopadhya, ASC with Mr. Abhijeet Kumar, Adv. for State.
Insp. Rahul Roshan and SI Mahesh Kumar PS Vasant Vihar.

AND

\+ **CRL.REF. 11/2025 in W.P.(CRL) 4080/2024**

YOGESH SHARMA @YOGI .....Petitioner

Through: Mr. Siddharth Yadav, Adv. (M: 9899284083)

versus

STATE (NCT OF DELHI) .....Respondent

Through: Ms. Rupali Bandhopadhya, ASC (Crl.) for the State with Mr. Abhijeet Kumar, Advocate.
ASI Om Prakash PS Sarai Rohilla.

CORAM:
JUSTICE PRATHIBA M. SINGH
JUSTICE AMIT SHARMA

JUDGMENT

`Can Furlough applications be considered by the Executive during the pendency of Appeals before the Supreme Court?'

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, (for short, 'CrPC') on behalf of the captioned respective Petitioners who

seek furlough under the Delhi Prison Rules, 2018 (hereinafter referred to as 'Prison Rules') during the pendency of their appeals before the Hon'ble Supreme Court.

FACTUAL BACKGROUND

2. Petitioner, Budhi Singh in W.P.(CRL) 697/2022, Basant Vallabh in W.P.(CRL) 997/2022, Suresh Chand Sharma in W.P.(CRL) 1044/2022 and Jai Pal Singh in W.P.(CRL) 1067/2022 had preferred the present petitions seeking first spell of furlough under the Prison Rules from the competent authority which was rejected on the ground of pendency of their appeals before the Hon'ble Supreme Court in view of Note 2 to Rule 1224 of the Prison Rules. Their respective rejection orders were challenged by these petitioners by way of aforementioned writ petitions which were disposed of by learned Single Bench of this Court *vide* judgment dated 3rd July, 2023. Learned Single Bench framed various issues that had arisen in these matters and while disposing some of them referred remaining issues in the form of reference to the Division Bench. The issues framed by the learned Single Judge *vide* order dated 02nd December, 2022, reads thus: -

> *"1. From the preliminary arguments advance on behalf of the parties, following issues are framed:*
>
> *"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 SC112*** *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? "

3. Learned Single Judge *vide* order dated 3rd July, 2023, gave the following findings with respect to the aforesaid issues: -

***"Issue A:** The principle of derogation of power as per the decision of Supreme Court in **K.M. Nanavati v. The State of Bombay, AIR 1961 SC112,** would be applicable to Note 2 to Rule 1224 of Prison Rules.*
***Issue B:** The term "High Court" referred in Note 2 to Rule 1224 of Prison Rules 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: *Exercise of the plenary powers by the High Court under Article 226 to grant furlough to a prisoner during pendency of his appeal is not permissible in terms of Note 2 to Rule 1244 of the Prison Rules. Such exercise of powers would amount to derogation of appellate powers."*

4. After deciding the aforesaid issues, learned Single Judge, thereafter, with respect to issues C, E, F and G, passed the following directions: -

"*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."

5. Pursuant to the aforesaid reference order, certain more writ petitions raising similar issues were tagged with the said reference. It is noted that in ***W.P.(CRL) 2257/2024*** titled as "***Hambir Singh vs. State of NCT of Delhi"*** the Constitutional validity of Rule 1224 of the Prison Rules has also been challenged.

6. Two learned *Amicus Curiae* namely, Mr. Vivek Sood, Senior Advocate and Mr. V.P. Garg, Advocate, had been appointed to assist this Court.

SUBMISSIONS ON BEHALF OF THE PETITIONERS

W.P.(CRL) 697/2022

7. Mr. Mohit Mathur, learned Senior Counsel appearing on behalf of the petitioners submits as under:

- In view of the observation made in paragraph 85 of the reference order with regard to the validity of Rule 1224, which has to be considered by this Court, even the issues decided by the learned Single Judge would have to be reconsidered.
- The powers of the Constitutional Court under Article 226 of the Constitution of India is part of basic structure, and therefore, there cannot be a bar for a convict to approach this Court invoking writ jurisdiction by seeking judicial review of the order passed by the competent authority.
- Note 2 of the Rule 1224 of the Prison Rules only mentions that, 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.
- That there is a deliberate omission of the term "Supreme Court" in the said rules, and thus it cannot be read into the Rule.
- that under the Prison Rules reference to the 'High Court' or 'Supreme Court', separately or together have been made at various instances meaning thereby that at the time of framing of the Rules, the authority framing them was conscious of the fact that Special Leave Petitions and Special Leave to Appeal are two distinct categories. It was pointed out that reading of the Prison Rules would reflect that the 'High Court' and 'Supreme Court' have been addressed distinctively, and therefore,

reading 'Supreme Court' into the Note 2 to Rule 1224 of the Prison Rules would be contrary to the language of the Prison Rules itself.

- In view of the above, if an appeal is pending before the Supreme Court, the executive, *i.e.,* the Competent Authority or the High Court would not be barred from considering the grant of furlough. Reliance has been placed upon the decision of the Supreme Court in ***Atbir v. State (NCT of Delhi)***[1], to submit that principles governing furlough have been broadly interpreted and it was held in no certain terms that even when a convict is suffering a sentence for remainder of natural life, he cannot be barred from seeking furlough. The question as to whether furlough has to be granted or not would depend on facts of each case, however, the convicts whose appeal are pending before the Hon'ble Supreme Court cannot be held ineligible from seeking furlough from the competent authorities or by way of judicial review from this Court.
- Any restriction imposed on seeking furlough would be violative of fundamental rights including the right to life under Article 21 of the Constitution of India. Furlough being a reward for good conduct while serving the sentence, cannot be denied merely on the ground that an appeal is pending before the Hon'ble Supreme Court.
- That the standards and the parameters for grant of furlough are distinct and different and cannot be equated with those which apply for suspension of sentence pending appeal.
- In view of the above, the competent authority and this Court in exercise of its power of judicial review can consider granting furlough, even

[1] (2022) 13 SCC 96

during the pendency of the appeal before the Supreme Court of India of a convict.

W.P.(CRL) 997/2022

8. Mr. Zeeshan Diwan, learned counsel appearing on behalf of the petitioner appointed by DHCLSC has made the following submissions:

- The principle of 'derogation of power' as held in **K.M. Nanavati v. State of Bombay[2],** does not apply to furlough.
- The said principle would apply when executive powers are invoked to suspend or remit a sentence, thus, causing a conflict with the judicial power under Article 142 of the Constitution of India as held in paragraph 19 of the said judgment.
- Since furlough is neither suspension nor remission, the said principle would not apply. Reliance was placed on **Atbir *(supra)***, wherein the Supreme Court after interpreting the Prison Rules has held that remission cannot be a pre-requisite for obtaining furlough. It was observed in the said judgment that the convict is *"deemed to be serving the sentence"* even during the period of furlough. It was held that there is no reduction of sentence, and hence, there is no question of "remission" and hence, it was argued that grant of furlough would raise no possible or real conflict with Article 142 of the Constitution of India.
- that there is no ambiguity in Note 2 to Rule 1224 of the Prison Rules, as the mention of "High Court" (and no other Court) is clear and unequivocal and it is submitted that principle of interpretation that the literal rule of interpretation is the best test of construction unless it is

[2] (1961) 1 SCR 497

ambiguous is squarely applicable in the present circumstances. Reliance has been placed on **Sri Venkataramana Devaru v. State of Mysore**[3], **V. Jagannadha Rao v. State of A.P.**[4] and **B.N. Mutto v. T.K. Nandi (Dr.)**[5].

- That nothing prevented the authority from framing the Rules to include the words "Supreme Court" in Note 2 to Rule 1224 of the Prison Rules. It is pointed out that this becomes clear on bare perusal of the present Rules which repeatedly referred to an appeal filed in the Supreme Court wherein various provisions of the present Rules have been highlighted. It was submitted that even assuming that the admitted reference to the word "Supreme Court" is a drafting error, this Court cannot supply the *casus omissus*. Reliance is placed on **Padma Sundara Rao v. State of T.N.**[6], in support of this contention. It was submitted that if the word "Supreme Court" is supplied in Note 2 to Rule 1224 of the Prisons Rule, the same would lead to following illustrative anomalies: -

> *"a. Co-convicts would be treated differently based on whether one chooses to appeal and one does not.*
> *b. Convicts who appeal to Supreme Court will be discriminated based on the State where they are incarcerated. In case of transfer of a prisoner from Delhi to Bombay, he could avail the benefit of Furlough despite pendency of his appeal before the Supreme Court.*
> *c. The rule discourages right to appeal to the Supreme Court*
> *d. The rule is incongruous inasmuch as those convicts, whose appeals take a long time to be decided, are at a further disadvantage than those whose appeals are decided quickly.*

[3] 1958 SCR 895 (paragraph 25)
[4] (2001) 10 SC 401 (paragraph 18)
[5] (1979) 1 SCC 361 (paragraph 14)
[6] (2002) 3 SCC 533 (paragraph 15)

e. The rule also runs counter to Rule 1199 DPR 2018 which describes the meaning of furlough being an incentive and motivation for maintaining good conduct. The definition states that furlough is a release after a certain "qualified" number of years of incarceration, as defined further in Rule 1220.
Hence, the rules could never have envisaged a person who is ordinarily eligible in terms of rules 1220-1223, and not disentitled in terms of exceptions in Rule 1224, to have no right to furlough merely because they exercise their right to seek leave to appeal under Article 136 of the Constitution."

- That furlough is integral to the concept of reformation and is granted as a reward and incentive for good behaviour in prison. Thus, any interpretation of barring furlough to a convict during the pendency of an appeal in the Supreme Court would render Note 2 to Rule 1224 of the Prison Rules arbitrary and violative of Articles 14 and 21 of the Constitution of India.
- That furlough is granted by the competent authority and whose decision in case of non-granting of the same is always subject to judicial review under writ jurisdiction of this Court. It was argued that the convict's only remedy in such a scenario would be to come to this Court under Article 226 of the Constitution of India which is much wider in scope in this regard. Reliance was placed on **Bandhua Mukti Morcha v. UOI**[7], to contend that rather than directly applying to Hon'ble Supreme Court under Article 32 of the Constitution of India for enforcement of fundamental right, alternate efficacious remedy must be exhausted. Thus, the contention of the State that the High Court can only issue a

[7] (1984) 3 SCC 16

writ of *Mandamus,* and thus, akin to an appeal over the governmental order, and therefore, circumscribed by **Nanavati (*supra*)** is erroneous and misconceived.

- The High Court in its exercise of writ jurisdiction under Article 226 of the Constitution of India has power to correct the statutory bar which may violate a fundamental right or which may by its operation and interpretation lead the same to be *ultra vires* to the object of the statute itself. Reliance has been placed on ***Common Cause v. UOI*[8]**,** in this regard.
- Note 2 to Rule 1224 of the Prisons Rules is *ultra vires* the fundamental rights enshrined in the Constitution of India, since furlough is a privilege which is earned by way of good conduct, and a convict who is otherwise fully eligible for availing the same cannot be barred for the sole reason that his appeal is pending before the Supreme Court.
- That ousting furlough pending an appeal before the Hon'ble Supreme Court has no rational nexus with the object of furlough, which is to incentivise good conduct and reformation.

9. Learned counsel further drew the attention of this Court to amendment dated 16.04.2018 in Rule 4(11), Prisons (Bombay Furlough & Parole) Rules, wherein prior to amendment, it was provided that if an appeal is pending before higher forum the prisoner would not be entitled to be released on furlough. The said rule was deleted on 16.04.2018. The Hon'ble Bombay High Court in ***Tanaji Maruti Kolekar v. State of Maharashtra & Ors.*[9]**,** has categorically held that the condition restricting grant of furlough in cases where the appeal is

[8] (2018) 5 SCC 1
[9] 2018 SCC OnLine Bom 1146

pending before the higher forum has been deleted and prisoners were allowed to avail furlough. It is submitted that the deletion in the Bombay Prison Rules reflects the intention of the legislature in upholding furlough as a matter of an earned incentivised privilege, though not an absolute right to be availed, and therefore, the prison rules ought to be interpreted strictly, not to include "Supreme Court".

W.P.(CRL) 32/2023

10. This petition was dismissed a withdrawn as the petitioner's Special Leave Petition being ***SLP (Crl.) 5726/2019*** which was pending before the Hon'ble Supreme Court of India had been converted into criminal appeal *vide* order dated 05th September, 2023 and the petitioner was directed to be released on bail during the pendency of the appeal, and therefore, the aforesaid petition was dismissed as withdrawn. However, Mr. Shiv Chopra, learned counsel for the petitioner had placed on record written submissions raising the following arguments: -

- Note 2 Rule 1224 of the Prison is *ultra vires* to Article 14 of the Constitution of India as the concept of imprisonment in India not only aims to safeguard society from harmful actions of the convicted persons acting as a deterrent against future criminal acts but is also designed to facilitate the rehabilitation and reformation of the convict and furlough and parole play a critical role in the same. Reliance has been placed on ***Ashok Kumar v. State of NCT of Delhi***[10]**.** It is submitted that learned Division Bench of Bombay High Court in ***Sharad Bhiku Marchande v.***

[10] 2024 SCC OnLine Del 3297

***State of Maharashtra*[11], has held that petitioner is entitled to apply for furlough as per the rules despite pendency of his appeal before the Hon'ble Supreme Court.

- Grant of furlough by the High Court during pendency of an appeal in Supreme Court does not amount to derogation of power as the grant of furlough is neither a suspension nor remission of sentence and is therefore not in conflict with the judicial powers in any manner. The principle in ***K. M. Nanavati's* case *(supra)*** cannot be applied in relation to furlough as it would not entail suspension of sentence.
- Unlike parole, there is no provision or remedy equivalent to furlough provided in CrPC that can be sought by the prisoner during the pendency of an appeal. Further, it is submitted, from a bare perusal of the Rules, it is evident that the appellate authority for grant of furlough is the High Court and not the Supreme Court.
- **Statute to be interpreted strictly -** The language of Note 2 to Rule 1224 of the Prison Rules, is plain and unambiguous and it is not open for the authorities to read such limitations which the legislature has in its wisdom omitted. It is highlighted that in the present case the petitioner filed an SLP in the year 2019 and the same was allowed in the year 2023, *i.e.,* after 4 years of filing the same. During this period, the petitioner was deprived of his right to be released on furlough. It is noted that the principle behind grant of furlough was to enable the prisoner, an opportunity to break the monotony of imprisonment and to enable the convict to maintain ties with family and integration with society. The

[11] 1990 SCC OnLine Bom 197

Petitioner in the present case has spent almost his entire sentence in prison during the pendency of his appeal. Attention of this Court was drawn to various other Rules in Prison Rules to show that the words 'High Court' and 'Supreme Court' have been specifically used separately in the said Rules, and therefore, omission of the word 'Supreme Court' in Note 2 of Rule 1224 of the Prison Rules was deliberate.

- **Note (2) to Rule 1224 is violative of Articles 14 and 21 of the Constitution of India -** Not granting the prisoner furlough merely on the ground of pendency of appeal especially in a case where the prisoner has already served more than half of his sentence is violative of Articles 14 and 21 of the Constitution of India as the same creates a disparity between similarly placed people and differentiates solely on the basis of pendency of appeal, thereby demotivating prisoners to file an appeal. It is pointed out that it puts the prisoners challenging their conviction at a disadvantage in comparison to the prisoners who have acknowledged and accepted their conviction which is against the principles of Articles 14 and 21 of the Constitution of India.

W.P.(CRL) 1067/2022

11. Learned Counsel, Mr. Arjun Malik, appearing on behalf of the petitioner, with respect to issues C and E, has made the following submissions:

- That there cannot be any bar to entertain an application for grant of furlough, since it does not amount to suspension of sentence.
- Note 2 to Rule 1224 of the Rules, refers to "High Court" and not to "Supreme Court", and thus, there is no ambiguity in the said provision.

