

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.08.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU

and

THE HONOURABLE MR.JUSTICE V.BHARATHIDASAN

H.C.P.No.166 of 2016

Gopal

.. Petitioner

vs.

1. The State of Tamil Nadu,
Rep. by its Secretary,
Department of Home,
Fort St.George,
Chennai-600 009.

2. The Superintendent of Central Prison
Puzhal-1, Chennai-600 066.

.. Respondents

Prayer : Petition filed under Article 226 of the Constitution of India praying for issuance of a writ of habeas corpus directing the respondents to produce the detainee Om Prakash, son of Laluram, before this Court, now confined at Central Prison, Puzhal-1, Chennai and set him at liberty.

For Petitioner	..	Mr.R.Sankarasubbu
For Respondents	..	Mr.V.M.R.Rajentren,APP

ORDER

(Order of the Court was made by S.NAGAMUTHU, J.)

The petitioner claims to be the friend of one Mr. Om Prakash, S/o of Laluram, aged 47 years, who is a life convict (Life Convict No.2210), now lodged in Central Prison, Puzhal, Chennai. Mr. Om Prakash (hereinafter

referred to as "detenu") was the 2nd accused in S.C.No.580 of 2000 on the file of the IV Additional District and Sessions Judge, Chennai. By Judgment dated 13.02.2002, the trial Court convicted him for various offences including murder. The trial Court has imposed the maximum punishment of imprisonment for life besides other terms of punishment and also fine. In pursuance of the said Judgment and in pursuance of the Commitment Warrant issued by the trial Court, he is lodged in Central Prison, Puzhal, Chennai.

2. According to him, during the period of investigation as under trial prisoner, he spent in prison the period between 25.2.2000 and 13.10.2001. His grievance is that this period which he had actually undergone as undertrial prisoner in Central Prison has not been counted for the purpose of Section 433-A of Cr.P.C. In this regard, earlier, the detenu himself filed H.C.P. No.853 of 2014 before this Court seeking a direction to the Government and Superintendent of Central Prison, Puzhal-I, Chennai to set him at liberty. The said petition was filed on the claim that the period of sentence undergone as undertrial prisoner should be counted as sentence period and he should be considered for remission. That petition was dismissed by another Division Bench of this Court (**Hon'ble Justices S.Tamilvanan and T.Mathivanan**) by order dated 17.12.2014 wherein the Bench has passed

the following order:

"This petition has been filed under Article 226 of the Constitution of India, by the petitioner directing the respondents to produce the detenu namely Om Prakash son of Laluram now confined at Central Prison, Puzhal-I, Chennai-66 and to set him at liberty.

2.The petitioner has alleged that he is a life convict and as per the judgment of conviction, he was sentenced to undergo life imprisonment under Section 302 of IPC. and other provisions of law. The said conviction and sentence were confirmed by the Division Bench of this Court.

3.It is not in dispute that since the petitioner was convicted and sentenced to undergo life imprisonment, which has reached its finality, he is not entitled to seek remedy under Section 428 of Criminal Procedure Code for deducting the period already undergone. However, he has not filed any petition challenging the order passed by the Sessions Judge dated 09.09.2008 in T.S. No.9641, a copy of which is available at page No.149 of the typed set of papers. The petitioner has simply filed a petition seeking an order in the nature of Habeas Corpus under Article 226 of the Constitution of India. When there is no illegal detention and the petitioner himself has admitted that he is a life convict sentenced to undergo life imprisonment, which has reached its finality, we are of the view that this petition itself is not legally sustainable.

4.It is made clear that the petitioner is entitled to approach the appropriate forum seeking appropriate relief. With the above observation, this petition is dismissed. "

3. Thereafter, the detenu made a representation to the Government

and the Superintendent of Central Prison for considering him for remission as provided under the of Code of Criminal Procedure, more particularly, Section 433-A Cr.P.C. That has not been considered so far, is the grievance expressed now. Therefore, the petitioner has come up with this Habeas Corpus petition seeking a direction to the respondents to set the detenu at liberty by counting the period of sentence undergone by him as under trial prisoner.

4. We have heard the learned counsel appearing for the petitioner and the learned Additional Public Prosecutor appearing for the State and we have also perused the records carefully.

5. In the counter filed by the respondent, *inter alia*, it is stated that the trial Court, viz., the learned IV Additional District and Sessions Judge, Chennai, in D.S.No.9641, dated 09.09.2008 has stated that the remand period could not be counted and set off under Section 428 Cr.P.C., since he was convicted for life sentence. On the basis of this order, according to the respondents, the period spent by the detenu as undertrial prisoner was not taken into account for consideration of Premature Release during the year 2008. It is further stated that since the claim of the petitioner for Premature Release was dismissed by this Court, as per order dated 17.12.2014 in

H.C.P.No.853 of 2014, the respondents are not in a position to consider the case of the detenu for Premature Release.

6. The learned counsel for the petitioner would submit that the said stand taken by the State is not legally sustainable in this case. He would refer to the Division Bench Judgment of this Court in M.P.Nos.1 of 2014 in Crl.A.Nos. 1342 of 2004 etc. batch, wherein while considering various aspects as to how Section 428 Cr.P.C. should be applied, has issued the following directions in paragraph 18 of the Judgment.

"18. In the result, these petitions are allowed and the convict prisoner in these cases are directed to be given the period of set off under Section 428 Cr.P.C., as set out in paragraph 10 above.

Before parting, we direct all trial courts in the State of Tamil Nadu:

(a) to refer to Section 428 Cr.P.C., and give details of the period in prison already undergone by the accused in that case upto the date of Judgment, be it conviction or acquittal. If he has not undergone any period of detention in that case prior to the judgment, that shall also be mentioned.

