

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO.1494 OF 2016

Santosh Tulsiram Shitole,
[Convict No.C-8016]
Age: Major, Occu: Nil,
R/o. Central Prison,
Aurangabad.

PETITIONER

VERSUS

1. The State of Maharashtra
Through the Secretary,
Home Department, Mantralaya,
Mumbai
2. The Police Superintendent,
Central Prison,
Aurangabad.

RESPONDENTS

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Mr.G.D.Jain, Advocate for the Petitioner
Mr.S.Y.Mahajan, Addl.P.P. for the Respondent
/ State

...

**CORAM: S.S.SHINDE &
K.K.SONAWANE, JJ.**

Reserved on : 20.03.2017
Pronounced on : 27.03.2017

JUDGMENT: (Per S.S.Shinde, J.):

1. Heard.

2. Rule. Rule made returnable forthwith, and heard finally with the consent of the parties.

3. By way of filing this Writ Petition under Article 226 of the Constitution of India, the petitioner seeks direction to the State Government for grant of State remission on account of 'Golden Jubilee of Indian Independence', as granted in favour of similarly situated convicts.

4. It is the case of the petitioner that on 11th August, 1995, Crime No.186/1995 was registered with Ambajogai Police Station, District Beed, for the offence punishable under Section 302, 34 of the Indian Penal Code, 1860, against the petitioner. The petitioner has been arrested on the same day. On 28th March, 1996, the petitioner has been released on bail by this Court. The petitioner was under-trial prisoner for the

period from 11th August, 1995 to 28th March, 1996. On 31st March, 2000, the Additional Sessions Judge, Ambajogai in Sessions Case No.64/1995 has convicted the petitioner for the offence punishable under Section 304 Part II of the Indian Penal Code, 1860 and sentenced to suffer rigorous imprisonment of five years and to pay a fine of Rs.500/-, in default to pay the fine he has to undergo three months more rigorous imprisonment.

5. It is further the case of the petitioner that on 25th April, 2000, the petitioner has been released on bail by this Court. This Court [Coram: T.V.Nalawade,J.] dismissed the Criminal Appeal No.146 of 2000, by the judgment and order dated 9th February, 2015. On 6th August, 1997, the State issued a letter in respect of grant of State remission on account of Golden Jubilee of Indian Independence to the convicts. At serial no.9, it is mentioned that if conviction is of five

years or more than five years but less than six years, State remission of ten months provided. It is submitted that the Division Bench of the Bombay High Court, Bench at Nagpur [Coram: K.J.Rohee & B.P.Dharmadhikari, JJ.] in Criminal Writ Petition No.244/2008 [Rajubhau Gaddalwar Vs. The State of Maharashtra & another] made observation that the State remission would be applicable to the convict from the date he is under-trial prisoner. It is submitted that on 31st March, 2000 in Sessions Case No. 64/1995, the Additional Sessions Judge, Ambajogai, issued a letter to the Jailor, Beed, in respect of surrender warrant. It is mentioned in the said warrant that the petitioner was in the custody of police and the Magistrate for the period from 11th August, 1995 to 28th March, 1996. He invites our attention to the copy of the letter dated 31st March, 2000, issued by the learned Additional Sessions Judge,

Ambajogai to the Jailor, Beed in Sessions Case No.64/1995. It is submitted that on 6th August, 1997, the State Government issued a letter in respect of grant of State remission on account of Golden Jubilee of Indian Independence to the convicts. It is mentioned in the said letter that if conviction of 5 years or more than 5 years but less than 6 years, the State remission is of ten months provided. He submits that the petitioner is entitled for such benefit in view of the observations of the Division Bench of the Bombay High Court, Bench at Nagpur, in its judgment delivered on 30th June, 2008 in Criminal Writ Petition No.244/2008 [Rajubhau Gaddalwar Vs. The State of Maharashtra and another]. It is submitted that by the said judgment, it is made clear by the High Court that the State remission would be applicable to the convicts from the date he is under-trial prisoner, though policy came into force

from 15th August, 1997. Therefore, he prays that the Petition may be allowed.

