Before Kanwaljit Singh Ahluwalia, J.

DHARAM PAL ALIAS SWAMI KALYANI,—*Petitioner*

versus

STATE OF HARYANA AND OTHERS,—*Respondents*

Crl. W.P. No.2042 of 2011

24th January, 2012

Code of Criminal Procedure, 1973 - Ss.428, 432 482 - Constitution of India - Arts.72, 161, 226, 227 - Indian Penal Code - Ss.376 - 506 - Punjab Jail Manual - Paras 635(2), 639, 644 & 645 - Petitions filed U/s 482 Cr.P.C. impugning action of State of Haryana in limiting remissions only to the period of sentence undergone and not awarding remissions while petitioners were under trails - In CWP 1491 of 2010 titled as Joginder Singh v. State of Haryana, it was held that under trail period would be treated as part of sentence and remissions shall be granted thereon - Interpretation of S.428 Cr.P.C. in Joginder Singh's decision doubted - Refereed to larger bench.

Held, that the concluding portion of para 4 of the Joginder Singh's case (supra), "thus Section 428 of the Code mandates that the sentence includes period undergone by an accused during the trial also", in my humble opinion, is not the correct interpretation of Section 428 Cr.P.C. as Section 428 Cr.P.C. specifically states that the period of detention, if any, undergone by an accused during the investigation, enquiry or trial of the same case before the date of conviction, is to be set off against the term of imprisonment imposed. Since I have doubted the interpretation of law given in Joginder Singh's case (supra), the following questions are required to be considered by a Larger Bench :

(a) When the sentence of a convict shall commence?

(b) Whether the period undergone by an accused as an under trial can be taken into Consideration for awarding remissions or not?

(c) Whether the period undergone by an accused as an under trial is to be considered as a part of the sentence or not?

(Para 8)

Further held, that if the interpretation given in Joginder Singh's case (supra) is sustained then answer to the above said three questions will be:

(i) That the day one is arrested, the sentence shall commence and this shall include the period before the sentence is awarded;

(ii) That the period undergone as an under-trial shall be taken into consideration for awarding remissions;

(iii) That the period undergone as an under-trial shall be considered as a part of the sentence.

(Para 9)

Further held, that in my humble opinion, if the interpretation of Joginder Singh's case (supra) and the answers (i), (ii) & (iii) to the questions (a), (b) & (c), noticed above, are allowed to remain, they will run contrary to the correct interpretation of Section 428 Cr.P.C. and the enunciation of law given by Hon'ble the Supreme Court. Therefore, the judgment rendered in Joginder Singh's case (supra) is required to be re-looked into by a Larger Bench of this Court.

(Para 10)

H.P.S. Aulakh, Advocate for the petitioner.

Amandeep Singh, Assistant Advocate General, Haryana for the State.

KANWALJIT SINGH AHLUWALIA, J.

(1) Present criminal writ petition has been filed under Articles 226/227 of the Constitution of India read with Section 482 Cr.P.C. praying that action of the respondents in limiting the remissions only to the period of sentence undergone and not awarding the remissions upon the period undergone by the petitioner as an under-trial, be set aside as the same is contrary to the judgment rendered by a Coordinate Bench of this Court in **'Joginder Singh v. State of Haryana etc.'** Criminal Writ Petition No.1491 of 2010, decided on 4th January, 2011 (Annexure P-1).

(2) During the course of arguments, it has been prayed that the judgment rendered in **Joginder Singh's case** (supra) is binding upon the State authorities, and thus, they should count and award remissions on the period already undergone by the petitioner as an under-trial also. According to the counsel, the State authorities have wrongly interpreted para No.645 of the Punjab Jail Manual, which states that the total remission shall not exceed one-fourth part of sentence.

(3) Before the arguments raised and the ratio of law laid down in **Joginder Singh's case** (supra) are considered, it will be necessary to give brief facts of the case.

