



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL WRIT PETITION NO.518/2024

Sanjay Mahadeo Gajbhiye (C-5109),
aged about 48 Yrs., Occ. NA,
R/o Kachara Mohalla,
Tah. & Distt. Gondia.

... Petitioner

- Versus -

1. The State of Maharashtra,
through Police Station Officer,
Police Station Gondia City,
Tah. & Distt. Gondia.

2. Superintendent of Jail,
Central Prison, Amravati.

... Respondents

Ms. Ratna Singh, Advocate for the petitioner.
Mr. S.S. Hulke, A.P.P. for respondent Nos.1 and 2.

CORAM: NITIN W. SAMBRE & MRS.VRUSHALI V. JOSHI, JJ.
DATE OF RESERVING THE JUDGMENT : 29.1.2025.
DATE OF PRONOUNCING THE JUDGMENT : 7.2.2025.

JUDGMENT (Per Mrs. Vrushali V. Joshi, J.)

Rule. Rule made returnable forthwith. Heard finally with
the consent of learned Advocates for the parties.

2. By this petition, the petitioner has prayed to direct the jail authority to apply set off period granted to him under Section 428 of the Code of Criminal Procedure vide judgment and order dated 24.7.2008 passed by the learned Additional Sessions Judge, Gondia in Sessions Trial No.51/1998 under clause (5) of the operative part of said judgment while considering the request of the petitioner for remission.

3. The petitioner was convicted in Sessions Trial No.51/1998 for the offence punishable under Section 302 of the Indian Penal Code vide judgment and order dated 24.7.2008. When he was on bail during the pendency of Sessions Case No.51/1998, he had committed another offence punishable under Section 392 and 397 of the Indian Penal Code. In said offence, the petitioner was convicted and sentenced to suffer rigorous imprisonment for 2 years for the offence punishable Section 392 of the I.P.C. and seven years for the offence punishable under Section 397 of the I.P.C. The petitioner was also sentenced for life imprisonment for

the offence punishable under Section 302 of the I.P.C. in Sessions Trial No.51/1998.

4. The petitioner had applied for premature release. It was forwarded to the State Government and it categorised the petitioner for remission under category 2(b) of the Guidelines for Premature Release dated 15.3.2010 which is of 22 years of imprisonment for the offence punishable under Section 302 of the I.P.C.

It is the case of the petitioner that while he was already convicted for an offence punishable under Section 302 of I.P.C. and then convicted for subsequent offence, he is entitled for the remission in view of the provisions of Section 428 of the Cr.P.C. by applying set off having regard to the sentence that he has already undergone for the conviction of the earlier offence.

5. The petitioner has placed reliance on the judgment of the Hon'ble Apex Court in the case of State of Maharashtra and another V/s. Najakat Ali Mubarak Ali reported in (2001) 6 SCC 311.

6. Following the ratio laid down in *Najakat Ali Mubarak Ali* (supra) this Court had passed an order on 18.11.2024 in the present petition and directed the respondents to forthwith deal with the claim of the petitioner in the light of aforesaid judgment and also give him set off under Section 428 of the Cr.P.C. and remit the decision to this Court within a period of two weeks. Accordingly, the jail authority has passed the order and rejected the claim of the petitioner.

7. On perusal of the order of this Court dated 18.11.2024 in the present petition, it is clear that the specific directions were given to consider the judgments in case of *Najakat Ali Mubarak Ali* (supra), however, the jail authority has not considered the said judgment and again rejected the application by relying on the judgments in other cases.

8. For deciding the issue, it is necessary to consider the provisions of Section 427 and 428 of the Cr.P.C. in detail.

“Section 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 term 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.”

Section 427 of the Cr.P.C. deals with instances wherein one person is sentenced in a case when he has already been undergoing the sentence in another case. The first sub-section of Section 427 says that the sentence in the second conviction shall commence at the expiration of the imprisonment to which the accused has been previously sentenced, unless the court directs that the subsequent sentence shall run concurrently with such previous sentence. The second sub-section to Section 427 of the Code says that when a person already undergoing a sentence of imprisonment for life is sentenced on a subsequent conviction to

imprisonment for a term or imprisonment for life, the subsequent sentence shall run concurrently with such previous sentence.