6. Pursuant to the notices issued to the respondents, respondent no.2 had filed affidavit-in-reply. Relying upon the averments in the said affidavit in reply, the learned APP made following submissions:

7. The petitioner is convicted for the offence punishable under Section 304 [II] of the Indian Penal Code by the Additional Sessions Judge, Ambajogai, District Beed, on 31st March, 2000 and sentenced to suffer 5 years imprisonment. As per the State Government letter [GR/Notification] dated 6th August, 1997, the Government had directed to give State remission only to the convicted prisoners and the effect of the same was to be given from 15th August, 1997. As per the Government letter dated 6th August, 1997, all convicted prisoners [and are sentenced for 5

to 6 years] as on or before 15th August, 1997, should be given remission of 10 months. The learned APP invites our attention to the contents of the said letter. The petitioner was under-trial from 11th August, 1995 to 28th March, 1996 and was on bail from 29th March, 1996 to 29th March, 2000. Thus, it is clear that the petitioner was on bail when the Government Resolution dated 6th August, 1997, was issued and was in respect of under trial accused. When the State Government issued Government Resolution / Notification dated 6th August, 1997, the applicant was not convicted by the Sessions Court, he was under-trial [MCR custody] and he was released on bail during the period 29th March, 1996 to 29th March, 2000. Thus, the petitioner is not entitled for the benefit of the State remission. The learned APP invites our attention to the judgment of the Supreme Court in the case of **Government of Andhra**

Pradesh Vs. Anne Venkatesware in Criminal Appeal Nos.418-419 and 484-485 of 1976 decided on 17th February, 1977, submits that the Supreme Court in that case considered whether the period of detention undergone by the writ petitioners in connection with the sessions cases before their conviction could be treated as a part of the period of imprisonment on conviction so as to entitle them to remission of their sentences under the Prisons Act.

8. He submits that the Supreme Court had occasioned to interpret the provisions of Section 428 of the Criminal Procedure Code, 1973 and it is held that Section 428 provides that the period of detention of an accused as an undertrial prisoner shall be set off against the term of imprisonment imposed on him on conviction. The section only provides for a "set off", it does not equate an "undertrial detention or remand detention

with imprisonment on conviction." The provision as to set off expresses a legislative policy; this does not mean that it does away with the difference in the two kinds of detention and puts them on the same footing for all purposes. The basis of the High Court's decision does not, therefore, seem to be right. Relying upon the observations of the Supreme Court, the learned APP submits that the section 428 only provides for a "set off", it does not equate an "undertrial detention or remand detention with imprisonment on conviction". Therefore, he submits that in the present case also, the period as under-trial prisoner by the petitioner, cannot be equated with imprisonment on conviction. He submits that since the petitioner was on bail during period from 29th March, 1996 to 29th March, 2000, he is not entitled to receive the benefit of Golden Jubilee of Indian

Independence. He further invites our attention to the judgment of the Supreme Court in the case of **Rakesh Kaushik Bhagirath Vs. Delhi Administration** in Criminal Appeal No.754 of 1983 and Writ Petition [Criminal] No.1266 of 1982, decided on 16th April, 1985. He also invites our attention to the ratio laid down by the Supreme Court in the case of **State of Haryana & others Vs. Jagdish**¹ and in particular para 43 thereof and submits that the Supreme Court has made it clear that the convict is entitled for the provisions in the policy that was existing on the date of his conviction. He submits that the policy to grant remission on account of Golden Jubilee of Indian Independence would necessarily apply from the date of coming into force the said policy.

9. We have heard the learned counsel appearing for the petitioner, and the learned

1 2010 [4] SCC 216

APP appearing for the respondent – State at length. With their able assistance, we have perused the pleadings in the Petition, annexures thereto, reply filed by the respondents, and also the judgments cited across the Bar by the learned counsel appearing for the petitioners, and the learned APP appearing for the respondent – State. In the present case, it is not in dispute that on 6th August, 1997, the State of Maharashtra issued a Notification, thereby making provision to grant State remission to the prisoners on the occasion of 'Golden Jubilee of Indian Independence'. However, according to the learned APP appearing for the respondent – State, the benefit is extended only to the convicted prisoner and effect of the same is to be given from 15th August, 1997, and on 6th August, 1997, the petitioner was not convicted. It is true that on 6th August, 1997, the petitioner was not

convicted, however, it is admitted position that the petitioner was under-trial prisoner. However, he was released on bail after his arrest. It is also true that on 15th August, 1997, the petitioner was on bail, however, he was under-trial prisoner.