(4) Dharam Pal alias Swami Kalyani – petitioner was named as an accused in a case FIR No.65 dated 29.03.2003 registered at Police Station Mahesh Nagar, Ambala under Sections 376 and 506 IPC. The Court of Additional Sessions Judge, Ambala held the petitioner guilty of offences punishable under Sections 376 and 506 IPC and sentenced him to undergo rigorous imprisonment for 7 years and to pay a fine of Rs.2,000/- under Section 376 IPC and further to undergo rigorous imprisonment for 2 years and to pay a fine of Rs.500/- under Section 506 IPC. Both the sentences were ordered to run concurrently. Aggrieved against the same, the petitioner had filed a Criminal Appeal No.1153-SB of 2005, which was dismissed.

(5) As per the reply filed by the State, the petitioner has undergone sentence of 5 years 5 months and 19 days as on 17.11.2011.

A chart prepared to this effect is reproduced below:-

		Y	M	D
1.	Under-trial period from 24.4.03 to 12.06.05	02	01	19
	DAP from 13.06.05 to 21.07.06	01	01	09
2.	Conviction period from 04.05.10 to 17.11.11	01	06	14
3.	Actual sentence undergone	04	09	12
4.	Remissions (+)	00	05	08
5.	Govt. Remission (+)	00	00	00
		05	02	20
6.	Less Parole period (-)	00	03	01
7.	**Total Sentence Undergone**	**05**	**05**	**19**

(6) The sum and substance of the argument raised by counsel for the petitioner is that the period of two years, one month and nineteen days undergone by the petitioner as an under-trial should be taken into consideration and the remissions awarded during that period should also be awarded in his favour, or if remissions are to be awarded on the sentence undergone by the petitioner then the period of two years, one month and nineteen days undergone by him as an under-trial should also be taken as a sentence. It is stated that Section 428 Cr.P.C. requires that the period of sentence undergone should be set off against the sentence.

(7) Before this question is examined, it will be necessary to notice the ratio of law laid down in **Joginder Singh's case** (supra), the relevant portion whereof reads as under:

> *"4. The solitary submission made by learned counsel for the petitioner is that the total sentence of the petitioner should be considered to be the period he has undergone during trial and after conviction and thereafter, he should be allowed remission as per paragraph 645 of the Punjab Jail Manual. Section 428 of Code of Criminal Procedure envisages that the period of detention, if any, undergone by an accused during the investigation, inquiry or trial before the date of conviction, shall be set off against the term of imprisonment imposed upon 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. Thus, Section 428 of the Code mandates that sentence includes the period undergone by an accused during the trial also."*

(8) The concluding portion of para 4 of the **Joginder Singh's case** (supra), *"thus Section 428 of the Code mandates that the sentence includes period undergone by an accused during the trial also"*, in my humble opinion, is not the correct interpretation of Section 428 Cr.P.C. as Section 428 Cr.P.C. specifically states that the period of detention, if any, undergone by an accused during the investigation, enquiry or trial of the same case before the date of conviction, is to be set off against the term

of imprisonment imposed. Since I have doubted the interpretation of law given in **Joginder Singh's case** (supra), the following questions are required to be considered by a Larger Bench:

(a) When the sentence of a convict shall commence?

(b) Whether the period undergone by an accused as an undertrial can be taken into consideration for awarding remissions or not?

(c) Whether the period undergone by an accused as an undertrial is to be considered as a part of the sentence or not?

(9) If the interpretation given in **Joginder Singh's case** (supra) is sustained then answer to the above said three questions will be:

(i) That the day one is arrested, the sentence shall commence and this shall include the period before the sentence is awarded;

(ii) That the period undergone as an under-trial shall be taken into consideration for awarding remissions;

(iii) That the period undergone as an under-trial shall be considered as a part of the sentence.

(10) In my humble opinion, if the interpretation of **Joginder Singh's case** (supra) and the answers (i), (ii) & (iii) to the questions (a), (b) & (c), noticed above, are allowed to remain, they will run contrary to the correct interpretation of Section 428 Cr.P.C. and the enunciation of law given by Hon'ble the Supreme Court. Therefore, the judgment rendered in **Joginder Singh's case** (supra) is required to be re-looked into by a Larger Bench of this Court.