(b) to give the particulars relating to the period of pre-conviction detention in the warrant of commitment.

(c) send a copy of the Judgment together with

the Warrant of Commitment to the Prison Authorities.

(d) to obtain a Bond under Section 88 Cr.P.C., '73 from the accused who was not arrested and released on bail, both in summons case and warrant case."

7. The learned counsel would further point out that the Hon'ble Supreme Court in BHAGIRATH VS DELHI ADMINISTRATION reported in **1985 (2) SCC 580** in identical situations, while considering the question as to whether the life imprisonment can be considered as a term of imprisonment as per the legislation employed in Sections 433-A and 428 of the Cr.P.C, has interpreted the same to say that the term of sentence will include imprisonment of life also. In paragraph 6 of the Judgment, the Hon'ble Supreme Court as held as follows:

"6. So goes the argument. So does it go but it fails to carry much conviction. Life is uncertain. In more ways than one. Who knows what good may come tomorrow and how many good tomorrows there are still to go? But, philosophical digressions apart, especially optimistic, the fact that the term of life is of an uncertain duration does not justify the conclusion that the sentence of imprisonment for life is not for a term. The relevant question and, the only one, to ask under Section 428 is: Has this person been sentenced to may be split into two parts. One,

has this person been sentenced to imprisonment? And, two, is the imprisonment to which he has been sentenced an imprisonment for a term ? There can possibly be no dispute that a person sentenced to life imprisonment is sentenced to imprisonment. Then what is the term to which he is sentenced ? The obvious answer to that question is that the term to which he has been sentenced is the term of his life. Therefore, a person who is sentenced to life imprisonment is sentenced to imprisonment for a term."

8. The learned Additional Public Prosecutor would, however, oppose this petition mainly on the ground that the claim of the petitioner has already been negated by this Court in the earlier Habeas Corpus Petition and therefore, the same issue cannot be reopened in the present Habeas Corpus Petition.

9. We have considered the above submissions. Since there is confusion as to whether for the purpose of considering a case of life convict for remission, whether the period spent by him as undertrial prisoner should be counted or not, the Hon'ble Supreme Court has answered in BHAGIRATH Judgment wherein in a crystal clear manner, the Hon'ble Supreme Court has held that the period spent as undertrial prisoner should be counted. It is

based on this Judgment, the Division Bench in Criminal Appeals (cited above) has issued the directions as mentioned above. Despite the Judgment of the Hon'ble Supreme Court and the directions issued by the Division Bench of **Hon'ble Justices S.Rajeswaran and P.N.Prakash**, there appears to be some doubt in the minds of the subordinate Judges. In this regard, we have to point out that after the Judgment of the Hon'ble Supreme Court in BHAGIRATH case, in order to obviate the doubt, if any, in respect of the above issue, the parliament thought it fit to amend Section 428 Cr.P.C. by adding the proviso to the same. The newly added proviso which came into effect from 23.6.2006 reads as follows:

"Provided that in cases referred to in section 433-A,
such period of detention shall be set off against the period
of fourteen years referred to in that section"

10. In view of the said legislative command, there can be no doubt as of now that the period of sentence undergone as undertrial prisoner should be counted as sentence period actually undergone for the purpose of 433-A of Cr.P.C.

11. Now, turning to the objection raised by the respondents referring to the earlier order passed by this Court in H.C.P.No.853 of 2014, we have

Carefully gone through the said judgment. With respect, we regret to say that the Division Bench was not apprised of the Judgment of the Hon'ble Supreme Court and the proviso to Section 428 Cr.P.C which was made by means of amendment in criminal procedure code. If the personal liberty of an individual is involved, we cannot interpret the legal provisions in a narrower manner as it would be violative of the fundamental rights of the individual. Right to life and liberty are considered to be sacrosanct which are basic human rights. On a technical plea raised by the Government, we are not inclined to deny the relief to the detenu. As we have already discussed, in view of the judgments cited supra and proviso under Section 428 Cr.P.C, the period between 25.2.2000 and 03.10.2001 spent by the detenu as undertrial prisoner should be taken into account for the purpose of considering his case for remission as provided under Section 433-A of Cr.P.C.

12. The learned counsel for the petitioner would submit that the case of the co-accused, who is similarly placed like that of the petitioner, has been given the benefit of remission. Therefore, this petitioner shall also be given remission.

13. We make it very clear that in this order, we do not express any opinion as to whether this detenu is entitled for remission or not. They are

matters to be considered by the authorities concerned, independently. We only say that the above said period should be added to the period of sentence already undergone and his case shall be considered in accordance with law by the authorities for remission.

14. In the result, the Habeas Corpus Petition is disposed of with the following directions:

(i) The period of detention undergone by the detenu as undertrial prisoner between 25.2.2000 and 03.10.2001 shall be counted for the purpose of Section 433-A of Cr.P.C and in the event, it is found that including that period, he has completed 14 years of actual sentence, he shall be considered for remission.

(ii) As we have already pointed out, whether he is entitled for remission or not, it is left open to the authorities to consider strictly in accordance with law. At any rate, the authorities concerned shall pass orders in this matter within a period of two months from the date of receipt of a copy of this order.

[S.N., J.] [V.B.D.,J.]
16.08.2016

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To

1. The Secretary,
State of Tamil Nadu,
Department of Home,
Fort St.George,
Chennai-600 009.

2. The Superintendent of Central Prison
Puzhal-1, Chennai-600 066.

3. The Public Prosecutor, High Court, Madras.

S.NAGAMUTHU, J.,
AND
V.BHARATHIDASAN, J.,

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