



W.P(MD)No.23758 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED: 27.11.2023

Coram

THE HON'BLE MR.JUSTICE **M.SUNDAR**
and
THE HON'BLE MR. JUSTICE **R.SAKTHIVEL**

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Sudharshan

.. Petitioner

VS

1.The Superintendent of Prison,
Trichy Central Prison,
Trichy.

2.The Inspector of Police,
K.K.Nagar Police Station,
Trichy.

.. Respondents

Prayer:- Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a writ of Certiorarified Mandamus calling for the entire records pertaining to the impugned order passed by the first respondent made in No.20597/Tha.Ku.1/2023, dated 22.09.2023 and quash the same as illegal, consequently direct the respondent No.1 to set off the remand period undergone by the petitioner's father from 09.09.2012 to 18.02.2013 and from 22.12.2013 to 24.06.2014 in S.C.No.137 of 2013 on the file of learned II Additional District and



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Sessions Judge, Tiruchirappalli further to calculate and include those days with conviction period under Section 428 of the Criminal Procedure Code in accordance with law.

For Petitioner : Mr.M.Naveesh Ahamed
for Ms.M.Sudharani

For Respondents : Mr.A.Thiruvadi Kumar
Additional Public Prosecutor

ORDER

[Order of the Court was made by **R.SAKTHIVEL, J.**]

This Writ Petition has been filed by the petitioner praying to quash 'the order dated 22.09.2023 bearing reference No.20597/Tha.Ku. 1/2023 passed by the first respondent' [henceforth, referred to as 'impugned order' for the sake of convenience and clarity] as illegal and consequently direct the first respondent to set off the remand periods already undergone by the 'petitioner's father' [henceforth, referred to as 'prison inmate' for the sake of convenience and clarity] from 09.09.2012 to 18.02.2013 and from 22.12.2013 to 24.06.2014 in Sessions Case No. 137 of 2013 on the file of learned II Additional District and Sessions Judge, Tiruchirappalli under Section 428 of 'the Criminal Procedure



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Code, 1973 (Act No.2 of 1974)' [henceforth, referred to as 'Cr.P.C.' for the sake of brevity]

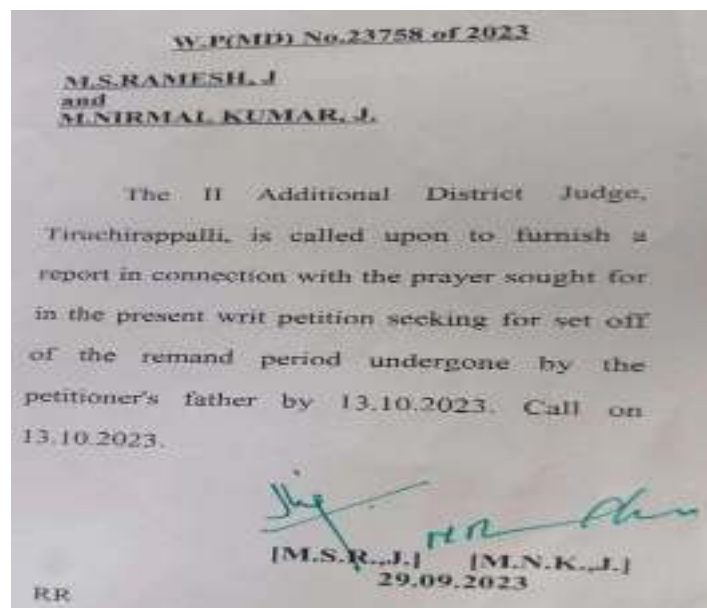
2. When this Writ Petition came up before this Court on 03.11.2023, this Court made the following order:

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M.SUNDAR, J.
and
R.SAKTHIVEL, J.

[Order of this Court was made by M.SUNDAR, J.]