- that barring the convicts from grant of furlough when appeal is pending before the Hon'ble Supreme Court would lead to class legislation as the same amounts to an improper discrimination by conferring privilege of furlough on the convicts whose appeals are not pending from a large number of convicts all of whom stand in the same place insofar as the grant of furlough is concerned.
- there is no reasonable distinction or substantial difference which can be found justifying the inclusion of convicts who have not challenged their conviction before the Hon'ble Supreme Court.
- The proviso to Note 2 to Rule 1224 of the Prison Rules does not satisfy the test of Reasonable Classification, and the same is arbitrary, artificial, and evasive.
- that furlough is temporary release of the prisoner and if Note 2 to Rule 1224 of the Prison Rules is interpreted to mean that furlough will not be granted if an appeal is pending before the Hon'ble Supreme Court of India, the same would be in violation of Article 21 of the Constitution of India.
- Regarding Issue F, it was submitted that Rule 1199 of Prison Rules provides that furlough is purely an incentive for good conduct in the prison. Furlough, being integral to the concept of reformation, is a reward/incentive for good behaviour in the prison so that convict can eventually re-amalgamate into the society. Reliance was placed on judgment of Hon'ble Supreme Court in ***Atbir* (*supra*)**, thus, denying of furlough, on account of pendency of an appeal in the Hon'ble Supreme Court, despite good conduct earned by the convict, would run contrary

to the theory of reformative approach, thereby, violating Rules 1199 and 1200 of the Prison Rules.

- With regard to issue G, it was submitted that the concept of furlough and parole stem from the Rules and 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. Reliance was placed on ***State of Gujarat v. Narayan*** [12] *and* ***Asfaq v. State of Rajasthan*** [13] . 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 Supreme 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 Supreme Court as furlough does not amount to suspension of sentence/bail. Reliance is placed on Division Bench judgment of this Court in ***Rajesh Kumar v. Govt. Of NCT of Delhi***[14].

W.P.(CRL) 1044/2022; 1861/2023 & 2257/2024

12. Learned Counsel, Mr. Rohan Alva, for the petitioners has submitted that the entire basis of the reasoning in the Single Judge's ruling on 3rd August, 2023 is the decision in ***K.M. Nanavati (supra),*** wherein, it was held that the executive has no duty to perform once the appeal is pending before the Court. He specifically refers to Article 161 of the Constitution of India to argue that the

[12] 2021 SCC OnLine SC 949 (paragraphs 20, 21 and 22)
[13] (2017) 15 SCC 55
[14] 2012 (2) Crimes 281 (Delhi)

power for granting any form of remission is traced back to the said provision and the same would not be subject to Article 142 of the Constitution. It is submitted that Article 142 does not override Article 161. Mr. Alva further makes the following submissions:

- That in ***K.M. Nanavati (supra)*** Rule 5 Order 21 of the Supreme Court Rules which stated specifically that the convict has to either surrender or seek an exemption was being considered. It was in this context that the ***KM Nanavati (supra)*** judgment was rendered. A harmonious construction would as per the said judgment, therefore, mean that the Executive does not have power to suspend the sentence during pendency of the appeal. The said decision would have no applicability in the current context.
- ***In Re Policy Strategy For Grant Of Bail,***[15] the Supreme Court has specifically observed that even when appeals against conviction are pending, there is no bar on considering applications for permanent remission as well. The power for permanent remission also traces back to Article 161 of the Constitution. The Supreme Court's observations *qua* permanent remission would definitely be applicable in cases of furlough or temporary remission as well. There is no clash between Article 142 and Article 161 of the Constitution in the present case. Reliance is placed upon *paragraph 41 (vi)* of the said order.
- Note 2 to Rule 1224 of the Prison Rules deals with two categories of convicts. First, where the appeals are pending, and second, where the period for filing the appeal has not expired. In the latter context there can

[15] Order dated 22.10.2024 in SMWP (Crl.) No. 4/2021

be no justification to hold back furlough or parole. The power of furlough flows from Article 21 of the Constitution, though, there is no unfettered right to be released but the convict always has a right to be considered for furlough.

- Rule 1224 has no relationship with the object sought to be achieved*, i.e.,* grant of furlough. If the interpretation is stretched to such an extent, the provision would become constitutionally invalid.
- That no State would have the jurisdiction to confer power on the Supreme Court due to lack of legislative competence. Reference is made to Entry 77 in List I, Entry 65 in List II and Entry 46 in List III of the VII Schedule to the Constitution of India. Reliance is placed upon the decision of the Supreme Court in a matter emanating from the Chhattisgarh High Court, ***Rajendra Diwan v. Pradeep Kumar Ranibala,***[16] where the Supreme Court set aside a law passed by the State of Chhattisgarh under its Rent Control Act where appeals against the order of the Tribunal were to be filed directly before the Supreme Court under Section 13(2) of the said Rent Control Act. The Supreme Court held that the State Legislature lacks legislative competence to enact Section 13(2) of the Rent Control Act as the State Legislature cannot confer jurisdiction upon the Supreme Court (paragraph 49 to 52).

W.P.(CRL) 4080/2024

13. In the present petition, the present petitioner has sought parole. Mr. Siddharth Yadav, learned counsel appearing on behalf of the petitioner relied

[16] (2019) 20 SCC 143

upon the decision in ***Sunil Fulchand Shah v. Union of India***[17], to submit that there is a clear distinction between the bail and parole and that suspension of sentence is not parole. It is submitted that ***K.M. Nanavati* (*supra*)** does not deal with parole. It was argued that parole is an executive function which is always subject to judicial review. It is pointed out that even after rejection of appeal by the High Court, a prisoner is granted parole to file an SLP by the State, and in case, where it is not granted the same is subject to judicial review by this Court. Reliance was placed on ***State of Haryana Ors. v. Mohinder Singh***[18], ***State of Haryana v. Nauratta Singh***[19] and ***Dadu @ Tulsidas v. State of Maharashtra***[20]**.**

SUBMISSIONS BY MR. VIVEK SOOD, LEARNED SENIOR COUNSEL, AMICUS *CURIAE*

14. Ld. *Amicus Curiae* has made detailed submissions which are set out below:

- The first submission is that the consideration for grant of furlough ought to be left to the executive as the executive is fully empowered to deal with the issues that arise in respect of the same. He submits that across the world, grant of furlough is dealt with by the executive and not by Courts.
- Note (2) to Rule 1224 of the Prison Rules, in his submission, is violative of Article 14 of the Constitution of India and there are various grounds on which it deserves to be struck down or harmoniously construed in favor of the convict.

[17] (2000) 3 SCC 409: AIR 2000 SC 1023
[18] (2000) 3 SCC 394: AIR 2000 SC 890
[19] AIR 2000 SC 1179
[20] (2000) 8 SCC 437

- the object of furlough which is recognized in Rule 1220 of the Prison Rules, is primarily to prevent solitude of prisoners due to long period of incarceration. It is meant to allow the prisoner to have family ties and under such circumstances Note (2) to the Rule 1224 which seeks to carve out a distinction between convicts whose appeals are either filed or are likely to be filed in the High Court and those whose appeals are pending before the Supreme Court. He submits that there is no intelligible differentia between the said categories. Clearly, there are two categories of convicts. One, in his words can be called as the convicts whose convictions have been confirmed either by the Trial Court or by the High Court or by the Supreme Court and no appeals are filed in such cases clearly, furlough is to be mandatorily considered by the executive. However, on the other hand, in respect of convicts whose appeals are pending the Note (2) to Rule 1224 seeks to direct that the convict would have to approach only the High Court. It is argued that there is no remedy which has been provided for those Appellants whose appeals are pending before the Supreme Court. This clearly constitutes a distinction which is not based on any rational or logic. The persons whose appeals are pending cannot be made worse off than those persons whose conviction has been upheld. The said Note (2), therefore, *inter se* discriminates between two categories of Appellants which cannot be the intention of the legislature.
- It is further submitted that if for seeking furlough convicts are mandatorily forced to approach the Supreme Court it would again create a procedural arbitrariness. It is common knowledge that furlough is a simple process which does not involve any costs. No lawyers are

engaged and no detailed grounds are set out. The authorities consider the petition for furlough on very simple requests moved by convicts with no legal technicalities involved. However, if for availing furlough an application has to be filed only before the Supreme Court where appeals are pending the entire process becomes extremely complex and burdensome for the convicts. The convict would have to then set out detailed grounds which are for example considered in the case of interim suspension or grant of bail. Thus, the Note (2) to Rule 1224 of the Prison Rules seeks to create a procedural arbitrariness and an impossibility for convicts which cannot be the purpose of granting furlough.

- Even where appeals are pending in the Supreme Court convicts should be free to approach for furlough before the High Court. In such an enquiry, when an application is filed before the High Court the Court ought to apply the liberal principles of furlough rather than the more stricter principles for suspension of sentence or grant of interim bail. Finally, it is submitted that in order to preserve the doctrine of separation of powers, in serious cases if the High Court is hearing an appeal and does not wish to give furlough or remission, even then the executive would not be entitled to exercise the said powers. The High Court always has the power while admitting the appeal or while finally confirming any conviction in serious cases to direct specifically that no furlough or remission would be granted in such a case. The High Court's powers in such cases would not be curtailed in any manner and the balance can then be maintained.

SUBMISSIONS BY MR. V.P. GARG, ADVOCATE, *AMICUS CURIAE*

15. Learned *Amicus Curiae* submitted that the issue of Constitutional validity of Note 2 to Rule 1124 of the Prison Rules does not arise inasmuch as a Division Bench of this Court headed by Hon'ble Chief Justice took *suo-motu* cognizance of the matter titled as "***Court on its own Motion v. State"*** in W.P.(CRL) 1121/2009 had approved draft guidelines on 20.01.2010. Thereafter, on 17.02.2010, Hon'ble Lieutenant Governor of GNCT Delhi issued a notification framing parole/furlough guidelines 2010. It is pointed out that paragraph 27 of those Rules is *pari materia* to Rule 1442 of the Prison Rules. In view of the fact that the Hon'ble Division Bench of this Court had already tested the *vires* of the aforesaid provision, there is no requirement to test the validity of Note 2 to Rule 1224 of the Prisons Rules. It is pointed out that in ***K.M. Nanavati* (*supra*)** judgment of the Court was delivered by a majority by 4:1 and Hon'ble Mr. Justice Kapur wrote a dissenting judgment. It was pointed out that the judgment was delivered in September 1960 and in the month of October 1960 a similar question arose in the case of ***Sarat Chander Rabba v. Nagender Nath,***[21] and the same Bench unanimously accepted the dissenting view of Justice J. L. Kapur. In ***Sarat Chander Rabba* (*supra*),** the Court had upheld the view that the judicial powers and executive powers over sentences are distinct since the grant of remission does not affect the order of conviction and sentence. The grant of remission merely reduces the sentence to the period undergone without touching upon the judgement of conviction. In view of the same, it is pointed out that the principle of derogation of power held in ***K.M. Nanavati* (*supra*)** was impliedly overruled.

[21] 1960 SCC OnLine SC 130

16. Ld. *Amicus* further made the following submissions:

- That by virtue of Article 239AA of the Constitution of India, the Delhi Legislative Assembly enacted Prison Rules in 2018.
- Prisons is in Entry No. 4 of the State List. It was submitted that Article 72 and Article 161 of the Constitution of India are distinct from the powers vested by Section 432 of the CrPC. Reliance was placed on judgment of Hon'ble Supreme Court in ***State of Haryana & Ors. v. Mohinder Singh (supra)*****,** in which, it was held that under Section 432 of the CrPC the State Government may remit the whole or any part of the punishment to which a person has been sentenced even though his appeal against the conviction and sentence was pending. Subsequent judgments of Hon'ble Supreme Court in ***Sunil Fulchand Shah* (*supra*)** approved the findings of the judgment in ***Mohinder Singh* (*supra*)**. Reliance was placed on judgment of Hon'ble Supreme Court in ***Maru Ram v. Union of India***[22]**,** wherein it was held that Section 433A of the CrPC does not forbid parole or other release within 14 years span.
- It was submitted that appeal is a statutory remedy and after the decision by the High Court, the judgment of High Court dates back retrospectively to the date of judgment of the Trial Court. It is further submitted that the High Court is the last fact-finding Court. It is further submitted that the prisoner becomes a convict and come in the jurisdiction of State after the judgment of appeal in the High Court. Reliance was placed on ***Nauratta Singh* (*supra*)** wherein it was held that when a person is convicted in appeal, it follows that the Appellate Court exercises its powers in place

[22] (1981) 1 SCC 107: AIR 1980 SC 2147

of the Court of original jurisdiction and guilt, conviction and sentence must be substituted for and shall have retrospective effect from the date of the judgment of the Trial Court. In this way, appeal to the High Court may be called as extended trial of a prisoner.

- That in the new era of Correction Reformation - Rehabilitation - Reintegration, parole / furlough is not a charity but part of national and international obligations, in view of the International Minimum Standards Rules For The Treatment of Prisoners, now known as Nelson Mandela Rules, to which India is a signatory and domestic Courts are bound to follow the same.
- Finally, it was submitted that against an Executive order of Parole or Furlough, this Court sits in Judicial Review under Article 226 of the Constitution and thus, in no way amounts to any encroachment on the powers of Supreme Court. It is submitted that Judicial Review can only be undertaken under Article 226 and Article 32 of the Constitution of India.
- During the course of hearing, Mr. VP Garg, learned *Amicus Curiae* had handed up in Court a judgment of the Full Bench of Hon'ble Madras High Court in ***T. Ramalakshmi v. The State Represented by its Principal Secretary to Government of Tamil Nadu & Ors., along with other connected matters,***[23] wherein, it was held that under Rule 35 of the Tamil Nadu Suspension of Sentence Rules, 1982, the Competent Prison Authority is empowered to grant ordinary leave or emergency leave to a

[23] Reference decided *vide* order dated 24.01.2025 in W.P. (MD). Nos. 9491, 9321, 9465, 9646 & 17228 of 2024 and W.M.P.(MD). Nos. 8612, 16834, 8590, 8748 & 16833 of 2024 passed by Full Bench of Madras High Court Principal Bench at Chennai

prisoner during the pendency of a criminal appeal before any of the Appellate Courts.

- Reliance is placed upon Chapter XVIII titled as "Prison Leave, Remission and Pre-Mature Release" of Model Prisons and Correctional Services Act, 2023, to lay emphasis on the fact that no such restraint/restriction as provided in Note 2 to Rule 1224 of the Prison Rules has been incorporated in the said proposed Act.

SUBMISSIONS ON BEHALF OF THE STATE

17. Mr. Rahul Tyagi, learned Additional Standing Counsel appearing for the State submits that the decision of the learned Single Judge on Issue No.(b) has attained finality and in terms of the said finding, Rule 1244 Note 2 has to be interpreted as meaning to include "Supreme Court of India". According to Mr. Tyagi, with this finding in paragraph 83, nothing remains to be decided, inasmuch as the expression High Court has been interpreted by the ld. Single Judge as to include the Supreme Court as well.

18. Coming to Question No.(C) of the reference order, the view of the ld. Single Judge is that an appeal can lie but merely because the appeal has been filed and is being contested, it does not mean that they cannot seek furlough. The argument that furlough can be sought even when the guilt is challenged based on the reformative approach is wholly untenable, inasmuch as so long the person continues to remain in jail, the theory of reformative approach cannot be applied. The learned Single Judge has clearly held that the exercise of power by the Executive in terms of paragraph 81 of the judgment under issue no.(A), would be in derogation, when the matter is pending in the Supreme Court.

19. It is further highlighted that under Section 71 read with Section 2(h) of the Delhi Prisons Act, the Government has the power to make Rules and it is under these Rules, that the Delhi Prison Rules have been enacted. Section 2(h) defines furlough. Appendix 1 of the Rules clearly provides under the heading *'Leave – Parole-Furlough'* that the leave period is counted as a remission of sentence. The concept of furlough and parole are nothing but species of remission, and therefore, it is his submission that the Executive has some role to play. Under Rule 1173, types of remission have been set out, which include ordinary remission, good conduct remission, special remission, and remission by Government. Furlough and parole are also similar remissions under Rules (a) & (b) under Delhi Prison Act. The special remission and remission by Government would come under Section 432 of the CrPC. Since there are separate category of remissions, exercise of power under Section 432 of the CrPC cannot be confused for furlough and parole.

