

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

CRIMINAL WRIT PETITION NO.285 OF 2013

Bhima s/o Rangnath Adagale,
Age 45 years, Occ. Labour,
R/o. at present Sahakar Nagar, Pune.

... PETITIONER

VERSUS

1. The State of Maharashtra.
2. The Inspector General of Prisons,
Aurangabad.
3. The Superintendent,
Aurangabad Central Prison,
Aurangabad
4. The Superintendent of Open prison,
Paithan, Dist. Aurangabad.

... RESPONDENTS

...

Mrs. Bharati B. Gunjal, Advocate for Petitioner.

Mr. R. D. Sanap, APP for Respondents.

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CORAM : **T. V. NALAWADE &
M. G. SEWLIKAR, JJ.**

RESERVED ON : 19th October, 2020.

PRONOUNCED ON : 03rd November, 2020.

ORDER: (Per T. V. Nalawade, J.)

. The petition is filed for relief of compensation in respect of the period of four years four months and ten days for which the petitioner was allegedly detained in jail illegally. Though there are other contentions like wrongful refusal of death parole etc., during the arguments the learned counsel for petitioner pressed for compensation on only the aforesaid ground, so-called illegal detention.

2 Both the sides are heard.

3 It is the case of the petitioner that he ought to have been kept in open prison for the period 9th March, 2008 to 2nd January, 23013 and as per the Rules of remissions made for open prison, he ought to have been granted remission of five years and seven days in respect of that period. It is contended that for about the period of four years and nine months, he was illegally kept in closed prison and so that period cannot be treated as the period during which imprisonment was suffered in closed prison. It is contended that in view of the decision of this Court given in Criminal Writ Petition No.389 of 2012, it needs to be presumed that for the aforesaid

period, the petitioner was kept in open prison. Thus, only one point raised in respect of the aforesaid period needs to be decided in the present proceeding.

4 The submissions made and the record show that the petitioner was sentenced to life imprisonment for the offence of murder. Initially he was kept in closed prison and then as per the Rules he was transferred to open prison. When he was released on furlough leave, when he was in open prison, he did not return to jail after the furlough period was over. Warrant was required to be issued for his arrest and he was brought back by executing that warrant. On 9th March, 2008, the Superintendent of Open Prison passed order and transferred the petitioner from open prison to closed prison in view of the circumstance that he had overstayed. This order was confirmed by the appellate authority, Deputy Inspector General (Prison) on 20th August, 2008. This decision of the authority was challenged by the petitioner by filing Criminal Writ Petition No.613 of 2010. The contention made in this writ petition to challenge the order was that the conduct of overstay could not have come in his way to continue to suffer sentence in open prison. Criminal Writ Petition No.613 of 2010 came to be dismissed on 17th February, 2011.

5 As per the aforesaid order dated 17th February, 2011, the petitioner started serving jail sentence in closed prison. Thus, from 9th March, 2008 till his release from jail, after completing the sentence period, he was kept in closed prison. It appears that even before dismissal of this petition, he had made representation to the respondent to give him open prison. This application was rejected on 30th June, 2010, but this fact was not brought to the notice of this Court when this Court decided Criminal Writ Petition No.613 of 2010 on 17th February, 2011. In any case, the order made in Criminal Writ Petition No.613 of 2010 on 17th February, 2011 attained finality.

6 The petitioner filed Criminal Writ Petition No.747 of 2011 to challenge the aforesaid order dated 30th June, 2010 of respondent by which his request to send him to open prison was turned down. Criminal Writ Petition No.647 of 2011 came to be disposed of with direction to respondent to reconsider the representation of the petitioner to send him to open prison. The order dated 30th June, 2010 was made by respondent on the ground that he had not surrendered to jail in time after furlough period was over. At the cost of repetition, it needs to be mentioned that even after the overstay period, the petitioner had not returned to jail on

his own. He was required to be traced, arrested and brought back to jail.