(11) I shall now divulge my reasons and answers to questions (a), (b) & (c) which have been formulated for consideration of the Larger Bench.

(12) A bare analysis and perusal of the provisions of the Code of Criminal Procedure makes it explicitly clear that the sentence has to commence on the day it is awarded after the conviction is recorded by the trial Court. The mandate of law laid down under Section 428 Cr.P.C. is that the period undergone is to be set off from the sentence. However, the period undergone as an under-trial is not to be considered as a sentence. Therefore, remissions

are not to be awarded on the period undergone as an under-trial; they are only to be awarded on the day the sentence commences and then conviction is recorded.

(13) The controversy raised in the present petition is not new. It came up for consideration before Hon'ble the Apex Court in **'Government of Andhra Pradesh and another *versus* Anne Venkatesware and others' (1).** As interpreted in **Joginder Singh's case** (supra), the High Court of Andhra Pradesh had held as under:

> *"Section 428 Cr.P.C. clearly ordains that the remand detention shall be set off against the term of imprisonment imposed on the accused person on conviction. The section further clarifies that 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. In other words, the statute equates the undertrial detention or remand detention with imprisonment on conviction. The provision, in so many words, treats the remand detention as part of the period of imprisonment after conviction. If remissions are given for imprisonment after conviction, there is no plausible or understandable reason why it should be denied to the remand period when the statute equates both of them."*

(14) After making the above said observation, the High Court of Andhra Pradesh held that the remissions are available or permissible to the accused qua the period for which the accused remained in police or judicial remand. Hon'ble the Apex Court in **Anne Venkatesware's case** (supra), considering the interpretation of law made by Andhra Pradesh High Court, disapproved the same and held as under:

> *"5. We do not consider the view taken by the High Court on this point as correct. Section 428 of the Code of Criminal Procedure, 1973 is in these terms :*
>
> '428. **Period of detention undergone by the accused to be set off against the sentence of imprisonment** – Where

(1) 1977 (3) SCC 298

an accused person has, on conviction, been sentenced to imprisonment for a term, 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.'

Section 428 provides that the period of detention of an accused as an undertrial prisoner shall be set off against the term of imprisonment imposed on him on conviction. The section only provides for a "set off", it does not equate an "undertrial detention or remand detention with imprisonment on conviction". The provision as to set off expresses a legislative policy, this does not mean that it does away with the difference in the two kinds of detention and puts them on the same footing for all purposes. The basis of the High Court's decision does not, therefore, seem to be right."

(15) Thus, it is apparent that **Joginder Singh's case** (supra) does not state correct position of law and the same is contrary to the law laid down by Hon'ble the Supreme Court in **Anne Venkatesware's case** (supra).

(16) The above questions formulated have also been answered by a Division Bench of Bombay High Court in **'Saikee Mazar and others v. B.N. Patel and others'** 1989 Cri.L.J. 1257 as under:

"8. In our judgment, the aforesaid two decisions of the Supreme Court are a complete answer to the submissions advanced by Shri Sardar. The under trial prisoners and the convict prisoners make a distinct classification and cannot attract the provisions of Art. 14 of the Constitution. What Art. 14 prohibits is class legislation and not reasonable classification for the purposes of legislation. If the Legislature takes care to reasonably classify persons for legislative purposes and

if it deals equally with all persons belonging to a 'well-defined class', it is not open to the charge of denial of equal protection on the ground that the law does not apply to other persons. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (ii) that, that differentia must have a rational relation to the object sought to be achieved by the statute in question. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. Article 14 does not insist that legislative classification should be scientifically perfect or logically complete. The difference which will warrant a reasonable classification need not be great. What is required is that it must be real and substantial and must bear some just and reasonable relation to the object of the legislation. When a law is challenged as denying equal protection, the question for determination by the Court is not whether it has resulted in inequality, but whether there is some difference which bears a just and reasonable relation to the object of legislation. Mere differentiation or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonable.