20. Learned ASC, Mr. Tyagi, for the State has relied upon the following judgments: -

i) ***Asfaq v. State of Rajasthan & Ors.***[24]***,***

ii) ***Rajesh Kumar v. Govt. of NCT of Delhi***[25]***,***

iii) ***Athar Pervez v. State***[26]***,***

iv) ***Rakesh Kumar Pandey v. Udai Bhan Singh & Anr.***[27]***,***

v) ***Ramesh Kumar v. State of Rajasthan & Ors.***[28]

[24] AIR 2017 SC 4986 [paragraph 11]
[25] 2011 SCC OnLine Del 5467: 2011:DHC:6538-DB [paragraphs 7 to 12]
[26] 2016:DHC:1680-DB [paragraph 11]
[27] (2008) 17 SCC 764 [paragraph 2]
[28] 2013 SCC OnLine Raj 1380: 2013 Cri LJ 2376: MANU/RH/0133/2013 [paragraph 28, 44 and conclusion]

21. Mr. Tyagi points out that Rule 9 of the Rajasthan Prison Rules is identical to the furlough under Delhi Prison Rules, and therefore, he commends the Full Bench decision of the Rajasthan High Court, in support of his submissions.

ANALYSIS AND FINDINGS

22. Heard learned counsels for the parties, the ld. *Amici Curiae* and perused the records.

23. The issues, which have been referred by the learned Single Judge as per the judgment making the Reference, for determination are as under: -

> *"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?*
>
> *** ***
>
> *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*?"

24. In the considered opinion of this Court, to determine the aforesaid issues, the findings given by the learned Single Judge that the word "Supreme Court" should be read into Note 2 to Rule 1224 of the Prison Rules needs to be examined afresh.

25. Learned Single Judge while holding that the word "Supreme Court" should be read into the aforesaid Rule, relied upon the principle of "Derogation of Powers" as held by the Hon'ble Supreme Court in judgment of Hon'ble Court in ***K. M. Nanavati* (*supra*),** by observing as under: -

> ***"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."*

26. In ***K.M. Nanavati* (*supra*),** the Hon'ble Governor under Article 161 of the Constitution of India suspended the sentence of the appellant therein, while his appeal was *sub judice* before the Hon'ble Supreme Court. Under Article 142 of the Constitution of India, the Hon'ble Supreme Court could pass any order including suspension of sentence pending appeal. Apart from that, Rules made by the Hon'ble Supreme Court in exercise of powers under Section 145 of the Constitution of India, and in particular, Order 21, Rule 5 of Supreme Court Rules, 1966, provided that any person filing a special leave to petition shall either surrender or seek exemption from surrender. The relevant observations of the Hon'ble Supreme Court read as under: -

> *"22. In the present case, the question is limited to the exercise by the Governor of his powers under Article 161 of the Constitution suspending the sentence during the pendency of the special leave petition and the appeal to this court; and the controversy has narrowed down to whether for the period when this court is in seizin of the case the Governor could pass the impugned order, having the effect of suspending the sentence during that period. There can be no doubt that it is open to the Governor to*

grant a full pardon at any time even during the pendency of the case in this court in exercise of what is ordinarily called "mercy jurisdiction". Such a pardon after the accused person has been convicted by the court has the effect of completely absolving him from all punishment or disqualification attaching to a conviction for a criminal offence. That power is essentially vested in the head of the Executive, because the judiciary has no such "mercy jurisdiction". But the suspension of the sentence for the period when this court is in seizin of the case could have been granted by this court itself. ***If in respect of the same period the Governor also has power to suspend the sentence, it would mean that both the judiciary and the executive would be functioning in the same field at the same time leading to the possibility of conflict of jurisdiction. Such a conflict was not and could not have been intended by the makers of the Constitution.*** *But it was contended by Mr Seervai that the words of the Constitution, namely, Article 161 do not warrant the conclusion that the power was in any way limited or fettered. In our opinion there is a fallacy in the argument insofar as it postulates what has to be established, namely, that the Governor's power was absolute and not fettered in any way.* ***So long as the judiciary has the power to pass a particular order in a pending case to that extent the power of the Executive is limited in view of the words either of Sections 401 and 426 of the Code of Criminal Procedure and Articles 142 and 161 of the Constitution. If that is the correct interpretation to be put on these provisions in order to harmonise them it would follow that what is covered in Article 142 is not covered by Article 161 and similarly what is covered by Section 426 is not covered by Section 401****. On that interpretation Mr Seervai would be right in his contention that there is no conflict between the prerogative power of the sovereign state to grant pardon and the power of the courts to deal with a pending cage judicially."*

(emphasis supplied)

27. It was that held that the power to suspend the sentence under Article 161 and Article 142 of the Constitution of India are operating in the same field, and therefore, in order to avoid any conflict, harmonious rule of construction was adopted. It was held that the power under Article 161 of the Constitution of India vested with the Hon'ble Governor is exclusive. However, such power cannot be exercised in criminal matters which are *sub judice* before the Hon'ble Supreme Court. The relevant observations read thus: -

> *"24. In this connection it would be relevant to consider what would be the logical consequence if Mr Seervai's argument is accepted. In the present case the Governor's order has been passed even before the petitioner's application for special leave came to be heard by this court; indeed it was passed before the said application was filed and the reason for passing the order is stated to be that the petitioner intended to file an appeal before this court. Let us, however, take a case where an application for special leave has been filed in this court, and on a motion made by the petitioner the court has directed him to be released on bail on executing a personal bond of Rs 10,000 and on furnishing two sureties of like amount. According to Mr Seervai, even if such an order is passed by this court in a criminal matter pending before it, it would be open to the petitioner to move the Governor for suspension of his sentence pending the hearing of his application and appeal before this court and the Governor may, in a proper case, unconditionally suspend the sentence. In other words, Mr Seervai frankly conceded that, even in a pending criminal matter before this court, an order passed by this court may in effect be set aside by the Governor by ordering an unconditional suspension of the sentence imposed on the petitioner concerned. This illustration clearly brings out the nature of the controversy which we are called upon to decide in this*

case. If Mr Seervai's argument is accepted it would inevitably mean that by exercising his power under Article 161 the Governor can effectively interfere with an order passed in the same matter by this court in exercise of its powers under Article 142. ***It is obvious that the field on which both the powers are operating is exactly the same. Should the sentence passed against an accused person be suspended during the hearing of an appeal on the ground that an appeal is pending? That is the question raised both before this court and before the Governor. In such a case it would be idle to suggest that the field on which the power of the Governor under Article 161 can be exercised is different from the field on which the power of this court can be exercised under Article 142. The fact that the powers invoked are different in character, one judicial and the other executive, would not change the nature of the field or affect its identity. We have given our anxious consideration to the problem raised for our decision in the present case and we feel no hesitation in taking the view that any possible conflict in exercise of the said two powers can be reasonably and properly avoided by adopting a harmonious Rule of construction. Avoidance of such a possible conflict will incidentally prevent any invasion of the Rule of law which is the very foundation of our Constitution."***

(emphasis supplied)

28. It is pertinent to note that the aforesaid judgment for the majority was authored by Chief Justice B.P. Sinha, as he then was, and Justice J.L. Kapur gave a dissenting minority judgment. In the minority judgment it was observed that the power to suspend the sentence was part of the larger power of pardoning vested with Hon'ble Governor under Article 161 of the Constitution of India and could be exercised at any time and the same would be in not conflict with the power of Hon'ble Supreme Court for granting suspension of sentence

because the said powers are exercisable on different considerations. The relevant observations of the minority judgment passed by Justice J.L. Kapur reads as under: -

> *"61. It was argued that the power of the court under Articles 142 & 145 and of the Governor under Article 161 are mutually inconsistent and therefore the power of the Governor does not extend to the period the appeal is pending in this court because law does not contemplate that two authorities i.e. executive and judicial should operate in the same field and that it is necessary that this court should put a harmonious construction on them. Article 142 of the Constitution, it was contended, is couched in language of the widest amplitude and comprises powers of suspension of sentences etc.* ***The argument that the power of the executive to suspend the sentence under Article 161 and of the judiciary to suspend the sentence under Article 142 and Article 145 are in conflict ignores the nature of the two powers. No doubt the effect of both is the same but they do not operate in the same field; the two authorities do not act on the same principles and in exercising their powers they do not take the same matters into consideration. The executive exercises the power in derogation of the judicial power. The executive power to pardon including reprieve, suspend or respite a sentence is the exercise of a sovereign or governmental power which is inherent in the State power. It is a power of clemency, of mercy, of grace "benign prerogative" of the highest officer of the State and may be based on policy. It is to be exercised on the ground that public good will be as well or better promoted by suspension as by the execution but it is not judicial process. The exercise of this power lies in the absolute and uncontrolled discretion of the authority in whom it is vested.***

62. The power of the courts to suspend sentences is to be exercised on judicial considerations. At Common Law, it was held in Ex parte U.S. [61 L Ed 129 at P 141] courts possessed and asserted the right to exert judicial discretion in the enforcement of the law to temporarily suspend either the imposition of sentence or its execution when imposed to the end that pardon might be procured or that the violation of law in other respects might be prevented. It was also held that a Federal District Court exceeds its power by ordering that execution of a sentence imposed by it upon a plea of guilty be suspended indefinitely during good behavior upon considerations wholly extraneous to the legality of the conviction : Ex parte U.S. [(1920) AC 508] .

*** ***

64. The judicial power therefore is exercisable on judicial considerations. The courts would approach every question in regard to suspension with a judicial eye. They are unable to look to anything which is outside the record or the facts which are proved before them. It is not their sphere to take into consideration anything which is not strictly judicial. A court knows nothing of a case except what is brought before it in accordance with the laws of procedure and evidence and consequently this is a power distinct from the power of the executive which may act, taking into consideration extra-judicial matters even on the ground that suspension, remission and commutation may be more for public good and welfare than no interference. These are all matters of public policy and matters which are not judicial and are within the power of the executive and therefore it cannot be said that the two powers operate in the same field. No doubt they may have the same effect but they operate in distinct fields, on different principles taking wholly irreconcilable factors into consideration.

*** ***

67. As to suspension of sentence again in Section 426 of the Criminal Procedure Code it is expressly stated that an appellate court can suspend the sentence for reasons to be stated; no such limitation is imposed on the executive under Section 401 of the Code. The language of the two sections themselves shows the field in which the two powers operate although the effect may be the same. It is relevant to consider in this connection the grounds on which a court acts in regard to offences punishable with death or imprisonment for life (section 497 of CrPC) but no such restrictions impede executive action. Similarly when the Supreme Court acts under Article 142 it acts judicially and takes only those facts into consideration which are sufficient in the judicial sense to justify the exercise of its power; so would be the case when the power is exercised under the Rules framed by the court. Thus it appears that the power of the executive and of the judiciary to exercise the power under Articles 161 and 142 or under Sections 401 and 426 are different in nature and are exercised on different considerations and even may have different effect.

(emphasis supplied)

29. This distinction between Judicial and Executive power was further recognized by the Hon'ble Supreme Court in ***State of Haryana Ors. v. Mohinder Singh***[29]. In this case, while upholding the power of the State Government under Section 432 of the CrPC to remit the whole or any part of the punishment of the person who has been sentenced, even though, his appeal against conviction and sentence was pending at that relevant time, it was observed and held as under: -

"10. The terms bail, furlough and parole have different connotations. Bail is well understood in criminal

[29] AIR 2000 SC 890

jurisprudence. Provisions of bail are contained in Chapter XXXIII of the Code. It is granted by the officer in charge of a police station or by the court when a person is arrested and is accused of an offence other than a non-bailable offence. The court grants bail when a person apprehends arrest in case of a non-bailable offence or is arrested for a non-bailable offence. When a person is convicted of an offence he can be released on bail by the appellate court till his appeal is decided. If he is acquitted his bail bonds are discharged and if appeal dismissed he is taken into custody. Bail can be granted subject to conditions. It does not appear to be quite material that during the pendency of appeal though his sentence is suspended he nevertheless remains a convict. ***For the exercise of powers under Section 432 it may perhaps be relevant that the State Government may remit the whole or any part of the punishment to which a person has been sentenced even though his appeal against conviction and sentence was pending at that time. Appeal in that case might have to abate inasmuch as the person convicted has to accept the conditions on which the State Government remits the whole or part of his punishment.****"*

(emphasis supplied)

30. In the considered opinion of this Court, however, the nature of relief by way of parole/furlough would be distinct from the exercise of judicial power of suspension of sentence by the High Court. As can be seen, that the grant of parole/furlough has always been vested with the executive. The distinction between the aforesaid two powers have been repeatedly recognised by the Hon'ble Supreme Court. In ***Sunil Fulchand Shah v. Union of India and Others***[30]**,** the Constitution Bench of Hon'ble Supreme Court while dealing with

[30] (2000) 3 SCC 409

the issue of granting parole to a *detenu* therein under the COFEPOSA, agreed with the judgment in ***Mohinder Singh* (*supra*)** and had observed as under: -

> ***"24.*** *Bail and parole have different connotations in law. Bail is well understood in criminal jurisprudence and Chapter XXXIII of the Code of Criminal Procedure contains elaborate provisions relating to grant of bail.* ***Bail is granted to a person who has been arrested in a non-bailable offence or has been convicted of an offence after trial. The effect of granting bail is to release the accused from internment though the court would still retain constructive control over him through the sureties. In case the accused is released on his own bond such constructive control could still be exercised through the conditions of the bond secured from him****. The literal meaning of the word "bail" is surety. In Halsbury's Laws of England [Halsbury's Laws of England, 4th Edn., Vol. 11, para 166.] , the following observation succinctly brings out the effect of bail:*
>
> *The effect of granting bail is not to set the defendant (accused) at liberty but to release him from the custody of law and to entrust him to the custody of his sureties who are bound to produce him to appear at his trial at a specified time and place. The sureties may seize their principal at any time and may discharge themselves by handing him over to the custody of law and he will then be imprisoned.*
>
> ***25.*** *"****Parole", however, has a different connotation than bail even though the substantial legal effect of both bail and parole may be the release of a person from detention or custody.*** *The dictionary meaning of "parole" is:*
>
> *The Concise Oxford Dictionary — (New Edition)*
>
> *"The release of a prisoner temporarily for a special purpose or completely before the expiry of a sentence,*

on the promise of good behaviour; such a promise; a word of honour."

Black's Law Dictionary — (6th Edition)

"Release from jail, prison or other confinement after actually serving part of sentence; Conditional release from imprisonment which entitles parolee to serve remainder of his term outside confines of an institution, if he satisfactorily complies with all terms and conditions provided in parole order."

According to The Law Lexicon [P. Ramanatha Aiyar's The Law Lexicon with Legal Maxims, Latin Terms and Words & Phrases, p. 1410] , "parole" has been defined as:

"A parole is a form of conditional pardon, by which the convict is released before the expiration of his term, to remain subject, during the remainder thereof, to supervision by the public authority and to return to imprisonment on violation of the condition of the parole."

According to Words and Phrases [Words & Phrases (Permanent Edition), Vol. 31, pp. 164, 166, 167, West Publishing Co.] :
" 'Parole' ameliorates punishment by permitting convict to serve sentence outside of prison walls, but parole does not interrupt sentence. People ex rel Rainone v. Murphy [135 NE 2d 567, 571, 1 NY 2d 367, 153 NYS 2d 21, 26] .
'Parole' does not vacate sentence imposed, but is merely a conditional suspension of sentence. Wooden v. Goheen [Ky, 255 SW 2d 1000, 1002] .

A 'parole' is not a 'suspension of sentence', but is a substitution, during continuance of parole, of lower grade of punishment by confinement in legal custody and under control of warden within specified prison bounds outside the prison, for confinement within the prison adjudged by the court. Jenkins v. Madigan [CA Ind, 211 F 2d 904, 906] .

A 'parole' does not suspend or curtail the sentence originally imposed by the court as contrasted with a 'commutation of sentence' which actually modifies it."

