

2011 (0) AIJEL-HC 227898

GUJARAT HIGH COURT

Hon'ble Judges: Akil Kureshi, J.

Liyakathussain Alias Master Khudabux Shaikh Versus State Of Gujarat

Special Criminal Application No. 2089 of 2010 ; 2219 of 2010 ; \*J.Date :- MAY 04, 2011

- CODE OF CRIMINAL PROCEDURE, 1973 Section - 268(1)

**Code of Criminal Procedure, 1973 - S. 268(1) - grant of Furlough Leave - conclusion of state was that if petitioner were given furlough leave he would escape from custody - petitioner was given temporary bail so many times and he surrendered within dead line which was important factor which should be kept in mind and considered - order u/s. 268(1) of CrPC could not take power of authorities to entertain application of petitioner - petitioner filed so many prayers to grant him furlough leave which were rejected not on the ground u/s. 268(1) but on other grounds - State Government directed to reconsider application and pass reasonable order within four weeks from the date of the order of this court - petition disposed of.**

**Imp.Para:** [11][13][16][17]

**Equivalent Citation(s):**

2011 JX(Guj) 1618 : 2011 AIJEL\_HC 227898

**JUDGMENT :-**

**Akil Kureshi, J.**

**1** Both these petitions have been filed by the same Petitioner. In Special Criminal Application No. 2219 of 2010, prayer is to set aside the order passed by the State Government under Section 268 of the Code of Criminal Procedure (Cr.P.C. for short). In Special Criminal Application No. 2089 of 2010, the Petitioner has prayed for grant of furlough leave.

**2** Petitioner is serving sentence in a TADA case. His sentence is confirmed by the Supreme Court. He is also facing several other criminal cases. State Government, therefore, has passed order under Section 268 of the Code of Criminal Procedure It is his case that he is falsely involved in series of cases. Even during trial and pendency of appeal before the High Court, he has been released on temporary bail on several

occasions. He had every time surrendered in time. His contention is that the order Section 268 of the Code of Criminal Procedure passed by the State Government is illegal. On account of such order, he is being denied furlough leave. He, therefore, filed a separate petition seeking direction to the State Authorities to consider and decide his application for furlough leave.

**3** Affidavit in reply has been filed by the State Government in Special Criminal Application No. 2219 of 2010 stating, inter alia, that the Petitioner is serving sentence of minimum of 20 years. Several other cases are filed against him. If he is released on furlough, he is likely to abscond and take part in terrorist activities. It is pointed out that previously the Petitioner had approached this Court by filing Special Criminal Application No. 151 of 2009 seeking furlough leave which was dismissed by this Court on 23rd April 2009.

**4** Though the Petitioner has not produced the order under Section 268 of the Code of Criminal Procedure the same has been produced along with the affidavit in reply. The said order dated 6.11.95 was issued by the State Government in exercise of powers under Sub-section (1) of Section 268 of the Code of Criminal Procedure It is stated that the Petitioner is involved in grave offences affecting public order. He is a dreaded criminal belonging to notorious Latif Gang. It is, therefore, stated that it is reasonably apprehended that if he is moved out of prison, there is all likelihood of attempt being made to secure his escape or freedom from custody/jail.

**5** On behalf of the Petitioner, it was contended that the Petitioner has already completed 18 years of sentence. All cases were registered previously. It was mainly contended that restriction imposed by the Government under Section 268 of the Code of Criminal Procedure can apply only to cases governed under Section 267 of the Code of Criminal Procedure and none others.

**6** In Special Criminal Application No. 2089 of 2010, counsel for the Petitioner submitted that the Petitioner's application for furlough leave is not being considered without any reason. In any case, order under Section 268 of Code of Criminal Procedure cannot be a ground for not considering his application for furlough leave.

**7** Section 267 and 268 of the Code of Criminal Procedure fall under Chapter XXII which is under the heading of Attendance of persons confined or detained in Prisons. These sections read as under:

Power to requirement attendance of prisoners.

267. (1) Whenever, in the course of an inquiry, trial or other proceeding under this Code, it appears to a Criminal Court, -

(a) that a person confined or detailed in a prison should be brought before the Court for answering to a charge of an offence, or for the purpose of any proceedings against him, or

(b) that it is necessary for the ends of justice to examine such person as a witness.

the Court may make an order requiring the officer-in-charge of the prison to produce such person before the Court for answering to the charge or for the purpose of such proceeding or, as the case may be, for giving evidence.

(2) Whether an order under Sub-section (1) is made by a Magistrate of the second class, it shall not be forwarded to, or acted upon by, the officer-in-charge of the prison unless it is countersigned by the Chief Judicial Magistrate to whom such Magistrate is subordinate.

(3) Every order submitted for countersigning under Sub-section (2) shall be accompanied by a statement of the facts which, in the opinion of the Magistrate, render the order necessary, and the Chief Judicial Magistrate to whom is submitted, may, after considering such statement, decline to countersign the order.

**8** Power of State Government to exclude certain persons from operation of Section 267.

**9** 268(1) The State Government may, at any time, having regard to the matter specified in Sub-section (2) by general or special order, direct that any person or class of persons shall not be removed from the prison in which he or they may be confined or detained, and thereupon, so long as the order remains in force, no order made under Section 267, whether before or after the order of the State Government, shall have effect in respect of such person or class of persons.