This proceedings has to be read in conjunction with and in continuation of earlier proceedings made by Hon'ble Predecessor Coordinate Bench in the listing on 29.09.2023 which reads as follows:





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2. *The main writ petition assails an order dated 22.09.2023 bearing reference No.20597/த.கு.1/2023 made by the 1st respondent as regards the set off of remand period incarceration qua the terms of imprisonment.*

3. *Learned Prosecutor submits that if the report of the II Additional District Judge, Tiruchirappalli, shows the remand period incarceration, the 1st respondent really does not have a say in the matter and the set off can follow. In other words, the Prosecutor does not have any objection if the remand period report enures to the benefit of the petitioner as there is no other sentence qua the prison inmate.*

4. *We now direct the Registry to send a copy of this proceedings forthwith and requisition II Additional District Judge, Tiruchirappalli, to send a report forthwith in such a manner that the report reaches this Court by 15.11.2023. It is open to the petitioner to file a memo in the Court of II Additional District Judge, Tiruchirappalli, enclosing a copy of this order bringing to the notice of the learned Judge the instant proceedings.*

5. *List a fortnight hence.*

6. *List on 17.11.2023.*

[M.S.,J.] [R.S.V.,J.]

03.11.2023

3. On 17.11.2023, this Writ Petition was re-notified and posted for today.



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4. A report dated 16.11.2023 sent by the II Additional District Judge, Tiruchirappalli is placed before this Court in compliance of the above-mentioned proceedings dated 03.11.2023. A scanned reproduction of the said report dated 16.11.2023 is as follows:

BY R.P.A.D.

From K.Jeyakumar, B.L., L.L.M., II Additional District Judge, Tiruchirappalli.	To The Hon'ble Additional Registrar General, Madurai Bench of Madras High Court, Madurai - 625 023.
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D.No. 1127 Dated: 16.11.2023

Honoured Sir,

Sub : Courts and Sessions Cases - S.C.No.137/2013 on the file of the II Additional District Court, Tiruchirappalli - The accused person Sundarrajan, S/o.Rengasamy convicted and sentenced to undergo imprisonment for Life for the offence under Section 302 of I.P.C. - Period of incarceration - Report called for in WP(MD) No.23758/2023 dated 03.11.2023 - Submitted - Regarding.

Ref : 1 Order passed by the Hon'ble Madurai Bench of Madras High Court, Madurai in WP(MD) No.23758/2023 dated 03.11.2023.

I humbly submit that the Hon'ble Madurai Bench Madras High Court, Madurai is called for a report with regard to the period of incarceration of the accused who was convicted and sentenced by this Court in S.C.No.137/2013.

I further submit that the accused was arrested by the 2nd respondent and remanded to the judicial custody on 09.09.2013 and he filed a petition in CrI.M.P.No.8356/2012 for obtaining bail under Section 167(2) of Cr.P.C. and the Judicial Magistrate No.II, Tiruchirappalli was ordered to release the accused on bail on 15.12.2012. As per the above said bail order dated 15.12.2012, the petitioner had produced sureties on 18.02.2013 and a bail bond was executed in this regard.

I further humbly submit that after submitting the case records to the Principal District Court, Tiruchirappalli for further proceedings and taken on file as



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S.C.No.137/2013 and made over to the II Additional District Court, Tiruchirappalli. On perusal of case records, duly default of the appearance of the accused, this Court was ordered to issue NBW on 10.10.2013 and the accused was arrested on NBW and remanded on 21.12.2013 and the accused was in judicial custody till the date of Judgment i.e. 25.06.2014.

I further submit that on 25.06.2014, the accused was convicted and sentenced to undergo imprisonment for Life and to pay Rs.5,000/- in default to undergo 6 months for simple imprisonment for the offence under Section 302 of I.P.C. Upon perusing the judgment, the accused was sentenced for Life and hence, no order was passed to set off the remand period under Section 428 of Cr.P.C. Therefore, the period of remand has not been mentioned in the committal warrant. The details of the remand particulars are submitted hereunder for your Honour's kind perusal.