26. *In this country, there are no statutory provisions dealing with* ***the question of grant of parole. The Code of Criminal Procedure does not contain any provision for grant of parole. By administrative instructions, however, rules have been framed in various States, regulating the grant of parole. Thus, the action for grant of parole is generally speaking, an administrative action. The distinction between grant of bail and parole has been clearly brought out in the judgment of this Court in State of Haryana v. Mohinder Singh [(2000) 3 SCC 394 : JT (2000) 1 SC 629] to which one of us (Wadhwa, J.) was a party. That distinction is explicit and I respectfully agree with that distinction.***

27. Thus, it is seen that "parole" is a form of "temporary release" from custody, which does not suspend the sentence or the period of detention, but provides conditional release from custody and changes the mode of undergoing the sentence. COFEPOSA does not contain any provision authorising the grant of parole by judicial intervention. As a matter of fact, Section 12 of COFEPOSA, which enables the administration to grant temporary release of a detained person expressly lays down that the Government may direct the release of a detenu for

any specified period either without conditions or upon such conditions as may be specified in the order granting parole, which the parolee accepts. *Sub-section (6) of Section 12 lays down:*

"12. (6) Notwithstanding anything contained in any other law and save as otherwise provided in this section, no person against whom a detention order made under this Act is in force shall be released whether on bail or bail bond or otherwise."

28. *Section 12(6) starts with a non obstante clause and mandates that no person against whom a detention order made under COFEPOSA is in force shall be released "whether on bail or bail bond or otherwise". The prohibition is significant and has a purpose to serve. Since the object of preventive detention is to keep a person out of mischief in the interest of the security of the State or public order, judicial intervention to release the detenu during the period an order of detention is in force has to be minimal. Under Section 12(1) or Section 12(1-A), it is for the State to see whether the detenu should be released temporarily or not keeping in view the larger interest of the State and the requirements of detention of an individual. Terms and conditions which may be imposed while granting order of temporary release are also indicated in the other clauses of Section 12 for the guidance of the State. Sub-section (6) in terms prohibits the release of a detenu, during the period an order of detention is in force, "on bail or bail bond or otherwise". The expression "or otherwise" would include release of the detenu even on parole through judicial intervention.*

29. *Thus, parole, stricto sensu may be granted by way of a temporary release as contemplated by Section 12(1) or Section 12(1-A) of COFEPOSA by the Government or its functionaries, in accordance with the parole rules or administrative instructions, framed by the Government which are administrative in character and*

shall be subject to the terms of the rules or the instructions, as the case may be. ***For securing release on parole, a detenu has, therefore, to approach the Government concerned or the jail authorities, who may impose conditions as envisaged by Section 12(2) etc. and the grant of parole shall be subject to those terms and conditions. The courts cannot, generally speaking, exercise the power to grant temporary release to detenus, on parole, in cases covered by COFEPOSA during the period an order of detention is in force because of the express prohibition contained in sub-section (6) of Section 12. Temporary release of a detenu can only be ordered by the Government or an officer subordinate to the Government, whether Central or State. I must, however, add that the bar of judicial intervention to direct temporary release of a detenu would not affect the jurisdiction of the High Courts under Article 226 of the Constitution or of this Court under Article 32, 136 or 142 of the Constitution to direct the temporary release of the detenu, where request of the detenu to be released on parole for a specified reason and/or for a specified period, has been, in the opinion of the Court, unjustifiably refused or where in the interest of justice such an order of temporary release is required to be made.*** *That jurisdiction, however, has to be sparingly exercised by the Court and even when it is exercised, it is appropriate that the Court leave it to the administrative or jail authorities to prescribe the conditions and terms on which parole is to be availed of by the detenu.*

30. *Since release on parole is only a temporary arrangement by which a detenu is released for a temporary fixed period to meet certain situations, it does not interrupt the period of detention and, thus, needs to be counted towards the total period of detention unless the rules, instructions or terms for grant of parole, prescribe otherwise. The period during which parole is availed of is not aimed to extend the outer limit of the*

maximum period of detention indicated in the order of detention. The period during which a detenu has been out of custody on temporary release on parole, unless otherwise prescribed by the order granting parole, or by rules or instructions, has to be included as a part of the total period of detention because of the very nature of parole. An order made under Section 12 of temporary release of a detenu on parole does not bring the detention to an end for any period — it does not interrupt the period of detention — it only changes the mode of detention by restraining the movement of the detenu in accordance with the conditions prescribed in the order of parole. The detenu is not a free man while out on parole. Even while on parole he continues to serve the sentence or undergo the period of detention in a manner different than from being in custody. He is not a free person. Parole does not keep the period of detention in a state of suspended animation. The period of detention keeps ticking during this period of temporary release of a detenu also because a parolee remains in legal custody of the State and under the control of its agents, subject at any time, for breach of condition, to be returned to custody. Thus, in cases which are covered by Section 12 of COFEPOSA, the period of temporary release would be governed by the conditions of release whether contained in the order or the rules or instructions and where the conditions do not prescribe it as a condition that the period during which the detenu is out of custody, should be excluded from the total period of detention, it should be counted towards the total period of detention for the simple reason that during the period of temporary release the detenu is deemed to be in constructive custody. In cases falling outside Section 12, if the interruption of detention is by means not authorised by law, then the period during which the detenu has been at liberty, cannot be counted towards period of detention while computing the total period of detention and that period has to be excluded

while computing the period of detention. The answer to the question, therefore, is 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. The period during which the detenu is on parole, therefore, requires to be counted towards the total period of detention."

(emphasis supplied)

31. In ***Dadu @ Tulsidas v. State of Maharashtra (supra)***, the three Judge Bench of the Hon'ble Supreme Court held that Section 32A of the NDPS Act[31] is unconstitutional to the extent that it took away the right of the Court to suspend the sentence of the convict under the said Act. The three Judge Bench while noting the decisions in ***Mohinder* (*supra*)** and ***Sunil Fulchand* (*supra*)** observed and held as under: -

*"**5.** Before dealing with the main issue regarding the validity of Section 32-A, a side issue, projected in Writ Petition No. 169, is required to be dealt with. The writ petition appears to be based upon the misconception of the provisions of law and in ignorance of the various pronouncements of this Court.*

6. Parole is not a suspension of the sentence. The convict continues to be serving the sentence despite granting of parole under the statute, rules, jail manual or the Government Orders. "Parole" means the release of a prisoner temporarily for a special purpose before the expiry of a sentence, on the promise of good behaviour and return to jail. It is a release from jail, prison or other internment after actually being in jail serving part of sentence.

7. Grant of parole is essentially an executive function to be exercised within the limits prescribed in that

[31] The Narcotic Drug and Psychotropic Substances Act, 1985

behalf. It would not be open to the court to reduce the period of detention by admitting a detenu or convict on parole. The court cannot substitute the period of detention either by abridging or enlarging it. Dealing with the concept of parole and its effect on period of detention in a preventive detention matter, this Court in Poonam Lata v. M.L. Wadhawan *[(1987) 3 SCC 347 : 1987 SCC (Cri) 506] held: (SCC p. 354, para 8)*

> *"8. There is no denying of the fact that preventive detention is not punishment and the concept of serving out a sentence would not legitimately be within the purview of preventive detention. The grant of parole is essentially an executive function and instances of release of detenus on parole were literally unknown until this Court and some of the High Courts in India in recent years made orders of release on parole on humanitarian considerations. Historically 'parole' is a concept known to military law and denotes release of a prisoner of war on promise to return. Parole has become an integral part of the English and American systems of criminal justice intertwined with the evolution of changing attitudes of the society towards crime and criminals. As a consequence of the introduction of parole into the penal system, all fixed-term sentences of imprisonment of above 18 months are subject to release on licence, that is, parole after a third of the period of sentence has been served. In those countries, parole is taken as an act of grace and not as a matter of right and the convict prisoner may be released on condition that he abides by the promise. It is a provisional release from confinement but is deemed to be a part of the imprisonment. Release on parole is a wing of the reformative process and is expected to provide opportunity to the prisoner to transform himself into a useful citizen. Parole is thus a grant of partial liberty of lessening of restrictions to a convict prisoner, but release on parole does not*

change the status of the prisoner. Rules are framed providing supervision by parole authorities of the convicts released on parole and in case of failure to perform the promise, the convict released on parole is directed to surrender to custody. (See The Oxford Companion to Law, edited by Walker, 1980 Edn., p. 931; Black's Law Dictionary, 5th Edn., p. 1006; Jowitt's Dictionary of English Law, 2nd Edn., Vol. 2, p. 1320; Kenny's Outlines of Criminal Law; 17th Edn., pp. 574-76; The English Sentencing System by Sir Rupert Cross at pp. 31-34, 87 et. seq.; American Jurisprudence, 2nd Edn., Vol. 59, pp. 53-61; Corpus Juris Secundum, Vol. 67; Probation and Parole, Legal and Social Dimensions by Louis P. Carney.) It follows from these authorities that parole is the release of a very long-term prisoner from a penal or correctional institution after he has served a part of his sentence under the continuous custody of the State and under conditions that permit his incarceration in the event of misbehaviour."

8. This position was again reiterated in State of Haryana v. Mohinder Singh [(2000) 3 SCC 394 : 2000 SCC (Cri) 645] .

9. *The Constitution Bench of this Court in Sunil Fulchand Shah v. Union of India [(2000) 3 SCC 409 : 2000 SCC (Cri) 659] considered the distinction between bail and parole in the context of reckoning the period which a detenu has to undergo in prison and held: (SCC pp. 429-31, paras 24-25)*

*** ***

10. *Again in State of Haryana v. Nauratta Singh [(2000) 3 SCC 514 : 2000 SCC (Cri) 711] it was held by this Court as under: (SCC p. 520, para 14)*

"Parole relates to executive action taken after the door has been closed on a convict. During parole period there is no suspension of sentence but the

sentence is actually continuing to run during that period also."

11. It is thus clear that parole did not amount to the suspension, remission or commutation of sentences which could be withheld under the garb of Section 32-A of the Act*. Notwithstanding the provisions of the offending section, a convict is entitled to parole, subject however, to the conditions governing the grant of it under the statute, if any, or the jail manual or the government instructions. The Writ Petition No. 169 of 1999 apparently appears to be misconceived and filed in a hurry without approaching the appropriate authority for the grant of relief in accordance with the jail manual applicable in the matter."*

(emphasis supplied)

32. Similarly, in ***Atbir* (*supra*)**, the Hon'ble Supreme Court while dealing with an issue of granting furlough to a convict whose death sentence had been commuted on the orders of Hon'ble President of India on the condition that he shall remain in prison for the whole of the remainder of his natural life without parole and further that there should be no remission of the term of imprisonment, had observed and held as under: -

"14. *While dealing with the issue raised in this matter i.e. as to whether the appellant is entitled to furlough under the Delhi Prison Rules, 2018 despite bar over any remission in the term of imprisonment for the whole of his natural life, it is necessary, in the first place, to take note of the relevant applicable provisions.*

*** ***

18. *The principles relating to different provisions dealing with the matter of release of a prisoner by way of bail, furlough and parole have been considered and the distinction has been explained by this Court in several of its decisions. We need not multiply on the*

authorities but, relevant it would be to take note of the observations and enunciations by this Court in Asfaq [Asfaq v. State of Rajasthan, (2017) 15 SCC 55 : (2018) 1 SCC (Cri) 390] , where it was observed, inter alia, as under : (SCC pp. 60-62, paras 11 & 14-16)

"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 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.

15. A convict, literally speaking, must remain in jail for the period of sentence or for rest of his life in case he is a life convict. It is in this context that his release from jail for a short period has to be considered as an opportunity afforded to him not only to solve his personal and family problems but also to maintain his links with society. Convicts too must breathe fresh air for at least some time provided they maintain good conduct consistently during incarceration and show a

tendency to reform themselves and become good citizens. Thus, redemption and rehabilitation of such prisoners for good of societies must receive due weightage while they are undergoing sentence of imprisonment.

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 the 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] .)"

(emphasis supplied)

19. *Further, in Narayan [State of Gujarat v. Narayan, (2021) 20 SCC 304 : 2021 SCC OnLine SC 949] , this Court has summarised the principles in the following terms : (SCC OnLine SC para 24)*

"24. The principles may be formulated in broad, general terms bearing in mind the caveat that the governing rules for parole and furlough have to be applied in each context. The principles are thus:

(i) Furlough and parole envisage a short-term temporary release from custody;
(ii) While parole is granted for the prisoner to meet a specific exigency, furlough may be granted after a stipulated number of years have been served without any reason;

(iii) The grant of furlough is to break the monotony of imprisonment and to enable the convict to maintain continuity with family life and integration with society;

(iv) Although furlough can be claimed without a reason, the prisoner does not have an absolute legal right to claim furlough;

(v) The grant of furlough must be balanced against the public interest and can be refused to certain categories of prisoners."

(emphasis supplied)

20. Having examined the matter in its totality, we find it difficult to agree with the reasoning in the order impugned and with the contentions that once it has been provided by the Hon'ble President of India that the appellant would remain in prison for whole of the remainder of his natural life without parole and without remission in the term of imprisonment, all his other rights, particularly those emanating from good jail conduct, as available in the 2018 Rules stand foreclosed.

21. As has rightly been pointed out, in the 2018 Rules, the eligibility requirement to obtain furlough is of "3 annual good conduct reports" and not "3 annual good conduct remissions". The expressions employed in clause (I) of Rule 1223 of the 2018 Rules are that the prisoner ought to maintain "Good conduct in the prison and should have earned rewards in last 3 annual good conduct report" and further that he should continue "to maintain good conduct". Even these expressions cannot be read to mean that the prisoner ought to earn "good conduct remissions". In the scheme of the 2018 Rules it cannot be said that earning rewards is equivalent to earning remissions.

22. It has also rightly been pointed out that when furlough is an incentive towards good jail conduct, even if the person is otherwise not to get any remission and has to remain in prison for whole of the remainder of his natural life, that does not, as a corollary, mean that his right to seek furlough is foreclosed. Even if he would spend some time on furlough, that will not come to his aid so as to seek remission because of the fact that he has to remain in prison for whole of the remainder of his natural life.

*** ***

31. In other words, even if the appellant is to remain in prison for the whole of the remainder of his life, the expectations from him of good conduct in jail would

always remain; and the lawful consequences of good conduct, including that of furlough, cannot be denied, particularly when the same has not been prohibited in the order dated 15-11-2012. We need not elaborate to say that depriving of even the concession of furlough and thereby taking away an incentive/motivation for good conduct would not only be counterproductive but would be an antithesis to the reformative approach otherwise running through the scheme of the 2018 Rules.

*** ****

33. *Thus, looking to the concept of furlough and the reasons for extending this concession to a prisoner lead us to hold that even if a prisoner like the appellant is not to get any remission in his sentence and has to serve the sentence of imprisonment throughout his natural life, neither the requirements of his maintaining good conduct are whittled down nor the reformative approach and incentive for good conduct cease to exist in his relation. Thus, if he maintains good conduct, furlough cannot be denied as a matter of course.*

34. We would hasten to observe that whether furlough is to be granted in a given case or not is a matter entirely different. Taking the case of the appellant, he is a person convicted of multiple murders. Therefore, the requirement of Rule 1225 of the 2018 Rules may come into operation. However, it cannot be said that his case would never be considered for furlough. Whether he is to be given furlough on the parameters delineated therein or not is a matter to be examined by the authorities in accordance with law.

