

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION***

WRIT PETITION NO. 3866 OF 2023

Bhaskar S/o Keshav Kumbhare }
Age-42, R/o Rawte Pada, Boisar, }
Tal. Palghar, District Thane (undergoing }
his sentence at Open Prison Jail Paithan) } ... Petitioner

Versus

1) State of Maharashtra, }
Through Superintendent of Jain, }
Open Jail Paithan }

2) Police Inspector, Boisar Police }
Station, Tal. Palghar, Dist. Thane } ... Respondents

Mr. Rupesh Jaiswal, for the Petitioner.

Ms P. P. Shinde, A.P.P for the Respondent – State.

***CORAM : REVATI MOHITE DERE &
MANJUSHA DESHPANDE, JJ.***

DATE : 22nd FEBRUARY 2024.

ORDER [PER MANJUSHA DESHPANDE, J.]

1. The petitioner herein is a life convict and undergoing imprisonment for life, at the Open Prison Paithan, District-Chhatrapati Sambhajinagar. The petitioner is challenging the order

passed by the Additional Sessions Judge, Palghar dated 12th December 2008, whereby, set off as provided under Section 428 of the Code of Criminal Procedure (Cr.P.C.) has been denied to him.

2. The petitioner was convicted by the learned Additional Sessions Judge, Palghar, for the offence punishable under Section 302 of the Indian Penal Code (IPC) and was sentenced to suffer life imprisonment for committing murder of one Mina Ravate in Sessions Case No. 10 of 2008. It is the contention of the petitioner that the petitioner was arrested on 8th November 2007. After trial, the learned Sessions Judge, Palghar, has convicted the petitioner vide its Judgment and Order dated 30th June 2008. The petitioner was an undertrial prisoner in Sessions Case No. 10 of 2008 for a period of 7 months and 23 days, as such, he was entitled to get the set off, as per Section 428 of the Cr.P.C. However, while passing the final judgment and order, the Sessions Court, Palghar has failed to give the set off. Upon realizing the same, the petitioner had preferred an application claiming set off for the period of detention during the trial. However, the said application was rejected by the learned Judge, Sessions Court, Palghar,

vide order dated 12th December 2008, which is impugned in the present petition. The reason given by the learned Sessions Judge seems to be that, the said prisoner is undergoing life imprisonment, therefore, he is not entitled for set off as provided under Section 428 of the Cr.P.C. and the Government should take steps in accordance with Section 432 of the Cr.P.C.. Resultantly, the said application has been rejected.

3. The petitioner contends that the Criminal Appeal filed by the petitioner in this Court being Criminal Appeal No. 1309 of 2008, has been dismissed, vide Judgment and Order dated 31st July 2015 and even in the said order, issue regarding set off has remained to be addressed. Therefore, the said order of the learned Additional Sessions Judge, Palghar, still continues to hold the field.

4. Section 428 reads as under:

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 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 terms of imprisonment imposed on him:

[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.]

The period of detention, if any, undergone by the convict during the investigation, inquiry or trial of the same case, is required to be set off against the total term of imprisonment imposed on the convict and liability of such person shall be restricted only to the remainder of the term of imprisonment. It is the statutory right of the convict to get the set off from the total period of imprisonment. The petitioner places reliance on the judgment in (i) *State of Maharashtra V/s. Najakat Ali Mubarak Ali*¹ (ii) *The State of Uttar Pradesh V/s. Tribhuwan and Ors.*² and (iii) *Vinay Prakash Singh V/s. Sameer Gehlaut and Ors.*³ in support of his case claiming set off. There are various judgments, whereby the statutory right of set off, under Section 428 of the Cr.P.C. has been recognized and reiterated by the Hon'ble Supreme Court as

1 2001 ALL MR (Cri) 1519

2 2018 ALL SCR (Cri) 288

3 2022 LiveLaw (SC) 974

well as the High Courts. The judgments of this Court as well as the Hon'ble Supreme Court hold that, the period of detention undergone by the convict at the time of trial is required to be set off from the total period of imprisonment.

5. Learned APP for the State has placed on record the report from the Superintendent of Open Prison Paithan, District- Chhatrapati Sambhajanagar. The said report contains the details of the petitioner; the order passed in appeal; his conduct during imprisonment and his entitlements such as leave and remission etc. According to the said report, at item No. 14, the details of the punishment undergone by the convict till 31st January 2024 alongwith remissions granted to him have been mentioned. Item No. 23 is regarding premature release of the convict by granting him remission. It refers to clause No. 2(b) of the Government Resolution dated 11th April 2008, it is mentioned, that the case of the present petitioner is recommended for premature release after completion of 22 years of total imprisonment with remission. Item No. 27 of the said report mentions about premature release orders of the petitioner. The remarks show that, as per the

Government Order dated 1st November 2023, the petitioner is entitled to be released prematurely. As per Government Resolution dated 11th April 2008, he has been categorized in clause- 2(b), he is entitled to be released after imprisonment of 22 years. However, after calculating all the remissions he is entitled to be released after undergoing total 14 years of imprisonment. It is further observed, that if at all there is an order granting set off as provided under Section 428 of the Cr.P.C., if the said period of 7 months and 23 days is deducted from the total period of imprisonment, in that case, the convict would be entitled to be released on 1st March 2024, and if the said set off is not extended, then in that case, the petitioner is likely to be released on 18th July 2024.

6. After going through the submissions as well as the memo of the petition with annextures and the papers placed on record it is clear, that at the time of passing of the judgment itself, the learned Additional Sessions Judge, Palghar has failed to grant set off against the term of imprisonment already undergone by the petitioner, which was required to be incorporated in the judgment. Even the subsequent

application has been rejected by the learned Judge. It is evident that grant of set off is a statutory right of a convict. In the judgments referred *supra* it has been observed by the Hon'ble Supreme Court that, a convict person is given right to reckon the period of his sentence of imprisonment from the date he was in jail as an under trial prisoner. The only requirement to invoke Section 428 of the Cr.P.C. is that, there must be a conviction, and the conviction must be followed by a sentence of imprisonment. It is also important to note that, it should be during the investigation, inquiry or trial in the same case. If these conditions are fulfilled, set off is required to be granted to the convict prisoner.

7. Considering that in the present case all the requirements as laid down by the Hon'ble Supreme Court in catena of decisions are fulfilled, it would be appropriate to apply the beneficial provision of Section 428 of the Cr.P.C. to the case of the petitioner.

8. Having considered the submission of the petitioner as well as the submission of the learned APP and after going through the report

placed on record by the learned APP, we deem it appropriate to quash and set aside the order passed by the learned Additional Sessions Judge, Palghar, dated 12th December 2008, which is impugned in this petition.

9. We further direct that, the set off for the period of 7 months and 23 days shall be granted to the petitioner from the total period of imprisonment. The State- Authority shall consider the said set off while counting the total period of imprisonment required to be undergone by the petitioner, while considering his case for premature release, as per remission granted to him and, accordingly, pass appropriate orders.

10. With the aforesaid directions, the Writ Petition is disposed of. No order as to costs.

11. All concerned to act on the authenticated copy of this order.

MANJUSHA DESHPANDE, J.

REVATI MOHITE DERE, J.