REMAND PARTICULARS

- | | |
|------------------------------|---|
| 1. Date of remand | : 09.09.2012 |
| 2. Released on bail by Court | : The Judicial Magistrate Court No.II,
Tiruchirappalli in CrI.M.P.
No.8356/2012; dated 15.12.2012 |
| 3. Date of actual release | : 18.02.2013 |
| 4. Date of re-arrest | : 21.12.2013 (On N.B.W.) |
| 5. Date of Released on bail | : Nil |

This is submitted for your Honour's kind consideration.

Yours faithfully,

K. J. Mani
II Additional District Judge,
Tiruchirappalli. 16.6.23



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5. This Court has perused the above-mentioned report. In the first page of the report, it has been stated that 'the accused was arrested by the 2nd respondent and remanded to the judicial custody on 09.09.2013'. The said date i.e. 09.09.2013 ought to be '09.09.2012' in view of the latter portion of the report. It appears to be a typographical error.

6. The above-mentioned report would reveal as follows:

(i) The prison inmate was arrested in connection with S.C.No.137 of 2013 and remanded to judicial custody on 09.09.2012. Thereafter, the prison inmate was enlarged on bail on 18.02.2013. However, the prison inmate was again arrested on execution of Non-Bailable Warrant and remanded to judicial custody on 21.12.2013 and he was in prison till the date of the Judgment i.e. 25.06.2014. In short, the prison inmate was in prison during the time periods, one from 09.09.2012 to 18.02.2013 and, another from 21.12.2013 to 24.06.2014 as pre-conviction detention period.

(ii) Further, the prison inmate was convicted *vide* Judgment dated 25.06.2014 passed in S.C.No.137 of



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2013 and sentenced to undergo imprisonment for life and pay a fine of Rs.5,000/-, in default thereof, to undergo simple imprisonment for a further period of 6 months for the offence punishable under Section 302 of the Indian Penal Code, 1860 (Act No.45 of 1860).

(iii) Since the prison inmate was sentenced to life imprisonment, no order was passed for set off under Section 428 of Cr.P.C.

7. It is apposite to extract Section 428 of the Cr.P.C. & Rule 76 of 'the Criminal Rules of Practice, 2019' (w.e.f. 01.01.2020) [henceforth, referred to as 'CrI.R.P.' for the sake of brevity]. They are extracted hereunder:

Section 428 of Cr.P.C.:

“428.Period of detention undergone by the accused to be set off against the sentence of imprisonment.-- Where an accused person has, on conviction, been sentenced to imprisonment for a term, [not being imprisonment in default of payment of fine], the period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case and before the date of such conviction, shall be set off against the term of imprisonment imposed on



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him on such conviction, and the liability of such person to undergo imprisonment on such conviction shall be restricted to the remainder, if any, of the term of imprisonment imposed on him.

*[Provided that in cases referred to in section 433A, such period of detention shall be set off against the period of fourteen years referred to in that section.] *Amendment by Act 25 of 2005 (w.e.f. 23-06-2006)”*

Section 76 of Crl.R.P.:

76. Sentences of imprisonment how calculated.— (1)

In calculating sentences of imprisonment, the day on which the sentence is passed and the day of release ought to be included and considered as days of imprisonment; for example, a man sentenced on the 1st January to one month's imprisonment should be released on the 31st January and not on the 1st February.

(2) The Court shall also give the details of the remand period and the period of set off under section 428 of the Code in the judgment and in the committal warrant.

(3) When two or more sentences are passed in a case, the Court shall, in the committal warrant, specify whether the sentences are to run concurrently or consecutively.



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8. The question as to whether a person who has been convicted for life imprisonment is entitled to the benefit of set off under Section 428 of Cr.P.C. remains no longer *res integra*.