7 In Criminal Writ Petition No.389 of 2012, the order made by the respondent again of similar nature and dated 11th April, 2012 came to be challenged. This Court allowed Criminal Writ Petition No.389 of 2012 on 30th November, 2012. This Court has carefully gone through the reasons given by this Court, other Honourable Judges of the Court, and it can be said that this Court formed opinion that there was discrimination and on that ground, it had become necessary to set aside the order. Some observations can be found in paras 32, 33, 36, 37 and 38 and they are as under:

“32. In our view, the net outcome of the way in which the prison authorities have behaved is to discriminate the petitioner from other similarly situated i.e. the overstaying prisoners, in the matter of treatment and this discrimination is not generated sheerly on account of a contingency or accident.

33. The differential and discriminatory treatment given to petitioner is not on account of any rational, or classification for reasons and grounds whatsoever duly disclosed and justifiable.

34. ...

35. ...

36. At this stage, learned APP has offered oral explanation as follows :-

68 days overstay is calculated after deducting the days of actual hospitalization from some incident of overstay of 126 days. Thus, this aspect will show due application of mind.

37. This explanation by learned APP amounts to an attempt to supplant reasons not found in the order. An order which has to be reasoned order, can not be justified by later on supplying reasons.

38. Therefore, we hold that the petitioner has been met with hostile and grossly discriminatory, as well arbitrary treatment.”

8 The operative part of the order passed in Criminal Writ Petition No.389 of 2012 is in different paragraphs and in those paragraphs the relief, which was given can be found. Those paragraphs are paras 39, 40, 42, 44 and 48 and they are as under:

“39. The Additional Director General of Prisons was afforded with an opportunity to undo said discriminatory conduct of his subordinates. The Additional Director General Police has chosen to disregard this opportunity and has blindly endorsed action of his subordinates.

We, therefore, set aside order passed by Additional Director General of Prisons passed on 5-4-2012 Annexure

R-2 at page no.42 and 43 of paper book of W.P.No.389/2012, as well order passed by Deputy Inspector General (Prisons) Aurangabad passed on 11-4-2012 and issue further directions as mentioned hereinafter.

40. We clarify that though we have set aside the order of committing the petitioner to Closed prison from Open Prison, this order shall not operate till 5-1-2013.

The Additional Director General (Prisons) Maharashtra shall call for the papers and take a decision as to whether and how :-

(a) Petitioner's case is different from the case of prisoners named in this order in the foregoing paragraph no.16;

(b) If there exist any special reason for which the petitioner was required to be arrested in comparison to those who were not arrested;

(c) Whether other prisoners have reported late, had brought on record justifiable and convincing reasons and circumstances beyond the control of the Prisoner concerned whereby the prisoners concerned were **"precluded and prevented"** from reporting in jail on the due date and on each day of delay, due to which they deserve retention in Open Prison in contrast with the case of present petitioner.

41. ...

42. We further clarify that, if for any reason, the Additional Director General (Prisons) Maharashtra is not able to take a decision on or before 5-1-2013, the petitioner shall be liable to be committed to Open Prison forthwith and the Additional Director General (Prisons) may

take the decision soon thereafter.

43. ...

44. It should also be seen that the fact that somebody is arrested alone in exclusion to many others, in isolation, should not be a ground of forfeiture of concession of continuation in Open Prison. We hope that appropriate decision be arrived at by the Director General of Prisons in consultation with the Government and sub-ordinate prison authorities. We hope and expect that such decision be arrived at within the period of 6 months at the most, and compliance be reported to this Court.

45. ...

46. ...

47. ...

48. We are constrained to impose costs in the background that not only petitioner has been met with an injustice, but also because the Additional Director of Prisons has totally disregarded the text and spirit of the orders passed by this Court in W.P.No.647/2011. We have not issued a personal notice to the Officer concerned as we are not viewing towards his conduct as an act of willful dis-obedience tantamounting to contempt. The token costs shall be Rs.2,500/-. This amount shall be payable by the Additional Director General of Prisons, who has passed impugned order dated 5-4-2012. Amount of costs be paid to the petitioner directly within 30 days and compliance be reported to this Court.”

