

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

CRIMINAL WRIT PETITION NO.1500 OF 2016

Nandkumar s/o. Shivmurti Mundhe,
Age Major, convict undergoing the
Life sentence – Prisoner No.6205,
Presently in Harsool Jail,
Aurangabad.

PETITIONER

VERSUS

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

RESPONDENTS

...
Mr. Chaitanya C.Deshpande, [Appointed]
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 directions to the respondent nos.1 and 2 to grant the State remission of 2 years to the petitioner in view of the Government Circular dated 6th August, 1997.

4. It is the case of the petitioner that the petitioner is undergoing sentence for life imprisonment as per the order dated 22nd December, 1999, passed by the Sessions Court at Beed in Sessions Case. The petitioner has sent letter to the Hon'ble Senior most Judge of the High Court of Bombay, Bench at Aurangabad, received on 9th November, 2016, wherein the petitioner has contended that, he was arrested in connection

with a crime for the offence punishable under Section 302 of the Indian Penal Code. After full-fledged trial, the Sessions Court at Beed has held him guilty for the offence punishable under Section 302 of the Indian Penal Code, and he has been sentenced to suffer R.I. for life. It is submitted that, from the application of the petitioner it is evident that the accused / petitioner has been arrested on 9th September, 1996 and was released on bail in the month of January, 1997. Thereafter, he has been convicted on 22nd December, 1999 and sentenced to suffer R.I. for life and was taken in custody. Thus, it appears that the petitioner was in jail from 9th September, 1996 to January 1997 and 22nd December, 1999 onwards. Thus, the petitioner has undergone the sentence for more than 16 years. However, the details of sentence as to fine amount etc. are not available.

5. It is submitted that the matters of remission of sentence are governed by the provisions of Sections 432, 433-A and 435 of the Code of Criminal Procedure and by the Maharashtra Prison [Remission System] Rules, 1962. As per the said Rules, the Rule 4 provides for 4 types of remission viz. 1) ordinary remission, 2) annual good conduct remission, 3) special remission, and 4) State remission. The State Government may on such occasion of National importance or public rejoicing as the State Government may determine grant remission to such prisoners for such number of days as the State Government may by order specify on this behalf. The said Rules provide for forfeiture of remission by way of punishment as well as provide for maintenance of record of remission. Thus, the Jailor of concerned Jail has to maintain the record of every prisoner in Form No.3. In exercise of powers under

Section 432 (1) of the Code of Criminal Procedure, the Government of Maharashtra, Home Department, Mantralaya, Mumbai issued one Circular dated 6th August, 1997, granting the State remission to the prisoners on the occasion of Golden Jubilee Independence day. The said remission is to take effect from 15th August, 1997. In para 2 of the said Government Circular, there are some exceptions wherein the benefit of remission should not be given. In para 3 of the said Circular, it is made clear that in case of life sentence, the prisoner has to undergo at least 14 years sentence and earlier to that, the prisoners cannot be released. Further it is made clear that, the prisoner referred in para 3 of the said Circular will also be entitled for this remission, but after they complete the 14 years of the sentence. Para 4 of the said Circular states that on 15th August, 1997, the prisoners, who were

unauthorizedly, were out of prison should not be given the benefit of the said Circular but the prisoners who were on authorization such as parole and furlough and earned leave etc. they be given the benefit of the State remission.

6. It is submitted that, as stated in the application of the petitioner his grievance appears to be that he has been arrested on 9th September, 1996, in connection with an offence under Section 302 of the Indian Penal Code. He was released on bail in January, 1997. The Government of Maharashtra has issued one Circular dated 6th August, 1997, on the occasion of the Golden Jubilee year of Independent India and for the said occasion, the State remission was granted to the prisoners. As contended in the application as the petitioner was on bail on 15th August, 1997 and looking at the date of arrest on 9th September, 1996, according to

the petitioner, he would be entitled to State remission though on the date of notification i.e. on 6th August, 1997. The petitioner was on bail in view of the fact that, from his date of arrest i.e. 9th September, 1996 till January, 1997, he was under-trial prisoner and subsequently he is undergoing the sentence, thus, the petitioner claimed the benefit of State Remission of two years be granted to him. The petitioner has relied upon the judgment of 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 decided on 30th June, 2008, [Rajubhau Gaddalwar Vs. The State of Maharashtra & another].