9. A Constitution Bench of the Hon'ble Supreme Court in ***Bhagirath's*** case [***Bhagirath & Another Vs. Delhi Administration, reported in (1985) 2 SCC 580***] has held as follows:

“8. To say that a sentence of life imprisonment imposed upon an accused is a sentence for the term of his life does offence neither to grammar nor to the common understanding of the word “term”. To say otherwise would offend not only against the language of the statute but against the spirit of the law, that is to say the object with which the law was passed. A large number of cases in which the accused suffer long undertrial detentions are cases punishable with imprisonment for life. Usually, those who are liable to be sentenced to imprisonment for life are not enlarged on bail. To deny the benefit of Section 428 to them is to withdraw the application of a benevolent provision from a large majority of cases in which such benefit would be needed and justified.



9. ...

10. ...

11. ...

12. ...

13. *We have considered with great care the reasoning upon which the decision in Kartar Singh [(1982) 3 SCC 1 : 1982 SCC (Cri) 522 : AIR 1982 SC 1439 : (1983) 1 SCR 445 : 1982 Cri LJ 1772] proceeds. With respect, we are unable to agree with the decision. We have already discussed why, imprisonment for life is imprisonment for a term, within the meaning of Section 428. We would like to add that we find it difficult to agree that the expressions “imprisonment for life” and “imprisonment for a term” are used either in the Penal Code or in the Criminal Procedure Code in contradistinction with each other. Sections 304, 305, 307 and 394 of the Penal Code undoubtedly provide that persons guilty of the respective offences, shall be punished with imprisonment for life or with imprisonment for a term not exceeding a certain number of years. But, that is the only manner in which the Legislature could have expressed its intention that persons who are guilty of those offences shall be punished with either of the sentences mentioned in the respective sections. The circumstances on which the learned Judges have placed reliance in Kartar Singh [(1982) 3 SCC 1 : 1982 SCC (Cri) 522 : AIR 1982 SC 1439 : (1983) 1 SCR 445 : 1982 Cri LJ 1772] , do not afford any evidence, intrinsic or otherwise, of the use of the two expressions in*



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contradistinction with each other. Two or more expressions are often used in the same section in order to exhaust the alternatives which are available to the Legislature. That does not mean that there is, necessarily, an antithesis between those expressions.”

10. Further, a Hon'ble Division Bench of Madras High Court [Principal Seat of this Court] in ***Kumar's*** case [***Kumar @ Kutty and others Vs. State of Tamil Nadu, reported in Manu/TN/3212/2014 : (2014) 2 LW(Cri) 789***] has held as under:-

“7. Whenever the Government decides to GRANT Pre- mature release, the Government will fix a definitive period of detention for extending the benefit and would call for reports from the Superintendent of Jails in the State. For example, in G.O. Ms No. 1155 dated 11.09.2008, the Government has said that, the G.O. will apply to “life convicts who have completed 7 years of actual imprisonment as on 15.09.2008”. At that time, the jail authorities will identify the prisoners who have undergone the period of detention fixed by the Government for being considered for premature release. If the jail authorities do not have the pre- conviction detention particulars of a prisoner, they will only furnish to the Government the post- conviction detention particulars. The prisoner cannot be made to suffer for the fault of the Presiding Officer of the Court in not giving the pre-conviction detention particulars of a prisoner to the jail



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authorities. Actus curiae neminemgravabit. [An act of the Court shall prejudice no man]. If the prison authorities do not send correct particulars to the Government, the prisoner will be seriously prejudiced inasmuch as he will be held disqualified for premature release though fully qualified."