9 It appears that some record was produced to supply information in respect of other prisoners, who were given open prison. In some cases, the lapses of the prisoners like returning late to jail were ignored. It was submitted for the authority that those prisoners had overstayed, but they had returned to jail on their own. It was submitted that the present petitioner had not returned to jail on his own and such cases were not considered favourably. Thus, the reason was given for rejection of open prison that as the prisoner had not returned to jail on his own, he had overstayed and he was brought to jail by his arrest.

10 The aforesaid discussion shows that there was a decision of Criminal Writ Petition No.613 of 2010, which was against the petitioner. The decision of Criminal Writ Petition No.389 of 2012 does not show that the petition was filed for recalling the decision of Criminal Writ Petition No.613 of 2010. There is no specific mention that the said decision was recalled while deciding Criminal Writ Petition No.389 of 2012. Further, it was made clear in the decision of Criminal Writ Petition No.389 of 2012 that this decision was to operate after 5th January, 2013. There is no reason appearing for fixing this date other than allowing authority to exercise power. The submissions made and the record show that the petitioner came to

be released from jail on 2nd January, 2013 as he had completed the jail term of 26 years including the remission period. It is not disputed that by commuting the life sentence he was placed in a category for which jail sentence of 26 years is provided and this period includes the remission period. Further, 14 years compulsory jail in such case is also a rule and that needs to be kept in mind.

11 The aforesaid circumstances show that the petitioner actually spent the aforesaid period in closed prison, but he is claiming remission in respect of that period on the basis of rule made for open prison. Even in the decision of Criminal Writ Petition No.389 of 2012, relief was not granted to the effect that the periods spent in closed prison was to be treated as a period spent in open prison. From the decision only one inference is possible that from 5th January, 2013, the petitioner was to get open jail. Criminal Writ Petition No.389 of 2012 was decided on 30th November, 2012.

12 The say filed by respondent and the Rules regarding remission for open prison show that some pre-conditions are given for getting open prison. The relevant portion of Rule 4 is as under:

“4. (i) The following prisoners may be selected for confinement in all open prisons—

Convicted criminal prisoners who –

(a) are found to be of good behaviour, and are physically and mentally fit; and

(b) ...

(c) ...

(d) ...

(ii) The following prisoners shall not normally be sent for confinement in an open prison:–

...

(h) escapees and escape risks,

(i) ...

(j) ...

(k) prisoners, who have been transferred from an open prison to a closed prison,

(l) ...

(m) ...

(n) any other prisoner or category of prisoners whom the Inspector General of Prisons considers unfit for being sent to an open prison.

(iii) Notwithstanding anything contained in sub-rule (ii) the Inspector General of Prisons, may on the recommendations of the Selection Committee, consider the cases of prisoners falling under sub-rule (2) for the purpose of confinement in an open prison.”

13 The aforesaid Rule shows that escapees and escape risks prisoner can be denied the facility of open prison. Further, there is a discretion to respondent either to grant or refuse open prison. The petitioner had overstayed on three occasions for different periods like 5, 63 and 126 days. Admittedly, on last occasion, he was required to be brought back to jail by arresting him. In view of these circumstances, it can be said that ordinarily it was open to the respondent to send him to closed prison from open prison. As he was transferred from open prison to closed prison,

this ground was there for refusing him open prison.

14 Due to aforesaid circumstances, this Court holds that it cannot be said that the detention of the petitioner in closed prison can be treated as illegal detention. It also cannot be inferred that the aforesaid disputed period needs to be treated as the period spent in open prison. This Court holds that at any stretch of imagination, it cannot be said that the petitioner was illegally detained. Admittedly, he actually suffered imprisonment of 26 years including remissions though remissions are calculated on the basis of his actual stay both in open prison and closed prison. Entire State remission, special remission was also given to him and so it cannot be said, for the present purpose, that action was *malafide*. This Court holds that it is not fit case in which compensation needs to be awarded. In the result, the petition stands dismissed.

[M. G. SEWLIKAR, J.]

[T. V. NALAWADE, J.]

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