(2) Before making an order under Sub-section (1), the State Government shall have regard to the following matters, namely:

(a) the nature of the offence for which, or the grounds on which, the person or class of persons has been ordered to be confined or detained in prison;

(b) the likelihood of the disturbance of public order if the person or class of persons is allowed to be removed from the prison;

(c) the public interest, generally.

**10** From the perusal of the above-mentioned statutory provisions, it can be seen that Section 267 pertains to the power of the Criminal Court in course of an inquiry, trial or other proceedings to require that the person who is in prison to be produced before the Court for answering to a charge of an offence or for the purpose of proceedings against him or that it is necessary for the ends of justice to examine him as a witness.

**11** On the other hand, Section 268 starts with the caption, "Power of State Government to exclude certain persons from operation of Section 267". Sub-section (1) of Section 268 in particular authorizes the State Government, having regard to the matters specified in Sub-section (2) to direct that any person or class of persons shall not be removed from the prison in which he or they may have been confined or detained. Upon such order being passed, so long as the same remains in force, no order made under Section 267 whether before or after the order of the State Government shall have effect in respect of such person or class of persons. Sub-section (2) of Section 268 specifies that matters such as, nature of offence, likelihood of disturbance of public order if the person is

removed from the prison and the public interest are to be kept in mind before the State Government could pass any order under Sub-section (1) of Section 268.

**12** Combined reading of the above statutory provisions would reveal that order passed under Sub-section (1) of Section 268 of the Code of Criminal Procedure would have effect only in a situation where situation envisaged under Sub-section (1) of Section 267 comes into operation. In other words, once an order under Section 268(1) is passed by the State Government, no court could direct production of a prisoner in the court in exercise of powers under Section 267(1) and if such order is passed, the same would be rendered inoperative so long as the order of the State Government under Section 268(1) remains in operation.

**13** As already noted, Sections 267 and 278 figure in Chapter XXII under the heading of "Attendance of Persons confined or detailed in prisons". Heading of Section 268 itself refers to power of State Government to exclude certain persons from operation of Section 267. Sub-section (1) of Section 268 makes it amply clear that the order passed by the State Government prohibiting removal of a person from prison would have consequence of rendering any order under Sub-section (1) of Section 267 by the Court ineffective. To my mind, therefore, any order passed by the State Government under Sub-section (1) of Section 268 would have effect only insofar as the situation specified in Sub-section (1) of Section 267 is concerned. To the above extent, I am entirely in agreement with the submission of the learned Counsel for the Petitioner.

**14** Question, however, does not remain here. Prayer of the Petitioner is that the order should be quashed. The order itself has given sufficient and extensive reasons why the State Government was prompted to pass an order under Sub-section (1) of Section 268. There is no reason for this Court to interfere with the said order when sufficient reasons are recorded. It may, however, be noted that the said order was passed way back in the year 1995. The order itself expresses an apprehension that if the Petitioner is removed from prison, there is likelihood of his attempting to escape from custody. However, as stated by the Petitioner in the petition, since passing of the said order, the Petitioner had enjoyed temporary respite on several occasions and every time he surrendered within the time permitted. He has given details of his release in the petition as follows:  
Sr.No.Authority/CourtDate 1City Sessions Court, Ahmedabad26.09.97 to 30.09.97 2  
29.01.98 to 01.02.98 3 25.04.98 to 30.04.98 4 13.07.98 to 24.07.98 5 21.10.98 to  
26.10.98 6 23.02.99 to 15.03.99 7 18.05.99 to 27.05.99 8 25.06.99 to 27.06.99 9  
22.09.99 to 24.09.99 10 15.01.2000 to 17.01.2000 11 21.10.2000 to 25.10.2000 12  
10.02.2001 to 19.02.2001

**15** It is also the case of the Petitioner that he has been released by this Court as well as by the Supreme Court on temporary periods.

**16** If the Petitioner has been released on several occasions and surrendered in time, it is difficult to appreciate the concern of the State Government that if he is released from prison even with police japta, he is likely to escape from custody. It may also be kept in mind that the order was passed in the year 1995 and much time has passed since then

and several factors have undergone changes. The Government therefore should reconsider the situation.

**17** With respect to the prayer of the Petitioner for furlough leave, I am of the opinion that the order under Section 268(1) of the Act should not detain the authorities from considering his application for leave as per Rules. Of course, reasons cited in the order of the State Government may be germane if found still relevant at this stage. The fact that the Petitioner had been released on temporary bail on several occasions and surrendered in time would also be a factor which must be borne in mind. It may be noted that the Petitioner had filed Special Criminal Application No. 311 of 2008 praying for furlough leave which petition was dismissed on 30.7.2008, however, not on the ground of Government's order under Section 268(1) of the Code of Criminal Procedure but on other grounds.

**18** In the result, both the petitions are disposed with following directions:

State Government shall reconsider the question of order under Section 268(1) of the Code of Criminal Procedure with respect to the Petitioner and pass appropriate order within a period of four weeks from the date of receipt of a copy of this order.

**19** Application for furlough leave of the Petitioner which is stated to be pending with the State Authority shall be considered within four weeks from the date of receipt of a copy of this order.

**20** Both the petitions stand disposed of accordingly.