

(2017) 10 BOM CK 0097
In the Bombay High Court
Case No : 1213 of 2017

Mohd. Ali s/o Mohd. Habib Shaikh

APPELLANT

Vs

The State of Maharashtra, Through Secretary, Home
Department, Mantralaya, & Anr.

RESPONDENT

Date of Decision : 12-10-2017

Acts Referred:

Constitution of India, Article 226 -
Power of High Courts to Issue certain writs
Code of Criminal Procedure, 1973, Section
432(1) - Power to suspend or remit sentences<

Citation : (2017) 10 BOM CK 0097

Hon'ble Judges : S.S. Shinde, Mangesh S. Patil

Bench : DIVISION BENCH

Advocate : Rupesh A. Jaiswal, P.V. Diggikar

Final Decision : Allowed

Judgement

1. Rule. Rule made returnable forthwith and heard finally with the consent of the learned counsel appearing for the parties.

2. By way of filing this Writ Petition under Article 226 of the Constitution of India, the Petitioner seeks directions to Respondent Nos.1 and 2 to grant the State remission of two years to the Petitioner in view of the Government Circular dated 6th August, 1997.

3. It is the case of the Petitioner that he is undergoing sentence for life imprisonment as per order dated 28th July, 2003, passed by the Additional Sessions Judge, Mumbai in Sessions Case. The Petitioner has contended that he was arrested in connection with a crime for the offence punishable under Section 302 of the Indian Penal Code. After fullfledged trial, the Sessions Court at Mumbai has held him guilty for the offence punishable under Section 302 of the Indian Penal Code and he has been sentenced to undergo imprisonment for life. It is submitted that the Petitioner was arrested on 2nd January, 1990 and he was

released on bail after three months and twenty two days from the date of his arrest. Thereafter he has been convicted on 28th July, 2003, and sentenced to suffer life imprisonment and was taken in custody. Thus, it appears that the Petitioner was in jail from 2nd January 1990 till April, 1990 and from 28th July, 2003 onwards he is in jail. Thus, the Petitioner has undergone the sentence for more than 14 years.

4. It is submitted that in exercise of powers under Section 432 (1) of the Code of Criminal Procedure, the Government of Maharashtra, Home Department, Mantralaya, Mumbai issued one Circular dated 6th August, 1997, granting the State remission to the prisoners on the occasion of Golden Jubilee Independence day. The said remission is to take effect from 15th August, 1997. In para 2 of the said Government Circular, there are some exceptions wherein the benefit of remission should not be given. In para 3 of the said Circular, it is made clear that in case of life sentence, the prisoner has to undergo at least 14 years sentence and earlier to that, the prisoners cannot be released. Further it is made clear that, the prisoner referred in para 3 of the said Circular will also be entitled for this remission, but after they complete 14 years of the sentence. Para 4 of the said Circular states that on 15th August, 1997, the prisoners, who were unauthorizedly, out of prison should not be given the benefit of the said Circular but the prisoners who were out of prison authorizedly, such as on parole and furlough etc., they be given the benefit of the State remission.

5. Learned counsel appearing for the Petitioner submits that, in the case of Rajubhau Gaddalwar vs. State of Maharashtra in Criminal Writ Petition No.244 of 2008 and also in the case of Chotu Punekar vs. State of Maharashtra, in Criminal Writ Petition No.163 of 2008 the High Court has held that even the prisoner, who is not convict, who is undertrial on relevant date i.e. 6th August, 1997, would be entitled to State Remission on the eve of Golden Jubilee of India's Independence, and hence the Petitioner is also entitled for State Remission of two years on eve of Golden Jubilee of India's Independence.

6. Learned counsel appearing for the Petitioner has further relied upon the Government Circular dated 28th April, 1999 wherein it is stated that every convict who is on bail at the time of grant of State Remission, would be entitled for such State Remission. Learned counsel submits that at the time of grant of State Remission, the Petitioner was on bail which was granted by Sessions Court, Mumbai and therefore, as per the provisions of Government Circular dated 28th April, 1999, the Petitioner is entitled for State Remission of two years. Therefore, he submits that the Petition may be allowed.

7. Learned A.P.P. appearing for the State submits that the Petitioner is convicted by Sessions Court Mumbai by order dated 28th July, 2003, for the offence punishable under Section 302 of the Indian Penal Code and he is sentenced to undergo life imprisonment. The Petitioner's undertrial period from 2nd January 1990 is three months and twenty two days. It is submitted that as per the Government Circular/letter dated 6th August, 1997, the Government has

directed to give State remission only to convicted prisoners and the effect of the same is to be given from 15th August, 1997. As per the Government letter dated 6th August, 1997, all prisoners, who were convicted for life imprisonment as on or before 15th August, 1997, should be given remission of two years. When the State Government letter dated 6th August, 1997 was issued, at that time the petitioner was not convicted prisoner and since April, 1990, he was enlarged on bail. Learned A.P.P., relying upon the exposition of law by the Supreme Court in the case of State of Haryana and others vs. Jagdish, 2010(4) S.C.C. 216 and in particular Para 43 thereof, submits that the Supreme Court has made it clear that the convict is entitled for the provisions in the policy that was existing on the date of his conviction. She submits that the policy to grant remission on account of Golden Jubilee of Indian Independence would necessarily apply from the date of coming into force the said policy.

