



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

**CRIMINAL WRIT PETITION NO.88 OF 2026**

Vikas @ Sadhu Gendev Hagare (Mali)  
Age : 50 years,  
Occu.: Nil Convict No.C-5255,  
R/o.: At present in Open Dist. Prison  
Class-1, Paithan, Tq. Paithan,  
District : Chhatrapati Sambhajinagar .... PETITIONER

**VERSUS**

1. The State of Maharashtra,  
Through Under Secretary,  
Home Department, Mantralaya,  
Mumbai
2. The Inspector General of Prisons,  
Maharashtra State, Pune
3. The Deputy Inspector General,  
Central Prison, Chh. Sambhajinagar,
4. The Superintendent,  
Open District Prison, Paithan,  
Class-1, Tq. Paithan,  
District : Chhatrapati Sambhajinagar ... RESPONDENTS

....  
Ms. Vanita H. Sangole Jaitmal, Advocate for the Petitioner  
Mr. Govind A. Kulkarni, APP for Respondent - State  
....

**CORAM : SANDIPKUMAR C. MORE AND  
ABASAHEB D. SHINDE, JJ.**

**DATED : 13/03/2026.**

***JUDGMENT : ( PER : SANDIPKUMAR C. MORE, J.) :***

1. **Rule.** Rule made returnable forthwith. Heard finally at the admission stage with the consent of the learned counsel for the petitioner as well as the learned APP for the respondent-State.

2. By way of this writ petition, the petitioner seeks a direction to the Additional Sessions Judge, Osmanabad, to correct or modify the judgment and order dated 15/02/2012 passed in Sessions Case No. 8 of 2012, to the extent of granting him set-off under Section 428 of the Cr.P.C. for the period of imprisonment already undergone by him from the date of his arrest till the decision of the aforesaid case.

3. The learned counsel for the petitioner submits that the learned Additional Sessions Judge, Osmanabad, convicted the petitioner, who is the original accused No. 1 in Sessions Case No. 8 of 2011, for offences punishable under Sections 302 and 323 of the IPC. However, while awarding the sentence, though the learned Additional Sessions Judge directed that the sentences imposed under the aforesaid sections of the IPC shall run concurrently, no order granting set-off under Section 428 of the Cr.P.C. was passed. The learned counsel for the petitioner further submits that the

petitioner was arrested in the aforesaid crime on 05/10/2010 and remained in custody until his conviction on 15/02/2012 and therefore entitled to set-off for the said period under Section 428 of the Cr.P.C. In support of her submissions, she has relied on the following judgments:

- A) *Rajaram Kashinath Charoskar vs. State of Maharashtra, 2008 ALL MR (Cri) 3407;***
- B) *Judgment of the Delhi High Court in Writ Petition (Cri) No. 1828/2013 (Zile Singh vs. State GNCT of Delhi), delivered on 12/12/2013; and***
- C) *Judgment of this Court in Criminal Appeal No. 172 of 2012 (Vikas @ Sadhu Gendev Hagare (Mali) vs. The State of Maharashtra), delivered on 29/07/2015.***

4. On the contrary, the learned APP strongly opposed the submissions made on behalf of the petitioner and raised a preliminary objection regarding the maintainability of the present petition by relying upon the judgment of the Hon'ble Apex Court in ***Pradnya Pranjali Kulkarni vs. State of Maharashtra and another, 2025 SCC OnLine SC 1948***. According to him, the writ petition under Article 226 of the Constitution of India is not maintainable, as the order passed by a judicial officer is under

challenge in the present matter. In the alternative, he submits that when the learned Additional Sessions Judge, Osmanabad, has specifically refrained himself from granting set-off under Section 428 of the Cr.P.C. to the present petitioner despite granting such benefit to another accused, i.e., accused No. 3, Ganpat Bhiva Hagare, the petitioner cannot claim the same as a matter of right. Accordingly, he prayed for dismissal of the petition.