35. *In view of the above, while disapproving blanket denial of furlough to the appellant in the orders impugned, we would leave the case of the appellant for grant of furlough open for examination by the authorities concerned in accordance with law."*

(emphasis supplied)

33. Principles of parole being granted by the Executive has been recognized internationally. In the United States of America, parole is granted by the Parole Board on certain considerations and the paroled prisoner remains in the custody and control of the Parole Board. By way of reference, it is apposite to refer to the decision of the Supreme Court of United States in ***John R. Jones v. W.K. Cunningham, Jr. Superintendent of Virginia State Penitentiary***[32], wherein, the same principle was recognised in a *habeas corpus* petition filed by the petitioner therein. The petitioner therein had filed *habeas corpus* petition before the United States District Court against the dismissal of which he was granted certificate of probable cause and leave to appeal *in forma pauperis* to challenge the same before Court of Appeals. Before the case could have come for oral arguments before the Court of Appeals, he was paroled by the Virginia Parole Board and was released from Virginia State Penitentiary and consequently, his leave to appeal was dismissed as moot by Court of Appeals as he was released from State Penitentiary and no longer in custody of State Penitentiary. Thereafter, the matter was taken before Supreme Court of United States which held that the petitioner was in custody of the Virginia Parole Board. The Supreme Court of United States observed and held as under: -

> *"[1 A United States District Court has jurisdiction under 28 U. S. C. § 2241 to grant a writ of habeas corpus " to a prisoner . . . in custody in violation of the Constitution . . . of the United States." The question in this case is whether a state prisoner who has been placed on petitioner was placed on parole, "in custody" within the meaning of this section so that a Federal District Court has jurisdiction to hear and determine his charge that his state sentence was imposed in violation of the United States Constitution.*

[32] 371 U.S. 236: 83 S. Ct. 373 (1963) in Supreme Court Reporter

In 1953 petitioner was convicted in a Virginia state court of an offense re- quiring confinement in the state penitentiary, and as this was his third such offense he was sentenced to serve 10 years in the state penitentiary. In 1961 he filed this petition for habeas corpus in the United States District Court for the Eastern District of Virginia, alleging that his third-offender sentence was based in part upon a 1946 larceny conviction which was invalid because his federal constitutional right to counsel had been denied at the 1946 trial. The District Court dismissed the petition but the Court of Appeals for the Fourth Circuit granted a certificate of probable cause and leave to appeal in forma pauperis. Shortly before the case came on for oral argument before the Court of Appeals petitioner was paroled by the Virginia Parole Board. The parole order placed petitioner in the "custody and control" of the Parole Board and directed him to live with his aunt and uncle in LaFayette, Georgia. It provided that his parole was subject to revocation or modification at any time by the Parole Board and that petitioner could be arrested and returned to prison for cause. Among other restrictions and conditions, petitioner was required to obtain the per- mission of his parole officer to leave the community, to change residence, or to own or operate a motor vehicle. He was further required to make monthly re-ports to his parole officer, to permit the officer to visit his home or place of employment at any time, and to follow the officer's instructions and advice. When petitioner was placed on parole, the Superintendent of the Virginia State Penitentiary, who was the only respondent in the case, asked the Court of Appeals determine his charge that his statement to dismiss the case as moot since petitioner was no longer in his custody. Petitioner opposed the motion to dismiss but, in view of his parole to the custody of the Virginia Parole Board, moved to add its members. The Court of Appeals dismissed, holding that the case was moot as to the superintendent

because he no longer had custody or control over petitioner "at large on parole." It refused to permit the petition-er to add the Parole Board members as respondents because they did not have "physical custody" of the person of petitioner and were therefore not proper parties. 4 Cir, 294 D.2d 608. We granted certiorari to decide whether a parolee is "in custody" within the meaning of 28 U.S.C. § 2241, 28 U.S.C.A. § 2241 and is therefore entitled to invoke the habeas corpus jurisdiction of the United States District Court. 369 U.S. 809 82 S. Ct. 687 L.Ed.2d 611.

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[4] Respondent strongly urges upon us that however numerous the situations in which habeas corpus will lie prior decisions of this Court conclusively determine that the liberty of a person released on parole is not so restrained as to permit the parolee to attack his conviction in habeas corpus proceedings. In some of those cases, upon which the Court of Appeals in this case also relied, the petitioner had been completely and unconditionally released from custody; such cases are obviously not controlling here where petitioner has not been unconditionally released. Other cases relied up on by respondent held merely that the dispute between the petitioner and the named respondent in each case had become moot because that particular respondent no longer held the petitioner in his custody.[15] So here, as in the cases last mentioned, when the petitioner was placed on parole, his cause against the Superintendent of the Virginia State Penitentiary became moot because the superintendent's custody had come to an end, as much as if he had resigned his position with the State. But it does not fellow that this petitioner is wholly without remedy. His motion to add the members of the Virginia Parole Board as parties respondent squarely raises the question, not presented in our earlier cases, of whether the Parole Board now holds the petitioner in its

"custody" within the meaning of 28 U.S.C. 2241, 28 U.S.C.A. 2241 so that he can by habeas corpus require the Parole Board to point to and defend the law by which it justifies any restraint on his liberty.

[5] ***The Virginia statute provides that a paroled prisoner shall be released "into the custody of the Parole Board," and the parole order itself places petitioner "under the custody and control of the Virginia Parole Board." And in fact, as well as in theory, the custody and control of the Parole Board involves significant restraints on petitioner's liberty because of his conviction and sentence, which are in addition to those imposed by the State upon the public generally.*** *Petitioner is confined by the parole order to a particular community, house, and job at the sufferance of his parole officer. He cannot drive a car without permission. He must periodically report to his parole officer, permit the officer to visit his home and job at any time, and follow the officer's advice. He is admonished to keep good company and good hours, work regularly, keep away from undesirable places, and live a clean, hon eat, and temperate life. Petitioner must not only faithfully obey these restrictions and conditions but he must live in constant fear that a single deviation, however slight, might be enough to result in his being returned to prison to serve out the very sentence he claims was imposed upon him in violation of the United States Constitution. He can be rearrested at any time the Board or pa role officer believes he has violated a term or condition of his parole, and he might be thrown back in jail to finish serving the allegedly invalid sentence with few, if any, of the procedural safe guards that normally must be and are provided to those charged with crime. It is not relevant that conditions and restrictions such as these may be desirable and important parts of the rehabilitative process; what matters is that they significantly restrain petitioner's*

liberty to do those things which in this country free men are entitled to do. Such restraints are enough to invoke the help of the Great Writ. Of course, that writ always could and still can reach behind prison walls and iron bars. But it can do more. It is not now and never has been a static, narrow, formalistic remedy its scope has grown to achieve its grand purpose -- the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty. ***While petitioner's parole releases him from immediate physical imprisonment, it imposes conditions which significantly confine and restrain his freedom; this is enough to keep him in the "custody" of the members of the Virginia Parole Board within the meaning of the habeas corpus statute, if he can prove his allegations this custody is in violation of the Constitution, and it was therefore error for the Court of Appeals to dismiss his case as moot instead of permitting him to add the Parole Board members as respondents.***

[6] Respondent also argues that the District Court had no jurisdiction because the petitioner had left the territorial confines of the district. But this case is not like Ahrens v. Clark, 335 U.S. 188, 68 B.CL. 1443, 92 L. Ed. 1898 (1948), upon which respondent relies, because in that case petitioners were not even detained in the district when they originally filed their petition. Rather, this case is controlled by our decision in Ex parte Endo, 323 U.S. 283, 304-307, 65 S.Ct. 208, 219-220, 89 L.Ed. 243 (1944). which held that a District Court did not lose its jurisdiction when a habeas corpus petitioner was removed from the district so long as an appropriate respondent with custody remained. Here the members of the Parole Board are the still within the jurisdiction of the District Court, and they can be required to do all things necessary to bring the case to a final adjudication.

> *The case is reversed and remanded to the Court of Appeals with directions to grant petitioner's motion to add the members of the Parole Bench as respondents and proceed to a decision on the merits of petitioner's case."*
>
> *(emphasis supplied)*

In the above decision, the US Supreme Court thus held that the Federal District Court had jurisdiction to hear and determine the petition of *habeas corpus* filed by the Petitioner even when he was released on parole, since the conditions of parole severely restrict and confine the freedom enjoyed by him. Thus, despite being released from the physical imprisonment the Petitioner continued to remain in the custody of the Virginia Parole Board due to the restrictions placed upon his freedom.

34. The principle that can be culled out from the aforesaid decision(s) is that parole and furlough are distinct from granting bail or suspension of sentence by a Court and operate in different fields. The end result of both is common to the effect that the convict gets released from physical imprisonment, however, the convict continues to be in custody of the concerned authorities in view of the restrictions imposed on his freedom for the duration of his release. The period of release in parole and furlough differ as in the case of former the period may be up to a month and in case of the latter it may extend up to only 15 days. However, the considerations for exercising such powers are, again, distinct. Powers of the Court to grant bail or suspension of sentence are governed by judicial considerations which may not be the case for the executive while exercising power to grant parole or furlough. The said distinction can be seen from the Rules itself. For instance, parole is granted as per Rule 1198 of the Prisons Rules which reads thus: -

*"**CHAPTER -XIX***
PAROLE & FURLOUGH

1197. *Parole and Furlough to inmates are progressive measures of correctional services. The release of prisoner on parole not only saves him from the evils of incarceration but also enables him to maintain social relations with his family and community. It also helps him to maintain and develop a sense of self-confidence. Continued contacts with family and the community sustain in him a hope for life. The release of prisoner on furlough motivates him to maintain good conduct and remain disciplined in the prison.*

1198. *Parole means temporary release of a prisoner for short period so that he may maintain social relations with his family and the community in order to fulfill his familial and social obligations and responsibilities. It is an opportunity for a prisoner to maintain regular contact with outside world so that he may keep himself updated with the latest developments in the society. It is however clarified that the period spent by a prisoner outside the prison while on parole in no way is a concession so far as his sentence is concern. The prisoner has to spend extra time in prison for the period spent by him outside the Jail on parole.*

1199. *Furlough means release of a prisoner for a short period of time after a gap of certain qualified numbers of years of incarceration by way of motivation for maintaining good conduct and to remain disciplined in the prison. This is purely an incentive for good conduct in the prison. Therefore, the period spent by the prisoner outside the prison on furlough shall be counted towards his sentence.*

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."

35. A reading of the aforesaid Rules shows that the objective of releasing the prisoner on parole or furlough does not concern the merits of a case against the prisoner. As provided in the aforesaid Rules, the grant or non-grant of parole/furlough to a prisoner would depend on the facts and circumstances of each case and would be subject to the restrictions contained in the said Rules with regard to the individual prisoner who is seeking parole or furlough. However, the general restriction irrespective of the eligibility of a prisoner to be released on parole or furlough by way of a rule restricting the executive's own power to grant such a relief, in the considered opinion of this Court, would have no reasonable nexus with the objective which is sought to be achieved in granting parole or furlough to prisoners/convicts. The issue of States not granting parole or furlough to a convict whose appeal is pending in the High

Court has been taken note of by the Supreme Court in ***Criminal Appeal No. 1343/2012*** titled as *"**Mukesh Kumar v. State***"[33]. Ld. Amicus and ld. Counsel have informed the Court that in the said case, the issue is only in respect of the bar when appeals are pending before the High Court. The relevant observation of the Hon'ble Supreme Court with respect to the said issue are as under: -

> *"1. In continuation of the previous orders and pursuant to the personal visit to Tihar Jail, Mr. Gaurav Agrawal, learned Senior Counsel representing the National Legal Services Authority (NALSA), in his brief note has, inter alia, pointed out that :*
> **** ****
> *(ii) Some of the States do not provide parole/furlough to a convict during the pendency of his appeal before the High Court against conviction. The parole and furlough is denied on the premise that such a convict can seek appropriate orders from the High Court. Learned Senior Counsel points out that parole and furlough are distinct and different than the order of suspension of sentence and/or release of a convict on interim/regular bail. While the later can be granted by the High Court, the convict can be released on parole/furlough only by the competent authority of the State Government in accordance with the rules/policy."*

36. It is further noted that the definition of "prisoner" who is entitled to parole for convict prisoner as per Section 2 (c) of the Delhi Prisons Act, 2000 is as under: -

> *"**Section 2(c):** 'Convicted criminal prisoner' means any criminal prisoner under sentence of a court or court material, and includes a person detained in prison under the provisions of Chapter VII of the Code of Criminal Procedure, 1973 (2 of 1974);"*

[33] Order dated 02.04.2024 in Miscellaneous Application No. 1658/2023 in Criminal Appeal No. 1343/2012

37. The reading of the aforesaid provision makes no distinction between a convicted criminal prisoner whose appeal is pending in any forum or not. It is further pertinent to note that the Rules with regard to parole and furlough as contained in Chapter XIX of Prison Rules have been made and the powers regarding the same has been prescribed Section 71 (2) (xxx). Power to make law with respect to "Prisons" is provided in Entry 4 in List II of the VIIth Schedule of the Constitution of India. At this stage, it is apposite to refer to judgment of a Constitution Bench of the Hon'ble Supreme Court in ***Rajendra Diwan v. Pradeep Kumar Ranibala and Anr. (supra)***, wherein, it was held that the State Legislature of Chhattisgarh was not competent to assign any adjudicative powers to a Constitution Court like High Court or Supreme Court and could not have created right of direct appeal to the Supreme Court. The Hon'ble Supreme Court in ***Rajendra Diwan* (*supra*)** observed and held as under: -

> *"**39.** The entries in the three Lists, relevant to the issues referred to this Bench, that is, Entry 77 of the Union List, Entries 18 and 65 of the State List and Entry 46 of the Concurrent List are set out hereinbelow for convenience:*
>
> *"**List I — Union List***
>
> *"**77.** Constitution, organisation, jurisdiction and powers of the Supreme Court (including contempt of such Court), and the fees taken therein; persons entitled to practise before the Supreme Court."*
>
> ***List II — State List***
>
> *"**18.** Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of*

agricultural land; land improvement and agricultural loans; colonization.

***

65. *Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List."*

List III — Concurrent List

"46. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List."

**** ****

49. *Section 13(2) of the Rent Control Act, providing for direct appeal to the Supreme Court from orders passed by the Rent Control Tribunal, is not ancillary or incidental to the power of the Chhattisgarh State Legislature to enact a Rent Control Act, which provides for appellate adjudication of appeals relating to tenancy and rent by a Tribunal. In enacting Section 13(2) of the Rent Control Act, the Chhattisgarh State Legislature has overtly transgressed the limits of its legislative power, as reiterated and discussed hereinafter.*

50. *While the widest amplitude should be given to the language used in one entry, every attempt has to be made to harmonise its contents with those of other Entries, so that the latter may not be rendered nugatory.*

51. *As observed above, both the Union legislature and the State Legislature derive their power to legislate from Article 245 of the Constitution of India. It is axiomatic that the legislature of a State may only make laws for the whole or any part of the State, while Parliament may make laws for the whole or any part of the territory of*

India. There is no provision in the Constitution which saves State laws with extra-territorial operation, similar to Article 245(2) which expressly saves Union laws with extra-territorial operation, enacted by Parliament. The Chhattisgarh State Legislature, thus, patently lacks competence to enact any law which affects the jurisdiction of the Supreme Court, outside the State of Chhattisgarh.

52. *Entry 18 of the State List only enables the State Legislature to legislate with regard to landlord-tenant relationship, collection of rents, etc. This Entry does not enable the State Legislature to circumvent Entry 65 of the State List or Entry 46 of the Concurrent List which enable the State Legislature to enact laws with respect to the jurisdiction and powers of Courts, except the Supreme Court, or to render otiose, Entry 77 of the Union List, which expressly confers law-making power in respect of the jurisdiction of the Supreme Court, exclusively to Parliament.*

**** ****

61. *An appeal, on the other hand, is a continuation of the original proceedings. Where there is a statutory appeal from an appellate order of the Tribunal, the appellate court is obliged to rehear the case, re-appreciate and re-analyse the evidence on record, adjudicate the correctness of the order impugned and correct errors both of fact and of law, that the Tribunal may have made."*

The aforesaid judgment also highlights the distinction between the statutory appeal and special leave to appeal under Article 136 of the Constitution of India.