9. It is observed by the Hon'ble Apex Court in the case of *Najakat Ali Mubarak Ali* (supra) in paras 13 and 14 as follows:-

“13. Thus, the sentence of life imprisonment imposed on the same person in two different convictions would converge into one and thereafter it would flow through one stream alone. Even if the sentence in one of those two cases is not imprisonment life but only a lessor term the convergence will take place and the post convergence flow would be through the same channel. In all other cases, it is left to the court to decide whether the sentences in two different convictions should merge into one period or not. If no order is passed by the court the two sentences would run one after the other. No doubt Section 427 is intended to provide amelioration to the prisoner. When such amelioration is a statutory operation in cases falling under the second sub-section it is a matter of choice for the court when the cases fall within the first sub-section. Nonetheless, the entire section is aimed at providing amelioration to a prisoner. Thus a penumbra of the succeeding section can be glimpsed through the former provision.

14. The purpose of Section 428 of the Code is also for advancing amelioration to the prisoner. We may point out that the section does not contain any indication that if the prisoner was in jail as an under-trial prisoner in a second case the benefit envisaged in the section would be denied to him in respect of the

second case. However, learned counsel for the appellant contended that the words of the same case in the section would afford sufficient indication that the benefit is intended to cover only for one case and not more than that. It must be remembered that the ideology enshrined in Section 428 was introduced for the first time only in the Code of Criminal Procedure, 1973. For understanding the contours of the legislative measure involved in that section, it is advantageous to have a look at the Objects and Reasons for bringing the above legislative provision. We therefore extract the same here:

The Committee has noted the distressing fact that in many cases accused persons are kept in prison for very long period as under-trial prisoners and in some cases the sentence of imprisonment ultimately awarded is a fraction of the period spent in jail as under-trial prisoner. Indeed, there may even be cases where such a person is acquitted. No doubt, sometimes courts do take into account the period of detention undergone as under-trial prisoner when passing sentence and occasionally the sentence of imprisonment is restricted to the period already undergone. But this is not always the case so that in many cases the accused person is made to suffer jail life for a period out of all proportion to the gravity of the offence or even to the punishment provided in the statute. The Committee has also noted that a large number of persons in the overcrowded jails of today are under-trial prisoners. The new clause seeks to remedy this unsatisfactory state of affairs. The new clause provides for the setting off of the period of detention as an under-trial prisoner against the sentence of imprisonment imposed

on him. The Committee trusts that the provision contained in the new clause would go a long way to mitigate the evil.”

10. It is further observed by the Hon’ble Apex Court in para 18 of above judgment of as follows:-

“18. Reading Section 428 of the Code in the above perspective, the words of the same case are not to be understood as suggesting that the set off is allowable only if the earlier jail life was undergone by him exclusively for the case in which the sentence is imposed. The period during which the accused was in prison subsequent to the inception of a particular case, should be credited towards the period of imprisonment awarded as sentence in that particular case. It is immaterial that the prisoner was undergoing sentence of imprisonment in another case also during the said period. The words of the same case were used to refer to the pre-sentence period of detention undergone by him. Nothing more can be made out of the collocation of those words. Section 428 of the Code in the above perspective, the words of the same case are not to be understood as suggesting that the set off is allowable only if the earlier jail life was undergone by him exclusively for the case in which the sentence is imposed. The period during which the accused was in prison subsequent to the inception of a particular case, should be credited towards the period of imprisonment awarded as sentence in that particular case. It is immaterial that the prisoner was undergoing sentence of imprisonment in another case also during the said period. The words of the same case were used to refer to the pre-sentence period of detention undergone by

him. Nothing more can be made out of the collocation of those words.”

11. As per the ratio laid down by the Hon’ble Apex Court and the order passed by this Court dated 18.11.2024 it is clear that Section 428 of the Cr.P.C. permits the accused to have period undergone by him in jail as an under trial prisoner. Set off is granted against the period of sentence imposed on him irrespective of the fact whether he was in jail in connection with the same case or not during that period.

12. For the aforesaid reasons, following order is passed:-

Respondent/jail authority is directed to apply set off under Section 428 of the Cr.P.C. while considering the request of the petitioner for remission.

Writ petition is allowed in the aforesaid terms.

(MRS.VRUSHALI V. JOSHI, J.)

(NITIN W. SAMBRE, J.)