11. The said Hon'ble Division Bench directed the Trial Courts as follows:-

"16. ... 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 the 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)"



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12. Further, another Hon'ble Division Bench of Madras High Court [Principal Seat of this Court], following the ***Bhagirath's*** case and relying on ***Kumar's*** case referred to *supra*, in the case of ***A.Palaniswamy @ Palaniappan [The Home Secretary (Prison-IV), Home Department and others Vs. A.Palaniswamy @ Palaniappan, reported in 2021-2-L.W. (Crl.) 118 : (2021) 3 MLJ (Crl) 225]*** has held as follows:

“14.4.Thus, in the light of the aforesaid pronouncements and taking note of the underlying object enshrined under Section 428 of the Code of Criminal Procedure, 1973, we have no hesitation to hold that 'set off' is permissible even for a life convict.”

13. Section 428 of Cr.P.C. is a mandatory provision, requiring the Trial Courts to explicitly mention the pre-conviction detention period undergone by the prison inmate/accused in the Judgment and apply set off accordingly as per Section 428 of Cr.P.C. This obligation extends to specifying the same in the warrant of commitment [Judicial Form No.21, in Appendix to Crl.R.P. w.e.f. 01.01.2020] and the said obligation lies with the Trial Court, not with the Jail Authorities.



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14. This Court deems fit to note that the Hon'ble Supreme Court in the case of **Suraj Bhan** [**Suraj Bhan Vs. Om Prakash and another, reported in (1976) 1 SCC 886**], in paragraph 7, has held as follows:-

“7. ... The procedure to invoke Section 428 of the Criminal Procedure Code, could be a miscellaneous application by the accused to the court at any time while the sentence runs for passing an appropriate order for reducing the term of imprisonment which is the mandate of the section.”

15. It is pertinent to note that the Hon'ble Supreme Court in the case of **Vinay Prakash Singh** [**Vinay Prakash Singh Vs. Sameer Gehlaut and others, reported in 2022 SCC OnLine SC 1595**], in paragraph No.12, has held as under:-

“12. As far as Section 428 of Cr.P.C. is concerned, an indispensable requirement to invoke Section 428 of Cr.P.C. is that there must be a conviction. The conviction must be followed by a sentence of imprisonment. It must be for a term and it should not be imprisonment in default of payment of fine. If these requirements exist, then the occasion opens up for applying the beneficial provisions of Section 428 of Cr.P.C.



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However, for it to be invoked the existence of detention undergone by the convict during investigation, enquiry or trial in the 'same case' is indispensable. If these requirements are satisfied, the convict would be entitled to the set off for the period of detention which he has undergone."

It is pertinent to note that in this case, both the remand periods i.e. from 09.09.2012 to 18.02.2013 and from 21.12.2013 to 24.06.2014 pertain to the same case in S.C.No.137 of 2013.

16. In the light of the above legal position, the Trial Court ought to have given set off the pre-conviction detention periods to the prison inmate under Section 428 of Cr.P.C. Hence, this Court is inclined to allow this Writ Petition. Accordingly, this Writ Petition is allowed with the following terms:

(i) The impugned order dated 22.09.2023 bearing reference No.20597/Tha.Ku.1/2023 passed by the first respondent is quashed.

(ii) This Court directs the Trial Judge [II Additional District and Sessions Judge, Tiruchirappalli] to call for the



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warrant of commitment issued in S.C.No.137 of 2013 from the Jail Authorities and incorporate the pre-conviction detention period in the warrant of commitment as per Section 428 of Cr.P.C. by way of amendment.

(iii) There shall be no order as to costs.

(M.S.,J.) (R.S.V.,J.)

27.11.2023

Index : Yes

Neutral Citation : Yes

ps / jen

Note: All concerned to act on this order being uploaded in official website of this Court without insisting on certified copies. To be noted, this order when uploaded in official website of this Court will be watermarked and will also have a QR code

To

- 1.The Principal District Judge,
Tiruchirappalli.
- 2.The II Additional District and Sessions Judge,
Tiruchirappalli
- 3.The Superintendent of Prison,
Trichy Central Prison, Trichy.



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4.The Inspector of Police,
K.K.Nagar Police Station,
Trichy.

5.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
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M.SUNDAR, J.,
and
R.SAKTHIVEL, J.,

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