7. It is further the case of the petitioner that in the case of **Rajabhau Gaddalwar Vs. State of Maharashtra** [cited **supra**], the Division Bench of the Bombay High Court, Bench at Nagpur, has been pleased to

grant State remission to the petitioner Rajabhau Gaddalwar, who was an undertrial prisoner from 02.02.1996 and was convicted on 30th August, 1997, while allowing the said petition of Rajabhau Gaddalwar, their Lordship have referred the law laid down in Criminal Writ Petition No.163/2008 [Chottu Ratanlal Punekar Vs. State of Maharashtra] decided on 20th June, 2008. It is submitted that in the case of *Chottu Ratanlal Punekar Vs. State of Maharashtra* reported in Laws (Bom) 2008-6-34, their lordship have been pleased to observe that the grievance of the petitioner Chottu Punekar was that he was arrested on 8th February, 1997, for the offence punishable under Section 302 r/w. 34 of the Indian Penal Code and continued to be under-trial prisoner till his conviction on 20th August, 1999. He was denied the state remission of two years. It was urged on behalf of the State Government that the State

remission can be extended only to those persons, who were convicts on 15th August, 1997. According to the State Government, those who were not convicts on 15th August, 1997, cannot be given the said benefit of State remission. Though the Circular of the Government about grant of State remission is dated 6th August, 1997, it was made operative from 15th August, 1997. While deciding the case of the Chottu Puneekar, their Lordship held that for all practical purposes after the accused is found guilty and sentenced, he becomes convict and as such is covered by the policy decision dated 6th August, 1997, mentioned above. Their Lordships further observed that 'the effort to contend that the period spent in jail as under trial prisoner is wholly irrelevant for the purposes of the said Circular, is without any basis and in fact it violates the spirit of the said decision" and thus, their Lordships in the

matter of *Chottu Punekar* has been pleased to accord the benefit of the state remission to the accused and it was ordered accordingly.

8. The petitioner seeks direction to respondent nos. 1 and 2 to grant benefit of state remission to the petitioner in view of his arrest on 9th September, 1996 and his being in jail from 11th December, 1999, uptill now.

9. The learned counsel appearing for the petitioner submits that in view of the Government Circular dated 6th August, 1997, the petitioner is entitled for the State remission of 2 years as per the item no.15 given in the said Circular. As per para 3 of the said Circular, life convicts are entitled to get the actual benefit of State remission of two years only after the convict has undergone the sentence of 14 years. He submits that it is true that on issuance of

the Government Circular dated 6th August, 1997, the petitioner was not convict, but in view of the judgment in the case of **Chottu Punekar [cited supra]**, the petitioner is entitled to get benefit of remission for the period for which he was under trial-prisoner. The petitioner has already undergone sentence of 16 years, and therefore, he is entitled for state remission of 2 years. The actual sentence takes effect from 9th September, 1996 i.e. the date from which the petitioner is under trial prisoner and intervening period from January 1997 to 22nd December, 1999, would be the period for which the petitioner was on bail under the orders of the Court and not an unauthorized escape from prison and after 22nd December, 1999, his further detention has been continued for a period of 16 years from 22nd December, 1999. Thus excluding the period for which the petitioner was on bail, he would be entitled for the

state remission of two years. It is submitted that in the case of **Chottu Punekar** [cited supra], the High Court has taken a view that the period spent in jail as under-trial prisoner is irrelevant for the purposes of afore-mentioned Circular dated 6th August, 1997. Therefore he submits that the petitioner is entitled for set off from 9th September, 1996 and resultantly would be entitled for the state remission of two years. Therefore, he submits that the petition may be allowed.

10. Pursuant to the notices issued to the respondents, one Mr. Bapurao Ramrao More, serving as Superintendent, Central Prison, Aurangabad, has filed affidavit-in-reply. Relying upon the averments in the said affidavit-in-reply, the learned APP submits that the petitioner is convicted by the Sessions Court, Beed in Crime No.122/1996 and Sessions Case No.75/1997 dated 22nd December,

1999, for the offence under Section 302 of the IPC and ordered to undergo Life imprisonment. The petitioner's under-trial period is from 9th September, 1996 to 27th December, 1997 i.e. 00 Years, 3 months and 19 days. It is submitted that as per the State Government letter [Government Resolution / Notification] dated 6th August, 1997, the Government has directed to give state remission only to convicted prisoner and the effect of the same is to be given from 15th August, 1997. As per the Government letter dated 6th August, 1997, all prisoners, who were convict for life imprisonment as on or before 15th August, 1997, should be given remission of 2 years. When the State Government letter [Government / Notification] dated 6th August, 1997 is issued, at that time the petitioner was not convict prisoner and he was an under-trial prisoner [MCR Custody] and was on bail since 27th December, 1996.

11. 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, and 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.

12. 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 from 27th December, 1996, 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. Jagdish¹** 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

1 2010 [4] SCC 216

said policy.

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

14. 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

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

Indian Independence with effect from 15th August, 1997. The Division Bench recorded the grievance of the petitioner in para 4. After 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.

15. 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.

16. 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.

17. 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