5. Admittedly, the learned Additional Sessions Judge, Osmanabad, convicted the present petitioner for offences punishable under Sections 302 and 323 of the IPC. For the offence under Section 302 of the IPC, the petitioner has been sentenced to suffer life imprisonment and to pay a fine of Rs. 500/-, with a default clause; and for the offence under Section 323 of the IPC, he has been sentenced to suffer simple imprisonment for three months and to pay a fine of Rs. 300/-, with a default clause. It is equally important to note that another accused, i.e., accused No. 3, Ganpat, was convicted for the offence under Section 323 read with Section 34 of the IPC and sentenced to suffer simple imprisonment for three months along with fine in the same crime. Further, the operative part of the judgment indicates that the said accused No. 3 was granted set-off under Section 428 of the Cr.P.C. by the

learned Additional Sessions Judge, Osmanabad, for the period from 05/10/2010 till 02/04/2011; however, no such set-off has been granted to the present petitioner.

6 . Learned APP by placing reliance on the observation of the Hon'ble Apex Court in the case of ***Pradnya Pranjal Kulkarni*** (supra) raised serious objection about the maintainability of this petition. On going through the said observation, the Hon'ble Apex Court has held by relying on its earlier judgment in the case of ***Neeta Singh vs. The State of Uttar Pradesh, Special Leave to Appeal (Cri.) No.13578 of 2024 dated 15/10/2024***, that a judicial order not being amenable to challenge before a high court under Article 226 of the Constitution and there being no prayer either under Article 227 thereof or Section 482, Cr.P.C., the Allahabad High Court was right in holding the writ petition under Article 226 to have been rendered infructuous. Apparently from the aforesaid observation it appears that writ petition under Article 226 of Constitution of India against a judicial order is not maintainable, but the facts and circumstances in which the aforesaid observation of the Hon'ble Apex Court has come on record, were totally different than the facts of this case. Moreover, while observing like this, the Hon'ble Apex Court had clearly opined

that Division Bench of the High Court was certainly having power to examine the grievance of the petitioner in that case. It was only asked to the said petitioner to mould the relief suitably to invoke the jurisdiction of High Court under Section 528 of BNS (Old Section 482 of Cr.P.C.). Therefore, the aforesaid observation is not helpful for the prosecution for raising the objection regarding maintainability of the petition.

7. Now the question before us is whether by invoking Article 226 of the Constitution of India, can this court grant set off to the petitioner under Section 428 of Cr.P.C. when it is not given by the learned Additional Sessions Judge, Osmanabad to the present petitioner specially when it has been given to another convict accused. The learned counsel for the petitioner heavily relied on the judgment of Delhi High Court in the case of **Zile Singh vs. State of GNCT of Delhi** (supra), wherein it is observed as follows:

*“6. Learned counsel for the petitioner further submits that it is the case of the petitioner that in view of clear statutory mandate of Section 428 Cr.P.C. the petitioner cannot be denied of this benefit. Counsel further submits that it is settled law by a catena of judgments of the Supreme Court of India and the High Courts wherein it has been held that*

*all accused persons are entitled to the benefit of Section 428 of Cr.P.C. as a mandate and not as a discretion even when a person is undergoing sentence of imprisonment in another case.”*

In this judgment a reference of judgment of Constitution Bench of the Hon'ble Apex Court in the case of ***Bhagirath vs. Delhi Administration, 1985(2) SCC 580***, has come, wherein it is observed as follows:

*“We have considered with great care the reasoning upon which the decision in Kartar Singh (1982 3 SCC 1) 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, do not afford any evidence intrinsic or otherwise, of the use of the two expressions in 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.”*

8. Even this court in case of **Rajaram Kashinath Charoskar** (supra) has considered the scheme of Section 428 of Cr.P.C. by considering various earlier judgments on this aspect. The following important issue which is also involved in this case was under consideration before this court in the aforesaid judgment.