38. It is noted by the Court that the Competent Authorities were granting parole and furlough to prisoners whose appeals were pending before the

Hon'ble Supreme Court. During the course of hearing, upon being directed, an affidavit dated 22.01.2025 has been filed by Mr. Prem Singh Meena, Superintendent-II, Prisons Headquarter, Janak Puri, New Delhi, to the following effect: -

> *"III. That the present affidavit is being filed in compliance of the Order dated 08.01.2025 passed by this Hon'ble Court in the above noted Writ Petition. That this Hon'ble Court vide order 08.01.2025 has directed to file an affidavit indicating therein about (i) furlough granted to the convicts in last 10 years whose Criminal Appeals/Special Leave Petitions are pending or were pending during the relevant period before the Hon'ble Supreme Court of India and (ii) the number of convicts whose Criminal Appeals/Special Leave Petitions are pending before the Hon'ble Supreme Court.*
>
> *1. As per the information retrieved from prison records:-*
>
> ***i) That 26 convicts were granted furlough during last 10 years when their Criminal Appeals (Crl. A.)/Special Leave Petitions (SLP) are/were pending till the directions dated 03.07.2023 of Hon'ble Court in Budhi Singh matter. A list of these 26 convicts is enclosed herewith and marked as Annexure-A.***
>
> *ii) At present there 68 convicts in the Delhi Prisons, whose Criminal Appeals/ Special Leave Petitions are pending before the Supreme Court. The list is enclosed and marked as* ***Annexure-B****.*
>
> *2. It is pertinent to mention here that Rule 1199 of Delhi Prison Rules, 2018 provides the purpose of Furlough is as follows:*

> *Furlough means release of a prisoner for short period of time after a gap of certain qualified numbers of years of incarceration by way of motivation for maintaining good conduct and to remain discipline in the prison. This is purely an incentive for good conduct in the Prison. Therefore, the period spent by the prisoner outside the Prison on furloughs shall be counted towards his sentence."*

Note 2 of Rule 1224 of Delhi Prison Rules, 2018 is reproduced as under:

> *"Note. - (2) 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."*

3. That the decision for inserting the aforesaid note has been consciously taken by the Government of NCT of Delhi taking away the jurisdiction vested in the Executive to consider an application for furlough, when the appeal of the convict is pending before the Appellant Court/High Court. A similar restriction has also been imposed on release of the prisoners on parole.

4. That Parole / Furlough Guidelines, 2010 which was approved by the Hon'ble LG, Delhi vide order No. 18/91-2009/HG dated 17.02.2010 also vide para 27 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 Court. "

> *6. The said position has been taken as it is in the Delhi Prison Rules, 2018 as mentioned in the above paras."*
>
> *7. It is pertinent to mention here that a similar issue on considering and granting Parole/Furlough during the pendency of appeal has also been taken and pending before the Hon'ble Supreme Court of India in the matter of Mukesh Kumar Vs. State (NCT of Delhi) in MA No.1658/2023 in Crl. Appeal No.1343/2012."*[34]
>
> *(emphasis supplied)*

39. Further, the reasoning adopted by the learned Single Judge in the reference order was to the effect that since furlough is subject to the restriction that if an appeal of a convict is pending before the High Court, therefore, the same *ipso jure* would include "Supreme Court" as well, is primarily on the ground that if an appeal is pending in the higher forum, then, any relief in the nature of parole or furlough would involve suspension of sentence, and thus, the said power should be exercised by the concerned Appellate Court.

40. At this stage, it is apposite to refer to the history of the Prison Rules with respect to parole and furlough. The oldest rules/instructions/guidelines in existence are to be found in the Punjab Jail Manual which were applicable to State of Punjab, Haryana, Delhi, and Himachal Pradesh and continued to operate in post-Independence era. The Rules/instructions/guidelines in the said Manual were made in exercise of powers conferred by the Prisons Act, 1894, as amended by the Prisons Punjab (Amendment) Act No. 1929 (Punjab Act IX of 1926). These Rules were supplemented with various instructions and notifications passed by the concerned administration time to time. The Rules as contained in Chapter XV (IX) are as follows: -

[34] There is no para 5 in the said affidavit and same is a clerical error

*" **IX: Instructions Regarding Parole/Furlough**-(1) According to the instructions of the Govt. no prisoner can avail of parole/furlough twice in a year, but in many cases a new parole/furlough case is initiated before the disposal of the Ist case which does not comply with the instructions of State Govt. For initiating a new parole/furlough case minimum 11 months must have passed after the date of initiating the first parole so that his case is not finalised within a year. The work of the jail initiating parole/furlough case before the time invites displeasure.*

2. Only those prisoners are entitled for parole/furlough whose conduct in the jail is good. For initiating the parole/furlough case after the commission of jail offence minimum one year must have passed so that the conduct of the concerned prisoner be considered good. Initiating the parole/furlough case before one year is totally wrong and against the law. This needs special attention, so that bad character prisoners could not get the benefit of parole/furlough.

3. If in any case any prisoner needs parole/furlough because of death of some near relative or serious illness of the near relative in such cases the certificate of illness by the Govt. doctor or by the Panchayat or by M.L.A. or any concerned authority must be sent with the cases. Because without such certificate the parole/furlough case could not be disposed of. If due to some serious illness the patient is to be operated upon the fixed date of operation be also sent.

4. The prisoner can be given parole/furlough because of the reasons mentioned u/s 3 of Good Conduct Prisoners Temporary Release Act, 1962. Before initiating the parole/furlough cases of every prisoner the reason mentioned u/s 3 of Good Conduct Prisoners Temporary Release Act, 1962 must be enquired while sending the

parole/furlough cases to the concerned must be enquired while sending the parole/furlough cases to the concerned District Magistrate it should also be mentioned that he should certify the causes of parole/furlough cases given in the application of the prisoner. If any prisoner tries to get parole/furlough by making false statement then that should be considered a jail offence u/para 609(6) of Punjab Jail Manual and he stands to be punished under para 712/613 of Punjab Jail Manual. For Agricultural purpose the parole should not be recommended less than six weeks. I. G Prisons Punjab Letter No. 25916 I.G/84-8.2A dated 28-7-69.

Emergency Parole & First Ordinary Parole- *In view of the provisions of Section 6 of the Punjab Good Conduct Prisoners (Temporary Release) Act, 1962, in cases where a prisoner has once been released on emergency parole (by jail authorities) and the prisoner concerned has maintained good conduct during that period of emergency parole, it is for the State Government to decide before taking final decision on his application for the first ordinary parole, whether comments of the District Magistrate should be called or not.*

Reports from Police/District Magistrate cannot be called in routine manner by the State Government or by any officer working under it (I.G. Prisons or Jail authorities in the case of application for first ordinary parole) of any such prisoner, as had once been released on emergency parole. The State Government is required to take conscious decision about obtaining reports from police/District Magistrate in all such cases. In order to enable the Government to take such decision whether such a report is necessary there should be some reliable material before the Government. That material can be in the form of report, if any, received by the Jail authorities, from the police or from the District Magistrate about the conduct of prisoner concerned

during the emergency parole of two weeks availed by him. Such reports should invariably be attached by you with the roll of the prison prepared for his first ordinary parole. However, in such cases, you are not required to obtain fresh reports from the police and the District Magistrate.

In the case of application for first ordinary parole submitted by such prisoners as have not availed of any parole (including emergency parole before reports from police and the District Magistrate may continue to be obtained by you as heretofore Punjab Government (Dept of Home Affairs and Justice) Letter no. 7583-3JL-80/20306 dated 26-11-1980 read with case Nand Singh v. State of Punjab decided on 8-10-1980 P & H High Court. "

41. Subsequently by way of various notifications, instructions were amended and first, in this regard, is Delhi Administration Instructions Letter No. F-18/(27)55 Home dated 07.03.1958 as modified upto 16.09.1963, which reads as under: -

"PART-1 (Parole)

Amended vide letter No. F.18/59/60-Home dt. 16-9-63-
(i) A prisoner may be released on parole for such period as the Chief Commissioner, Delhi, may order; parole shall be admissible for:-
(a) Seeing any sick or dying member of the family.

(b) Any other sufficient cause such as marriage of the prisoner or any other member of the family i.e. son, daughter, sister, brother etc.

(c) for construction of a house.

For purpose of (a) above, the prisoner's family means his/her parents, brothers, sister, wife/husband and children.

(ii) The period spend on parole will not count as part of the sentence.

2. On receiving an application form a prisoner or for his relatives or friend for release on parole the Superintendent of Jail shall verify personally from the prisoner facts stated in this application and forward the same together with the prisoners discreption roll to the District Magistrate, Delhi for further verification of the grounds for which release on parole is sought and his recommendations as to the prisoner on parole, in relation to public peace and tranquility, but irrespective of the nature of prisoner's offence. The District Magistrate will send his recommendation directly to the Delhi Administration who will, if the release is recommended by the Chief Commissioner, Delhi forward the case to the overment of India, for their orders. The orders of the Government of India, will be communicated to the :-

a) Inspector General of Prisons, Punjab, Ambala.

b) District Magistrate, Delhi.

c) Superintendent of the Jail concerned.

So that formalities, related to the release order i.e. execution of a personal bond and sureties, the amount of which will be fixed by the District Magistrate keeping in view the status of the prisoner, the nature of the

offence and period of imprisonment, may be completed expeditiously at the District Headquarters and the and the release of the prisoner of parole or effected at the jail where he is then confined.

(ii) The expense of journey from and to the Jail will be borne by the prisoner himself.

3. The prisoner and his sureties will execute bonds for maintenance of good behaviour during the period of parole and for return to Jail on expiry of parole to the satisfaction of the District Magistrate. The amount of personal bond and bonds to be executed by the sureties will be recommended by the District Magistrate keeping in view the status of the prisoner Magistrate keeping in view the status of the prisoner the nature of the offence and the period of imprisonment.

PART-II (Furlough)

1 (i) A prisoner who is sentenced to 5 years or more rigorous imprisonment and who has actually undergone three years imprisonment excluding remission may be released on furlough. The first spell may be of three weeks and subsequent spells of two weeks each per annum, provided that:

(a) his conduct in jail has been good: he has earned three annual good conduct remissions and provided further that he continues to earn good conduct remissions or maintain good conduct.

(b) that he is not a habitual offender.

(c) that he is not convicted of robbery with violence, dacoity and arson.

(d) that his not such a person whose presence is considered highly dangerous or prejudicial to the public peace and tranquillity by the District Magistrate of his home district.

(ii) The period of furlough will count as sentence undergone except any such period during which the prisoner commits an offence outside.
2. Same as at serial no. 2 under part-I (Parole) except that that orders sanctioning the furlough will be passed by Government of India will be necessary.

3. The expenses of the jouney from and to the jail will be borne by the prisoner himself, but government will bear the cost of journey of the prison if the family of the prisoner is so poor that it cannot meet the travelling expenses provided it is verified by the District Magistrate.

4. The period of furlough will be treated as a part of the sentence undergone in Jail."

42. The aforesaid notification was the subject matter of a decision of learned Single Judge of this Court in ***Charanjit Lal v. State***[35]. In the said case, convicts/petitioners therein moved this Court against refusal on part of the Delhi Administration to grant them furlough. This was on account of the judgment of Hon'ble Supreme Court in ***Maru Ram (supra)*** wherein, the validity of Section 433A of the CrPC was upheld to the effect that a prisoner serving life sentence will not be released till the completion of 14 years in custody. It was noted in the said judgment at that time that the stand of the Delhi Government was that as a matter of policy, in view of Section 433A of the

[35] 1985 SCC OnLine Del 67

CrPC, they were not releasing anybody on furlough. The learned Single Judge observed and held as under: -

> *"**2.** On a bare juxtaposition of the aforesaid guidelines pertaining to parole and furlough it is manifest that they are quite distinct in their nature, scope and content. While a prisoner can be released on parole when he is undergoing a sentence of imprisonment for any offence whatsoever and irrespective of the duration of the imprisonment awarded to him, furlough can be granted only in those cases where a prisoner has been sentenced to long imprisonment i.e. five years or more. Further, it is evident that release on parole is designed to afford some relief to the prisoner in certain specified contingencies, for instance, illness or death of member of his family or marriage of the prisoner himself or any member of the family etc. whereas furlough is in the nature of a remission earned by a prisoner by consistent good conduct for over a number of years and it is granted to him as a matter of course if other conditions laid in Part-II of aforesaid the letter are satisfied. One of the postulates which must weigh with the authorities while granting furlough is that the prisoner's release will not be hazardous or prejudicial to the public peace and tranquillity. Further the period of furlough counts as sentence undergone unless, of course, the prisoner released on furlough commits an offence outside the prison. In other words, while parole is tantamount to more suspension of the sentence for the time being keeping the quantum of sentence awarded to a prisoner in fact, furlough affords double relief in the sense that it gives no only an opportunity to the prisoner to breath fresh air and enjoy the society of his kith and kin etc. outside the prison but also counts towards the total sentence awarded to him, i.e. his total sentence is reduced to the extent he earns remission in the form of furlough by continuous good conduct. As observed by*

the Supreme Court in Maru Ram, Bhiwana Ram v. Union of India, AIR 1980 SC 2147:

> "'Remission' limited in time, helps computation but does not ipso jure operate as release of the prisoner. But when the sentence awarded by the judge is for a fixed term the effect of remissions may be to scale down the term to be endured and reduce it to nil, while leaving the factum and quantum of the sentence in tact. That is the ration of Rabha (AIR 1961 SC 334). Here, again, if the sentence is to run until life lasts, remissions, quantified in time, cannot reach a point of zero. This is the ration of Godse. The inevitable conclusion is that since in Section 433-A we deal only with life sentences, remissions lead nowhere and cannot entitle a prisoner to release."

*** *** ***

11. *Therefore, it inevitably follows that every person who has been convicted by the sentencing court before December 18, 1978, shall be entitled to benefits accruing to him from the remission scheme or short sentencing rules as if Section 433A did not stand in his way.*

12. *The upshot of the whole discussion, therefore, is that the guidelines formulated by the Delhi Administration in the aforesaid letter with regard to release of prisoners including life convicts cannot be said to militate against the provisions of Section 433A subject, of course, to the over-riding condition that the life convicts falling within two sinister categories of Section 433A must undergo mandatory minimum of 14 years of imprisonment and an order of release is then made either under Section 432 or Article 72/161 of the Constitution. In other words, remission by way of reward or otherwise cannot cut down the sentence to less than a minimum period of 14 years. However, that does not mean that even a life*

convict falling within the ambit of Section 433A cannot be set free on parole or furlough during the currency of his sentence of imprisonment. As said by Krishna Iyer, J. in Maru Ram's Case at page 2174:

> *"There was some argument that Section 433A is understood to be a ban on parole. Very wrong. The Section does not obligate continuous fourteen years in jail and so parole is permissible."*

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16. *It is not the case of the Delhi Administration that the instructions contained in the aforesaid letter with regard to furlough have been withdrawn, modified or altered in any way.* ***The admission made by the counsel for the State is that of late the Delhi Administration has discontinued release of life convicts on furlough irrespective of whether they were convicted prior to or subsequent to the introduction of Section 433A in the Code of Criminal Procedure. It is indeed regretable that the Delhi Administration should have taken such a stance notwithstanding the fact that the instructions contained in the aforesaid letter still subsist and have not undergone any change. It is well settled that a public authority cannot disable itself by a self-imposed policy from exercising a discretion it is required to exercise. No doubt, an authority is entitled to adopt a policy but the policy will be invalid where it disables the authority from exercising a discretion it is required to exercise. It cannot fetter its discretion in this way and disable itself from considering the application of a prisoner for his release on parole or furlough. Indeed it amounts to refusal on the part of the authority to exercise the discretion vesting in it.*** *In the well-known book "de Smith's Judicial Review of Administrative*

Action", 4th Edition, the law on the subject is stated as under at page 285:

> *"The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it : it must not act under the dictation of another body or disable itself from exercising a discretion in each individual case……..It must act in good faith, must have regard to all relevant considerations and must not be swayed by irrelevant considerations……."*
>
> *(emphasis supplied)*

It is pertinent to note that there was no restriction similar to Note 2 to Rule 1224 of Prison Rules. Thus, the ld. Single Judge noted the distinct nature of parole and furlough i.e., parole is granted for meeting certain exigencies such as illness or death, furlough is granted to the convict for good behaviour. Further, the parole is tantamount to suspension of sentence whereas furlough is a form of remission. The ld. Single Judge has also observed that the prison authorities cannot refrain from exercising a discretion *i.e.,* grant of furlough, which they are required to exercise.