8. We have heard learned counsel appearing for the Petitioner, and the learned APP appearing for the Respondent - State at length. With their able assistance, we have perused the pleadings in the Petition, annexures thereto, and also the Judgments cited across the Bar by the learned counsel appearing for the Petitioners, and the learned APP appearing for the Respondent - State. In the present case, it is not in dispute that on 6th August, 1997, the State of Maharashtra issued a Notification, thereby making provision to grant State remission to the prisoners on the occasion of "Golden Jubilee of Indian Independence". However, according to the learned APP appearing for the Respondent - State, the benefit is extended only to the convicted prisoner and effect of the same is to be given from 15th August, 1997, and on 6th August, 1997, the Petitioner was not convicted. It is true that on 6th August, 1997, the Petitioner was not convicted, however, it is admitted position that the Petitioner was undertrial prisoner and he was released on bail after his arrest. It is also true that on 15th August, 1997, the petitioner was on bail, however, he was undertrial prisoner.

9. The Division Bench of the Bombay High Court, Bench at Nagpur, in the case of Chottu Ratanlal Punekar Vs. State of Maharashtra, 2009 [1] Mh.L.J. [Cri.] 209 had occasion to consider the communication dated 6th August, 1997, issued by the Desk Officer, Home Department, Government of Maharashtra, informing the Inspector General of Prisons, Pune under the orders of the Governor of Maharashtra that, State remission is to be given to the convicts on the eve of Golden Jubilee of Indian Independence with effect from 15th August, 1997. The Division Bench recorded the grievance of the Petitioner in para 4 and after assigning the reasons in para 5 and 6, allowed the said Petition. Para 4 to 6 of the said Judgment, reads thus:

4. The grievance of the petitioner is that benefit of the said State remission is not extended to him though he is entitled for it. It was urged on behalf of the respondent / State that State remission can be extended only to those persons who were convicts on 15-8-1997 and it cannot be extended to those who were

not convicts on that date. Since the petitioner was not a convict on 15-8-1997 and was merely an undertrial, he is not entitled to get benefit of the State remission. The logic, according to the learned APP is that had the petitioner been acquitted, there was no question of giving him benefit of the State remission.

5. The logic in the submissions of learned APP is difficult to accept. The fortuitous circumstance of one Court deciding a comparatively new matter before 15-8-1997 and the another Court deciding a very old matter thereafter cannot be permitted to be utilized to distinguish between convicts / prisoners for the purposes of extension of said benefit. Section 432 of Criminal Procedure Code empowers the State Government to pass appropriate orders and to remit sentences. In view of Golden Jubilee of Indian Independence, the decision dated 6-8-1997 has been taken. The decision is made operative from 15-8-1997. Thus the above referred fortuitous circumstance is totally relevant and if any classification is permitted on the basis of such circumstance, it would be wholly arbitrary. For an undertrial prisoner languishing in jail, after he is found guilty and is sentenced, section 428 of Criminal Procedure Code permits set off of the period spent by him as undertrial prisoner against the period of sentence ultimately imposed. Thus for all practical purposes after he is found guilty and sentence, he becomes convict and as such is covered by the policy decision dated 6-8-1997 mentioned above. The effort to contend that the period spent in jail as undertrial prisoner is wholly irrelevant for the purposes of the said circular, is without any basis and in fact it violates the spirit of said decision. An undertrial prisoner who is ultimately acquitted is not a convict at all and hence he is not entitled to benefit of remission.

6. We, therefore, hold that the present petitioner is entitled to benefit of the said State remission and accordingly direct respondent / State Government to extend its benefit to him. Rule is made absolute in the above terms."

10. Therefore, the grievance/ controversy raised in the present Petition is the same like raised by the Petitioner therein in the case of Chottu Ratanlal Punekar [cited supra]. The State Government, being aggrieved by the Judgment of the Division Bench in the case of Chottu Ratanlal Punekar, filed Petition for Special Leave to Appeal [Cri.] No.1798/2009 [State of Maharashtra Vs. Chottu Ratanlal Punekar]. The said Petition was heard by the Hon"ble Supreme Court on 9th March, 2016, and for the reason stated in the order, the said Petition was dismissed.

11. Learned counsel appearing for the Petitioner also relied upon Government Circular dated 28th April, 1999, wherein it is stated as under: "VERNACULAR MATTER OMITTED"

. Thus it is provided in the said Government Circular that benefit of all State Remissions should be given to the convicts who were enlarged on bail by the competent Court on the relevant date.

12. In the light of the discussion in the foregoing paragraphs, though we are not

inclined to issue any mandatory directions to the Respondents to accept the prayer of the Petitioner, however, we are inclined to give directions to the Respondents to consider the case of the Petitioner afresh, in the light of the Judgment of the Division Bench in the case of Chottu Ratanlal Punekar [cited supra] and also the observations made herein above, and the office record in relation to the case of the Petitioner maintained by the Respondents, and to take decision afresh. We make it clear that the earlier order, if any, passed by the Respondents, refusing benefit to the Petitioner of the Circular dated 6th August, 1997, and the Circular dated 28th April, 1999, stands quashed and set aside. We direct the Respondents to consider the case of the Petitioner afresh, and take the decision as expeditiously as possible, however, within TEN weeks from today and communicate the same to the Petitioner.

13. The Writ Petition is partly allowed. Rule is made absolute partly on above terms. The Writ Petition stands disposed of accordingly.