9. *The under trial prisoners are a distinct category as distinguished from the convict prisoners. Merely because S. 428 of the Cr.P.C. provides for set off of the period of detention undergone during investigation, inquiry or trial, the same cannot equate an under trial detention or remand detention with imprisonment on conviction. The provision as to set off expresses a legislative policy but the same cannot do away with the difference in the two kinds of detention and put them on the same footing for all purposes. Moreover, as provided in R.3 of the aforesaid Remission*

System Rules, remissions are granted as a matter of concession only and not as of right. Hence, on this ground also no resort can be had to Art. 14 of the Constitution. In this view of the matter, it will have to be held that the present petition is devoid of any merit and deserves to be dismissed."

(17) In view of the authoritative pronouncement of law made by a Division Bench of the Bombay High Court in **Saikee Mazar's case** (supra), I am of the view that the State Jail Department has rightly restricted grand of remissions to one-fourth sentence undergone by the petitioner.

(18) Another argument has been raised regarding validity of para No.645 of the Punjab Jail Manual. It will be apposite here to reproduce para No.645 of the Punjab Jail Manual. The same reads as under:

*"**Para 645 Total remission not to exceed onefourth part of sentence –** The total remission awarded to a prisoner under all these rules shall not without the special sanction of the Local Government, exceed one-fourth part of his sentence.*

Provided in Every exceptional and suitable cases the Inspector General of Prisons may grant remission amounting to not more than one-third of the total sentence."

(19) Remissions are awarded to an accused undergoing sentence under three different provisions of law. Accused are also entitled to remissions under Articles 72 and 161 of the Constitution of India. Remissions can be granted under Section 432 Cr.P.C. and remissions can also be granted under Para Nos. 635(2), 639, 644 of the Jail Manual. Once any person seeks benefit under the Jail Manual, the Jail Manual has to be taken as a whole and it cannot be said that the restriction imposed under Para No.645 will not govern the other parts of the Jail Manual which award remissions. Therefore, the argument raised by Shri Aulakh that this Court should declare Para No. 645 to be ultra vires of the Constitution, cannot be sustained in the eyes of law.

(20) Since I have recorded my difference of opinion with the view formulated in **Joginder Singh's case** (supra), the matter be laid before a Larger Bench for enunciation of law so that the controversy is settled once for all.

(21) Since numerous cases of this nature are being listed, the matter be listed before the concerned Division Bench in motion hearing at the earliest after obtaining appropriate orders from Hon'ble the Chief Justice.

(22) A copy of this reference order be sent to all the Directors General of Police (Prisons), Punjab, Haryana and Union Territory Chandigarh so that in the cases of similar nature, till the reference is decided, further orders are kept in abeyance.

(23) A copy of this order, duly attested by the Court Secretary of this Court, be also handed over to counsel for the State of Haryana, Punjab and Union Territory Chandigarh.

J.S. Mehndiratta

Before Ranjan Gagoi, CJ & K.S. Ahluwalia, J.

NIRBHAI SINGH,—*Petitioner*

versus

STATE OF PUNJAB,—*Respondent*

CWP 7036 of 2005

14th November, 2011

Constitution of India, 1950 -Art. 226/227 - Water (Prevention and Control of Pollution) Act, 1974- S. 33 - Environmental Law - Public Interest Litigation - Contamination of Budha Nullah seasonal water-stream that flows through Ludhiana District in Punjab and merges in the river Sutlej-How to make pollution free?- Evolving a comprehensive plan and strategy to make Budha Nullah free of ill-effects of rapid, haphazard and unplanned industrial growth- Budha Nullah victim of official apathy- Observed that till the city life of Ludhiana improves, Budha Nullah cannot be saved.

Held, That industrialization and technological progress had caused a negative impact on the environment in terms of pollution and degradation, and had stressed the environmental system due to accumulation of the stock of wastes. Pollution of water, air and atmosphere are the bye-products of