43. Thereafter, it seems furlough and parole were being granted or denied without any comprehensive guidelines by the Delhi Government which was brought to the notice of the then Hon'ble Chief Justice who took *suo motu* cognizance of the matter in ***Court on its own motion v. State*** in ***W.P. (CRL) 1121/2009***. Consequently, draft guidelines for parole and furlough were made by the Delhi Government in consultation with Member Secretary, Delhi Legal Services Authority and the same were then notified in the Gazette by way of

Order No. 5.18/91-2009/HG dated 17.02.2010, titled "Parole/Furlough Guidelines, 2010". The relevant provisions with regard to parole and furlough in the said guidelines are as under:

"REGULAR PAROLE

9. It would be open to the Government to consider applications for parole on other grounds such as :-

9.1 Serious illness of a family member;

9.2 Critical conditions in the family on account of accident ***or death*** *of a family member:*

9.3 Marriage of any member of the family of the convict;

9.4 Delivery of a child by the wife of the convict if there is no other family member to take care of the spouse at home;

9.5 ***Serious*** *damage to life or property of the family of the convict including damage caused by natural calamities:*

9.6 To maintain family and social ties;

9.7 To pursue the filing of a Special Leave Petition before the Supreme Court of India against a judgment delivered by the High Court convicting or upholding the conviction, as the case may be.

10. It is clarified that where an appeal of a convict is pending before the High Court, parole will not be granted since the convict can seek appropriate orders from the High Court.

**** **** ****

21. While granting parole, it would be open to the competent authority to impose suitable conditions such as execution of personal bonds with or without sureties and including conditions to report to the local police station and/or restricting the movement of the convict to a limited area.

FURLOUGH

24. A prisoner who is sentenced to 5 years or more or rigorous imprisonment but has undergone 3 years of imprisonment excluding remission can be released on furlough.

25. A prisoner, as described above, would be entitled to I weeks of furlough in a year. The first spell could consist of 3 weeks, while the subsequent spells would consist of 2 weeks each.

26. In order to be eligible to obtain furlough, the prisoner must fulfill the following criteria:-

26.1 Good conduct in the prison and should have earned three 'Annual Good Conduct Remissions' and continues to maintain good conduct;
26.2 The prisoner should not be a habitual offender;

26.3 The prisoner should be a citizen of India.

26.4 The prisoner should not have been convicted of robbery, dacoity, arson, kidnapping, abduction, rape and extortion;

26.5 The prisoner should not have been convicted of any offence relating to any offence against the State such as sedition;

26.6 The release of the prisoner should not be considered dangerous or deleterious to the interest of national security or there exists reasonable ground to believe that the convict is involved in a pending investigation in a case involving serious crime;

26.7 The convict is not such a person whose presence is considered highly dangerous or prejudicial to the public peace and tranquility District Magistrate by his home district.

27. 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 Court.

28. While forwarding an application for furlough. the Superintendent of Jail will submit the following:-
1. Name of the convict
2. Father's name
3. Last address
4. Conduct in prison
5. Nominal roll"

(emphasis supplied)

44. It is pertinent to note that Note 2 to Rule 1224 in the Prison Rules is exactly the same as the guidelines referred to hereinabove which were duly notified with the permission of this Court. It is pertinent to note that this restriction in grant of parole and furlough to a convict whose appeal is pending before High Court was introduced for the first time in guidelines dated 17.02.2010. Prior to that, as can be seen from the relevant rules quoted hereinabove, no such restrictions were in existence. The said restriction of approaching the High Court where the appeal is pending, stems from the

principle that the first statutory appeal is extension of trial, and therefore, for various reasons for which a prisoner can be granted parole/furlough can be sought by way of an application before the High Court where the appeal is pending.

45. The aforesaid Rule 10 of the 2010 guidelines was challenged before this Court and the learned Division Bench of this Court in ***Rajesh Kumar* (*supra*)** dismissed the challenge by observing and holding 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.*
>
> *8. We are of the view that the period when the Court is in seisin of the case, any other executive authority ought*

not to be allowed to pass any order with respect to what the Court is seized of. We, in this regard are guided by K.M. Nanavati v. State of Bombay AIR 1961 SC 112 which was concerned with the exercise of power by the Executive to suspend the sentence during the pendency of the matter before the Supreme Court. It was held that suspension of the sentence when the Supreme Court was in seisin of the case could have been granted by the Supreme Court itself and if in respect of the same period the Executive were also to be held to have the power to suspend sentence, it would mean that both the Judiciary and the Executive would be functioning in the same field at the same time leading to the possibility of conflict of jurisdiction which could not have been intended.

9. We may however notice that a similar view taken by the Division Bench of the Bombay High Court was set aside by a Full Bench of that Court in S. Sant Singh @ Pilli Singh v. Secretary, Home Deptt, Govt. of Maharashtra, 2006 Crl. L.J. 1515. It was held that the considerations in grant of bail and parole are different and the two have different connotations and operate in different spheres; that the powers of the Executive of parole can be exercised notwithstanding refusal of bail or suspension of sentence; the right of parole is attracted as soon as a person is in prison governed by the Prisons Act, 1894 irrespective of the pendency of the appeal. K.M. Nanavati (supra) was distinguished by holding that the same dealt with the power of the Government under Section 432 Cr.P.C. to remit or suspend the sentence and has no application to parole which does not fall under remission of sentence.

10. With due respect to the Full Bench of the Bombay High Court, we are unable to concur. The ratio of K.M. Nanavati (supra) is that the Executive is barred from granting the same relief which the Court is entitled to, when seized of the matter and possibility of a conflict if the same were to be permitted. Once the said ratio is

found to be applicable to a situation as before us, we fail to see as to how it matters whether the conflict is owing to exercise of power by the Executive under Section 432 Cr.P.C. or to grant parole. What we are concerned with is that what the Court has denied to the convict/accused cannot be permitted to be granted by the Executive and the same if permitted would be totally subversive of rule of law. We may notice that the Supreme Court in Rakesh Kumar Pandey v. Udai Bhan Singh (2008) 17 SCC 764 deprecated the High Court for releasing an accused whose bail had earlier been cancelled by the Apex Court, in the garb of parole. It would thus be seen that the Courts have always looked down upon something which the Court seized of the matter has refused, being allowed to be done otherwise. As noticed above, the effect of both bail/suspension of sentence and parole is the release of person from detention or custody. If this Court seized of the appeal, in the facts deems it proper to keep the accused/convict behind bars, the Executive cannot be permitted to allow such sentence to run outside the bars.

12. Insofar as challenge to the conviction order in the Supreme Court is concerned, the difference is that such an order is challenged by filing SLP under Article 136 of the Constitution and Leave to appeal has to be obtained whereas filing an appeal in the High Court is a statutory right given to a convict; therefore the two situations are not akin to each other*."*

(emphasis supplied)

Thus, the learned Division Bench, recognised the principle of appeal pending in the High Court to be an extension of a trial, and therefore, it was observed that challenge to conviction in the Hon'ble Supreme Court is by way of Special Leave Petition under Article 136 of the Constitution of India and leave to appeal has to be obtained, however, appeal before the High Court is a statutory right given to the convict. Thus, the validity of the Rule was upheld by the ld.

Division Bench, on the foundation of this distinction, between appeals which come to the High Court and the Petitions that are filed before the Supreme Court.

46. The Full Bench of the Rajasthan High Court in ***Ramesh Kumar v. State of Rajasthan* (*supra*),** while answering a reference as to whether a right of an accused/prisoner/convict to be released on parole can be considered by the State Government under the provisions of Rajasthan Prisoners Release on Parole Rules, 1958 during the pendency of any appeal filed by him/her against his/her conviction, after analysing the judgment of Hon'ble Supreme Court in ***K.M. Nanavati* (*supra*),** observed and held as under: -

> *"**37.** It is of course, true that after the aforementioned discussion, the Hon'ble Supreme Court essentially considered the matter of balance between Article 161 and 142 and ruled as under:*
>
> > *"25. As a result of these considerations we have come to the conclusion that the order of the Governor granting suspension of 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. After the filing of such a petition this Court was seized of the case which would be dealt with by it in accordance with law. It would then be for this Court, when moved in that behalf, either to apply R. 5 of O. XXI or to exempt the petitioner from the operation of that rule. It would be for this Court to pass such orders as it thought fit as to whether the petitioner should be granted bail or should surrender to his sentence or to pass such other or further order as this Court might deem fit in all the circumstances of the case. It follows from what has been said 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 Principles in K.M. Nanavati Cover Whole of the Issue at Hands

38. *As we have already noticed, on essential features relevant for the present purpose, Section 401 of the Code of 1898 is equivalent to Section 432 of the Code of 1973; and Section 426 of the Code of 1898 is equivalent to Section 389 of the Code of 1973. Thus, the law declared by the Hon'ble Supreme Court in the foregoing passages in K.M. Nanavati's case, when to be applied for the purpose of the Code of 1973, Section 432 (of the Code of 1973) could be read in place of Section 401 (of the Code of 1898); and Section 389 (of the Code of 1973) could be read in place of Section 426 (of the Code of 1898). The dictum of the Hon'ble Supreme Court, coming out of Nanavati's case, in our view could be understood, explicit and clear, in the following lines with clarification about the present provisions of the Code of 1973. The Supreme Court has ruled:*

"....So long as the judiciary has the power to pass a particular order in a pending case to that extent the power of the Executive is limited in view of the words either of ss. 401 and 426 of the Code of Criminal Procedure (i.e., of Ss. 432 and 389 of Code of 1973) and Arts. 142 and 161 of the Constitution." (italicized words in parenthesis supplied)

The Hon'ble Supreme Court has harmonized the two provisions dealing with the powers of the executive and those of the judiciary as regards the matters concerning the convicts in the following:—

".... They can be harmonised without any difficulty, if S. 426 (Section 389 of Code of 1973) is held to deal with a special case restricted to the period while the

appeal is pending before an appellate court while S. 401(Section 432 of the Code of 1973) deals with the remainder of the period after conviction.

....

"....what is covered by Section 426 (Section 389 of Code of 1973) is not covered by Section 401 (Section 432 of the Code of 1973)." (italicized words in parenthesis supplied)

In our view, with the abovementioned enunciation by the Hon'ble Supreme Court, there remains nothing to doubt that howsoever wide might be the expanse of the power of the executive under Section 432 of the Code of 1973, it cannot be exercised while the Court is seized of the same matter. Section 389 of the Code of 1973 deals with the period until the appeal is pending before an appellate Court; and Section 432 deals with the remainder of the period after conviction and when the appeal is not pending.

***39.** Now, the Rules of 1958 have been framed precisely under sub-Section (6) of Section 401 of the Code of Criminal Procedure, 1898 (equivalent to Section 432 of the Code of 1973). Therefore, whatever is the name given to the indulgence granted to the convict under the Rules of 1958, the source of such a power has to be traced to Section 432 Cr. P.C., 1973 only; and for this, the dictum of the Supreme Court is clear that the same cannot be exercised so long the matter is in the seizin of the Court.*

***40.** Much has been sought to be suggested that in Nanavati's case, the question before the Supreme Court was only as to whether the Governor under Article 161 of the Constitution of India can exercise his power of suspension of sentence during the period when the Supreme Court is in seizin of the case; and, therefore, this decision does not apply to the question at*

hands about the power of grant of parole. The argument, in our view, has several shortcomings.

41. *In the first place, it could be noticed clearly that Article 161 of the Constitution in fact occurs in Chapter II of Part VI of the Constitution of India providing for the executive power of the States; and therein, Article 161 confers plenary powers on the Governor to grant pardons and to suspend, remit or commute sentences. With respect, we are clearly of the view that what has been laid down by the Hon'ble Supreme Court in respect of the power of the Governor under Article 161 of the Constitution of India that the same could be exercised until the matter is not sub judice before the Court, applies with greater force on the powers of the State Government under Section 432 of the Code of 1973. It follows rather as a necessary consequence that such powers of the State Government under Section 432 can be exercised only so long the matter is not sub judice in the Court.*

42. *Secondly, the scope of powers under the relevant provisions of the Code of Criminal Procedure directly arose for consideration; or at any rate, it was an innate issue, which was considered and pronounced upon by the Hon'ble Supreme Court. The issue arose precisely in the circumstances that the Governor's order was likely to interfere or meddle with the exercise of jurisdiction by the Hon'ble Supreme Court; and that was held impermissible. In all its parameters and features, the decision in K.M. Nanavati relates to the question at hands and the answer therein, in our view, governs the entire field.*

43. *Though as observed hereinabove, pronouncement on law by the Hon'ble Supreme Court in K.M. Nanavati is directly applicable to the case at hands but, even if it be assumed for the sake of hypertechnical*

> *argument that the scope of particular statutory provision was not as such before the Hon'ble Supreme Court and even if it be assumed that what the Hon'ble Supreme Court has said in K.M. Nanavati's case as regards the provisions of the Code of Criminal Procedure is in the nature of obiter-dictum (though such assumptions would not be justified as noticed above), we have no hesitation in repelling such arguments too with a simple reference to the fundamental principle that even an obiter of the Hon'ble Supreme Court is required to be followed and obeyed [vide observations in paragraph 17 in Sarwan Singh Lamba v. UOI : (1995) 4 SCC 546).*
>
> ***44.** Thus, respectfully following the dictum in Nanavati, we are clearly of the view that the answer to the referred question is in the negative."*

47. It is pertinent to note that the Rules which were placed before the Full Bench of the Rajasthan High Court for interpretation were framed by the State Government under the provisions of Code of Criminal Procedure under Section 401(6) of the CrPC, 1898 (corresponding provision to Section 432 of the CrPC, 1973) and in this view of the matter, it was held, following the dictum of the Hon'ble Supreme Court in ***K.M. Nanavati* (*supra*)**, the exercise of powers under Section 401 of the CrPC, 1898 could not be exercised by the executive so long as the matter is in *seisin* of the Court. However, the judgment of the Hon'ble Supreme Court in ***Mohinder Singh* (*supra*)** has held that power of remission under Section 432 of the CrPC can be exercised by the Executive even when the appeal is pending before the Hon'ble Supreme Court which was subsequently noted by the Constitutional Bench in ***Sunil Fulchand Shah* (*supra*)**.

48. A Full Bench of Hon'ble Madras High Court in ***T. Ramalakshmi along with other connected matters (supra)*****,** was dealing with the following questions under a Reference: -

> *"3. The reference has been made to answer the following two issues:*
>
> ***(1) Whether during pendency of the appeal before the High Court/Special Leave Petition before Apex Court, the prisoner can be extended the benefit of Ordinary Leave or Emergency Leave under the Tamil Nadu Suspension of Sentence Rules, 1982, by exercising the powers under Article 226 of the Constitution of India?***
>
> *(2) Whether the Tamil Nadu Suspension of Sentence Rules, 1982 as amended by G.O.(MS)No.205, Home (Prison-V) Department dated 25.04.2022 places an embargo on grant of ordinary leave under Rule 22 as explanation to Rule 22 states that the period of actual imprisonment shall be counted from the date of admission to prison as convict and not the date of arrest and whether the period of incarceration during remand or during trial could be counted while determining the length of sentence suffered by the convict?"*
>
> *(emphasis supplied)*

After considering the conflicting views of Division Benches, the Full Bench of the Madras High Court observed and held as under: -

> *"7. Thus, we have no hesitation in holding that under Rule 35 of the Tamil Nadu Suspension of Sentence Rules, 1982, the competent Prison Authority is empowered to grant ordinary leave or emergency leave to a prisoner during the pendency of a criminal appeal before any of the Appellate Courts."*

It is pertinent to note here that The Tamil Nadu Suspension of Sentence Rules, 1982, were notified in exercise of the powers conferred under Section 432(5) of the CrPC[36].