10. The Division Bench of the Bombay High Court, Bench at Nagpur, in the case of **Chottu Ratanlal Punekar Vs. State of Maharashtra**² had occasioned to consider the communication dated 6th August, 1997, issued by the Desk Officer, Home Department, Government of Maharashtra, informing the Inspector General of Prisons, Pune under the orders of the Governor of Maharashtra that State remission is to be given to the convicts on the eve of Golden Jubilee of Indian Independence with effect from 15th August, 1997. The Division Bench recorded the grievance of the petitioner in para 4. After

2 2009 [1] Mh.L.J. [Cri.] 209

assigning the reasons in para 5 and 6, allowed the said Petition. Para 4 to 6 of the said Judgment, reads thus:

4. The grievance of the petitioner is that benefit of the said State remission is not extended to him though he is entitled for it. It was urged on behalf of the respondent / State that State remission can be extended only to those persons who were convicts on 15-8-1997 and it cannot be extended to those who were not convicts on that date. Since the petitioner was not a convict on 15-8-1997 and was merely an undertrial, he is not entitled to get benefit of the State remission. The logic, according to the learned APP is that had the petitioner been acquitted, there was no question of giving him benefit of the State remission.

5. The logic in the submissions of learned APP is difficult to accept. The fortuitous circumstance of one Court deciding a comparatively new

matter before 15-8-1997 and the another Court deciding a very old matter thereafter cannot be permitted to be utilized to distinguish between convicts / prisoners for the purposes of extension of said benefit. Section 432 of Criminal Procedure Code empowers the State Government to pass appropriate orders and to remit sentences. In view of Golden Jubilee of Indian Independence, the decision dated 6-8-1997 has been taken. The decision is made operative from 15-8-1997. Thus the above referred fortuitous circumstance is totally relevant and if any classification is permitted on the basis of such circumstance, it would be wholly arbitrary. For an undertrial prisoner languishing in jail, after he is found guilty and is sentenced, section 428 of Criminal Procedure Code permits set off of the period spent by him as undertrial prisoner against the period of sentence ultimately imposed. Thus for all practical purposes after he is found

guilty and sentence, he becomes convict and as such is covered by the policy decision dated 6-8-1997 mentioned above. The effort to contend that the period spent in jail as undertrial prisoner is wholly irrelevant for the purposes of the said circular, is without any basis and in fact it violates the spirit of said decision. An undertrial prisoner who is ultimately acquitted is not a convict at all and hence he is not entitled to benefit of remission.

6. We, therefore, hold that the present petitioner is entitled to benefit of the said State remission and accordingly direct respondent / State Government to extend its benefit to him. Rule is made absolute in the above terms.

11. Therefore, the grievance/controversy raised in the present Petition is the same like raised by the petitioner therein in the case of **Chottu Ratanlal**

Punekar [cited supra]. The State Government, being aggrieved by the judgment of the Division Bench in the case of *Chottu Ratanlal Punekar*, filed Petition for Special Leave to Appeal [Cri.] No.1798/2009 [State of Maharashtra Vs. Chottu Ratanlal Punekar]. The said Petition was heard by the Hon'ble Supreme Court on 9th March, 2016, and for the reason stated in the order, the said Petition was dismissed.

12. In the light of the discussion in the foregoing paragraphs, though we are not inclined to issue any mandatory directions to the respondents to accept the prayer of the petitioner, however, we are inclined to give directions to the respondents to consider the case of the petitioner afresh, in the light of the judgment of the Division Bench in the case of ***Chottu Ratanlal Punekar*** [cited supra] and also the observations made hereinbefore, and the office record in relation to the case

of the petitioner maintained by the respondents, and to take decision afresh. We make it clear that the earlier order, if any, passed by the respondents, refusing benefit to the petitioner of the Circular dated 6th August, 1997, stands quashed and set aside. We direct respondents to consider the case of the petitioner afresh, and take the decision as expeditiously as possible, however, within 10 weeks from today and communicate the same to the petitioner.

13. The petition is partly allowed. Rule is made absolute partly on above terms and the Writ Petition stands disposed of accordingly.

[K.K.SONAWANE]
JUDGE

[S.S.SHINDE]
JUDGE