*Whether in spite of specific order of the Sessions Judge, directing that no set off be granted under Section 428 of the Code to the petitioner, which direction has not been interfered with in appeal by the High Court, the petitioner is entitled to claim set off under Section 428 r/w 433-A of the Code of Criminal Procedure?*

On going through the said judgment it is clearly evident that this court had an occasion to go through various earlier judgments

passed by Hon'ble Apex Court including the case of **Bhagirath** (supra). We would like to quote certain observations of this court in the said judgment, which are as follows :

*“21. The aforesaid discussion of the relevant legal aspects of the matter thus shows that neither the judgment delivered by the Sessions Judge nor the one delivered by this Court in the appeal, can be read to mean that the petitioner cannot be granted set off to which he may otherwise be entitled to under the said Code. It was not for the judiciary to direct grant or otherwise of such a set off to the petitioner at that stage. It is exclusively within the domain of the Executive Government to take such a decision. Obviously, therefore, it is open for the Executive Government in terms of the aforesaid provisions of law and in the light of its policy decisions reflected by relevant Government Resolutions and / or Circulars to decide the issue as to whether the petitioner is entitled to set off or not. In taking such a decision the aforesaid observations and / or order of the Sessions Judge or for that matter of this Court cannot operate as an hurdle much less prohibition.*

*22. We, therefore, answer the aforesaid issue by holding that the petitioner is entitled to claim commutation of his sentence as also set off, if otherwise found entitled in law, in spite of specific orders of the Sessions Judge, which is confirmed*

*in appeal by this Court, directing to the contrary.”*

9. Moreover, the extract from **Bhagirath** (supra) was also considered which is as follows.

*“11. .... The question of setting off the period of detention undergone by an accused as an under trial prisoner against the sentence of life imprisonment can arise only if an order is passed by the appropriate authority under Section 432 or Section 433 of the Code. In the absence of such order passed generally or specially and apart from the provisions, if any, of the relevant Jail Manual, imprisonment for life would mean, according to the rule in Gopal Vinayak Godse, imprisonment for the remainder of life.”*

Further, this court has also observed in para 26 & 27 as follows:

*“26. In the light of the aforesaid discussion, we are also of the view that the petitioner is entitled to this benovent provision, contained in section 428 of the Code and the petitioner cannot be deprived of such a statutory compulsory benefit to be awarded to a convict, without an exception and / or discretion of the Court under section 428 r/w section 433-A of the Code.*

27. *In view of the aforesaid factual and legal aspect of the matter, we allow this writ petition and hereby direct that the petitioner be granted the benefit of set off, to which he is entitled under section 428 r/w section 433-A of the Code of Criminal Procedure.”*

10. Thus, on going through the observations of the Hon'ble Apex Court as well as this court in the aforesaid cases it is ultimately held that grant of set off to the life convict is exclusively in the domain of Executive Government and not for judiciary to grant or deny set off. In the instant case, the learned Additional Sessions Judge, Osmanabad admittedly has not granted set off to the present petitioner despite granting it to another accused, but as per the observation of this court in the case of **Rajaram** (supra) the petitioner is entitled to claim commutation of his sentence as also set off despite its rejection by the concerned Sessions Judge which was confirmed by this court. Therefore, considering all these aspects on the issue involved in this case, we are of the opinion that though the learned Additional Sessions Judge, Osmanabad did not pass any order regarding set off under Section 428 of Cr.P.C. to the present petitioner, but the petitioner is entitled for the same under Article 226 of the Constitution of India before this

court. Admittedly, at present the petitioner is undergoing the sentence of life imprisonment in Open District Prison, Class-1, Paithan, Tq. Paithan, District : Chhatrapati Sambhajnagar. Accordingly, the petition is hereby allowed and respondent No.4 – the Superintendent, Open District Prison, Paithan, Class-1, Tq. Paithan, District Chhatrapati Sambhajnagar is hereby directed to issue appropriate order for giving set off to the petitioner for the period from 05/10/2010 to 15/02/2012 as per Section 428 r/w Section 433-A of Cr.P.C. within three months from the date of this order.

Rule is made absolute in above terms and the petition is disposed of accordingly.

**( ABASAHEB D. SHINDE J. )      ( SANDIPKUMAR C. MORE , J. )**

VS Maind/-