49. Under the Prisons (Bombay Furlough & Parole) Rules, Rule 4(11) prior to its amendment provided for a similar restriction as provided in Note 2 to Rules 1224 of the Prison Rules. The said Rule provided that, if the appeal of a convict is pending adjudication before higher forum, he shall not be eligible to be released on furlough. However, the said Rule was amended *vide* notification dated 16.04.2018. The Division Bench of Hon'ble Bombay High Court in ***Tanaji Maruti Kolekar* (*supra*)** duly noted the amendment and observed as under: -

> *"3. The only ground on which the application of the petitioner for furlough is rejected is that the appeal preferred by the petitioner against his conviction is pending before the higher forum. Thus, according to the Authorities, the case of the petitioner falls in Category 4(11) of the Prisons (Bombay Furlough & Parole) Rules. Rule 4(11) of the Rules stated that a prisoner whose appeal is pending before the higher forum shall not be eligible to be released on furlough. However, it is seen that the Government has issued a new notification dated 16.4.2018 in relation to Rule 4. As per the new notification, the criteria that the prisoner whose appeal is pending before the higher forum shall not be eligible for furlough, has been deleted from the Rules. Thus, this ground now cannot be a good ground to deny furlough to the petitioner. In this view of the matter, we set aside both the orders dated 14.6.2017 and 3.11.2017 and grant furlough to the petitioner for a period of 28 days."*

[36] Corresponding to Section 473 of the Bharatiya Nagarik Suraksha Sanhita, 2023

50. Recently, the Central Government through the Ministry of Home Affairs has drafted Model Prisons and Correctional Services Act, 2023, and circulated the same *via* letter dated 25.05.2023 issued by Home Secretary, with all the States and Union Territories for the adoption of the provisions of the said Act in their jurisdictions with any modification which they may consider necessary. The relevant provision, relating to parole/furlough, of the said Act drafted by the Central Government reads as under: -

> *"**CHAPTER-XVIII***
> ***PRISON LEAVE, REMISSION AND PRE-MATURE RELEASE***
>
> ***51. Parole and Furlough** – (1) Prison leave may be granted to eligible convicted prisoners as an incentive for good behaviour and responsiveness to correctional treatment with the objective of their rehabilitation, as may be prescribed under the rules.*
>
> *(2) There may be the following types of prison leave, namely:*
> *a) Regular Parole*
> *b) Emergency Parole*
> *c) Furlough*
>
> *(3) Regular Parole may be granted to eligible convicts by the competent authority under such conditions and for such purposes as may be prescribed under the rules. The period spent on regular parole may not exceed thirty days at a time and may not be granted more than two times in a year. The period spent on regular parole shall not be counted as part of sentence.*
>
> *(4) Emergency Parole may be granted by the competent authority to eligible convicts in rare or emergent*

situations, under police protection for a period extending upto 48 hours, as prescribed under the rules. The period spent under this parole shall be counted towards part of sentence.

(5) Furlough may be granted to eligible convicts by the competent authority, as an incentive for maintaining good conduct and discipline in the prison after the completion of three years of incarceration for a period not more than 14 days in a year. The period spent on furlough shall be counted as part of sentence served by the prisoner.

(6) For prisoners governed by any of the laws relating to the Armed Forces of the Union, the grant of leave shall be subject to the provisions of those laws.

(7) For public safety and preventing parole jumping, prisoners may be granted prison leave on the condition of their willingness to wear electronic tracking devices for monitoring the movement and activity of such prisoners. Any violation by the prisoner shall attract cancellation of prison leave, in addition to disqualification from any prison leave being granted in future, as may be prescribed under the Rules.

(8) If a prisoner on parole or furlough fails to surrender on the due date, upon intimation by the officer-in-charge of the Prison, the police shall arrest the prisoner under the provisions of section 224 of the Indian Penal Code 1860 and take action as per the provisions of law."

It is pertinent to note that no such restriction as provided in Note 2 to Rule 1224 of the Prison Rules has been inserted in the aforesaid proposed Act.

51. As can be seen from the legislative history of parole/furlough, the restriction with regard to grant of parole/furlough during pendency of appeals

before the High Court was introduced for the first time in 2010 guidelines which was then incorporated in the Prison Rules, 2018. The fact that the term "Supreme Court" was not included in the aforesaid Rules cannot be said to be a casual oversight. In the judgment of the ld. Division Bench of this Court in ***Rajesh Kumar* (*supra*)** as well as the learned Full Bench of Rajasthan High Court in ***Ramesh Kumar (supra),*** the issue whether the prisoner would be denied parole or furlough while the appeal is pending before the Hon'ble Supreme Court was not considered. In fact, this position was also noted by the ld. Division Bench in ***Rajesh Kumar (supra)*** and the said Bench observed that appeals before the High Court and Special Leave Petitions to Appeal before the Hon'ble Supreme Court are a on different footing.

52. As noted hereinabove, even the Hon'ble Supreme Court in ***Rajendra Diwan (supra)*** has held that Entry 65 in List II of the VIIth Schedule to the Constitution of India has given power to State Legislatures to legislate with regard to jurisdiction and powers of all Courts except the Supreme Court in respect to any matters specified in the said List (State List). The relevant entry in respect of prisons is Entry 4 in List II of the VIIth Schedule to the Constitution. Note 2 to Rule 1224 of the Prison Rules, not only just lays down the restriction with regard to non-grant of parole/furlough but it further states that if any such relief is sought for, then the convict can approach the High Court. In view of the restrictions provided in Entry 65 of List II of the VIIth Schedule to the Constitution of India, the words "Supreme Court" cannot be included in Note 2 to Rule 1224 of the Prison Rules by means of any interpretation.

53. The decisions discussed above as also some of the legislative material on the Rules governing parole and furlough would show that both the said

measures have evolved as part of the process of reformative justice. The clear legislative intent is to enable even hardened criminals who are sentenced to long imprisonment terms ought to be given a chance to connect with Society in general, their friends and family and, as observed by the Supreme Court in ***Asfaq***[37]**,** to "*breathe fresh air*". Thus, these measures are exercised in favour of persons who are serving long sentences with an intent to grant redemption and rehabilitation.

54. The distinction between parole and furlough is not relevant for deciding the present reference. However, it is sufficient to state that both these measures are part of executive functioning and the power vests with the prison authorities, under applicable prison rules, as to whether parole or furlough ought to be granted or not. The periods of parole and furlough vary from State to State and for grant of parole, a specific reason would be required, however, furlough may be granted to break the monotony of the convict. The object behind parole and furlough stems from rights, which are Constitutional Rights derived from Article 21 of the Constitution of India. The said Right is one which recognizes the dignity of convicts & prisoners. Exercise of these measures is usually when a convict exhibits good conduct during incarceration or there is an emergent need. There is one view that grant of parole and furlough is an act of grace as part of the reformative process.

55. The purpose of the present Reference by the ld. Single Judge is to clarify as to whether prison authorities can exercise the power of granting parole and furlough when a Special Leave Petition or an Appeal is pending before the Supreme Court in respect of the conviction of the concerned convict. The

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[37] ***Asfaq* v. *State of Rajasthan*, (2017) 15 SCC 55**

question that is to be addressed in this reference is - the existence of power to grant parole and furlough and not as to whether in individual cases the same is merited or not.

56. The decision in ***K.M. Nanavati (supra)*** is at the core of this reference. In the said decision, the question was whether the Hon'ble Governor could have suspended the sentence when the appeal was pending before the Supreme Court. The Supreme Court held therein that Articles 142 and 161 of the Constitution need to be harmonised. Similarly, Sections 401 and 426 also of the CrPC need to be harmonised. Thereafter, in ***Mohinder Singh (supra)***, the Supreme Court observed that the State Government could permit whole or part of the punishment under Section 432 of CrPC.

57. In ***Sunil Fulchand Shah* (*supra*),** the Supreme Court distinguished between these measures and held that parole is nothing but a conditional release from custody and merely changes the manner in which sentence is to be undergone. In ***Dadu @ Tulsidas (supra***), it was held that parole did not amount to suspension, remission or connotation of sentence.

58. Further, in ***Atbir (supra)***, again the Hon'ble Supreme Court observed that a furlough is a brief release from prisons and is a good conduct remission. Even in a case where the President had remitted the death sentence and had converted the sentences is one for the remainder of his natural life, the Supreme Court held that furlough would still be applicable.

59. The question as to whether parole or furlough could be considered when the matter is pending before the Supreme Court has been considered by different High Courts. The Madras High Court in ***T. Ramalakshmi along with other connected matters (supra)*** has held that ordinary leave or emergency

leave under the prison rules can be granted during the pendency of the appeals before the Appellate Courts.

60. The Rajasthan High Court in ***Ramesh Kumar (supra)***, held that it would not be permissible to exercise poweSrs under Section 432 CrPC for granting parole while the appeal is pending against conviction. The Bombay High Court ***Tanaji Maruti Kolekar* (*supra*)** discussed the entire issue and noted the fact that the Rule 4 (11) of the Prisons (Bombay Furlough & Parole) Rules was removed vide notification dated 16th April, 2018, and after the said amendment, the bar on consideration of furlough and parole has been removed even if an appeal is pending before a higher forum.

61. In so far as the Delhi High Court is concerned, the decision in ***Rajesh Kumar (supra)*** of the Ld. Division Bench of this Court gives some guidance when it observes that the pendency of an appeal before the High Court and a Special Leave Petition before the Supreme Court are two distinct situations. The Bench observed that a Special Leave Petition is filed under Article 136 of the Constitution of India and the same cannot be treated as a statutory appeal unless leave to appeal is granted. The said observation is very relevant and is set out below:

> *"12. Insofar as challenge to the conviction order in the Supreme Court is concerned, the difference is that such an order is challenged by filing SLP under Article 136 of the Constitution and Leave to appeal has to be obtained whereas filing an appeal in the High Court is a statutory right given to a convict; therefore the two situations are not akin to each other."*

62. Thus, the Bench, dismissed the challenge to Clause 10 of the Parole/Furlough Guidelines, 2010 which categorically provided that if an appeal is pending before the High Court, then no parole would be granted.

63. In the opinion of the Court the decision in ***Rajesh Kumar (supra)*** would be clearly applicable in deciding the present Reference being a decision of the Coordinate Bench of this Court. The distinction drawn in ***Rajesh Kumar (supra)*** would apply to the questions raised herein. Note 2 to Rule 1224 of the Delhi Prison Rules which uses the expression *Delhi High Court* cannot be read as intending to include even the *Supreme Court*. There is nothing that barred the use of the expression *'Supreme Court'* in this Note in clear terms especially when in other Rules, the High Court and the Supreme Court are mentioned in different contexts.

64. The fact that "Supreme Court" had not been incorporated in Note 2 to Rule 1224 of the Prison Rules is further fortified from the fact that various other provisions in the Prison Rules have referred to "Supreme Court" in various circumstances, and therefore, non-mentioning of "Supreme Court" in the Note 2 to Rule 1224 of the Prison Rules cannot be considered as an omission. The intention of the Competent Authority while drafting the Rules is clear from the plain language itself that what was restricted was grant of parole/furlough to convicts whose appeal are pending adjudication before the High Court and not Hon'ble Supreme Court.

65. Thus, the Delhi Prison Rules do not bar consideration of parole and furlough if the matter is pending before the Supreme Court. It is an altogether different question as to whether in the facts of a specific case, the prison authorities ought to grant parole or furlough, if the Supreme Court is seized of the matter either in a Special Leave Petition or in an Appeal. The grant or non-grant of the parole and furlough on merits would depend on the facts of each case. There could be a situation wherein the Supreme Court may have specifically refused to grant suspension of sentence or refused bail to a

particular convict. In such cases a deeper scrutiny would be required by the prison authorities as to whether parole or furlough could be granted to the convict. However, the mere fact that the authorities can exercise power would not mean that parole or furlough ought to be granted as a matter of right. The authorities would have to bear in mind the non-grant of suspension or bail by the Supreme Court or other relevant circumstances and the same may have an impact on the consideration of parole/furlough.

66. The question in this reference is whether there is a bar on the consideration of parole/furlough while pendency of Special Leave Petition or Appeal before the Supreme Court, which clearly as per Note 2 of Rule 1224, there is none. The prison authorities can consider a particular case for grant of parole/furlough if the Special Leave Petition or Appeal is pending in the Supreme Court, however, whether the same could be granted or not is an altogether different issue which would be depend on the facts of each case.

67. In view of the above position, it is clear that the power to suspend sentence and grant bail is distinct from the power to grant parole or furlough. Thus, while appeals are pending before a higher forum, grant of parole and furlough can be considered as per the applicable prison rules by the jail authorities.

68. Both the ld. Amicus Curiae have also agreed with this legal position in their oral and written submissions. To impose a bar on consideration of parole/furlough if a Special Leave Petition or Appeal is pending in the Supreme Court could have completely unpredictable consequences and could also result in practical difficulties for convicts who may require to be granted parole/furlough due to emergent situations. It cannot be expected that every convict would have to compulsorily approach the Supreme Court for temporary

release or emergent release in grave situations including medical exigencies of the convict, demise in the family, any emergency involving children of the convict, etc. There is divergence of opinion between High Courts on this issue and in most cases the interpretation has depended on the relevant local prison rules. The Delhi Prison Rules are categorical and clear that Rule 1224 bars parole/furlough being granted only if the appeal is pending in the High Court. This bar cannot be extended to the Supreme Court by way of judicial interpretation when the language does not read as such.

69. As already noted hereinabove, in the affidavit filed on behalf of the Competent Authority, it is stated that parole and furlough were granted to the convicts while their Criminal Appeals/Special Leave Petitions were pending before the Hon'ble Supreme Court and which continued till the decision of the learned Single Judge of this Court, in the present reference, was pending.

70. In these circumstances, if some convicts were denied parole or furlough on account of pendency of their Criminal Appeals/Special Leave Petitions before the Hon'ble Supreme Court before the judgment of learned Single Judge, the same was discriminatory and violative of Articles 14 and 21 of the Constitution of India. In such circumstances, it was open to such convicts to approach this Court under Article 226 of the Constitution of India on the ground of violation of their fundamental right by seeking judicial review of said rejection order(s).

CONCLUSION

71. In view of the aforesaid discussion of law and facts and circumstances, the answer to the references is as follows: -

> "**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?**
>
> **Answer**: In the opinion of this Court, Note 2 to Rule 1224 of the Delhi Prison Rules, 2018, cannot be interpreted to hold that the right of prisoners to apply for parole or furlough is barred, while their Criminal Appeal/Special Leave Petition is pending adjudication before the Hon'ble 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?**

Answer: In the opinion of this Court, Note 2 to Rule 1224 of the Delhi Prison Rules, 2018, cannot be interpreted to hold that the right of prisoners to apply for furlough is barred, while their Criminal Appeal/Special Leave Petition is pending adjudication before 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?

Answer: Since mere pendency of Criminal Appeal/Special Leave Petition before the Hon'ble Supreme Court cannot be taken as a bar for release on furlough, each case would be determined on its own eligibility criteria as per Rules by the Competent Authority and the same would be subject to judicial review under Article 226 of the Constitution of India by the High Court.

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

> **Answer**: Yes, jurisprudence on parole can be applied to furlough as well. As held in **Sunil Fulchand Shah (*supra*)** and **Dadu @ Tulsidas (*supra*)** that parole does mean suspension of sentence."

72. The questions referred to adjudication by the learned Single Judge are answered accordingly.

73. In view of the above, the findings of the learned Single Judge in the order dated 3rd July, 2023 *qua* **Issue B,** as formulated *vide* order dated 2nd December, 2022, interpreting the term "High Court" in Note (2) to Rule 1224 of the Prison Rules *ipso jure* to include 'Supreme Court', is set aside.

74. Being conscious of the fact that there is divergent opinion between different High Courts and also considering the significance of the questions raised in this Reference, this Court deems appropriate to grant Certificate of Appeal to the Supreme Court under Article 132/134A of the Constitution of India.

75. The Court records its appreciation for both *Amici Curiae* – Mr. Vivek Sood, Senior Advocate and Mr. V.P. Garg, Advocate as also to all the other ld. Counsels who appeared in these matters for rendering effective assistance to the Court in the adjudication of the reference.

76. The reference petitions are disposed of in the above terms.

77. Each of the writ petitions may now be listed before the Roster Bench for decision on the prayer for parole and furlough, on the facts of each case in terms of today's judgment.

78. Judgment be uploaded on the website of this Court *forthwith*.

PRATHIBA M. SINGH
JUDGE

AMIT SHARMA
JUDGE

JULY 15, 2025*/sn/bsr/ns/msh*