CASE NO.:
Criminal.M.P (PR) 9478 of 2002

PETITIONER:
MALIYAKKAL ABDUL AZEEZ

RESPONDENT:
ASSISTANT COLLECTOR KERALA AND ANR.

DATE OF JUDGMENT: 17/01/2003

BENCH:
SHIVARAJ V. PATIL & ARIJIT PASAYAT

JUDGMENT:
JUDGMENT

2003(1) SCR 423

The following Order of the Court was delivered Delay condoned.

Though this is not a case which deserves grant of leave to prefer appeal-we think it appropriate to dispose of the petition with a reasoned order as many cases involving similar issues are being filed.

According to the petitioner, he is entitled to set off as provided under Section 428 of the Code of Criminal Procedure, 1973 (in short 'the Code') for the period of detention under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (in short 'COFEPOSA'), since the detention was quashed by the Delhi High Court. Reliance is placed on a decision of this Court in State of Maharashtra and Another v. Najakat Alia Mubarak All, [2001] 6 SCC 311 to contend that the period is available to be set off against the period of sentence imposed on conviction under Section 135(1) of the Customs Act, 1962 (in short 'the Customs Act').

Factual position is almost undisputed and needs to be noted in brief. Prosecution version which led to trial of the accused petitioner is as follows:

The petitioner arrived at the Trivandrum Airport on 12.8.1985 from Dubai by Air India Flight No. A1 920. Though declaration was given by him about the possession of 16 items, nothing was stated about possession of the gold. When his baggage was subjected to open examination, it was revealed that he was carrying 20 gold biscuits of the foreign origin . On the basis of the information furnished by the petitioner an electric water motor brought by him was opened and 70 gold biscuits were found concealed. The total value of the illegally transported gold biscuits was fixed at around Rs. 22 lakhs. The Assistant Collector, Air Customs. Trivandrum Airport filed a complaint and the petitioner faced trial by the Additional Chief Judicial Magistrate (Economic Offences) Ernakulam. As noted above, he was found guilty of offence punishable under Section 135(1) of the Customs Act and was sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs. 20,000 with default stipulation of two months simple imprisonment. Appeal before the Sessions Court, Ernakulam was partly allowed and the custodial sentence was reduced to two years. The fine amount was maintained, but default stipulation partly modified. In the revision filed before the Kerala High Court, the conviction and sentence imposed were challenged. Additionally, it was prayed that the period of detention under the COFEPOSA was for two years and should be set off in terms of Section 428 of the Code. The High Court rejected the revision on merits. The plea relating to set off was also turned down. It was held that the period spent under COFEPOSA was not to be considered as detention for the purpose of the criminal case. It was further noted that the petitioner was on bail while the detention order was passed and, therefore, cannot be treated to be an under-trial prisoner. He was in judicial custody when

detained under the COFEPOSA. After detention under COFEPOSA, bail granted was not cancelled and, therefore, the petitioner was not an under-trial prisoner.

In support of the application for grant of leave, strong reliance was placed on the decision in State of Maharashtra and Ors. v. Naiakat Alia Mubarak AH, (supra). It was submitted that the period of imprisonment undergone by an accused as an under-trial during investigation, enquiry or trial of a particular case irrespective of whether it was in connection with the same case or any other can be set off against the sentence of imprisonment imposed on conviction in that particular case. It was further submitted that the facts situation is identical to those involved in Government of Andhra Pradesh and Anr. v. Anne Venkatesware and Ors., [1977] 3 SCC 298.

In order to appreciate the stand of the petitioner, Section 428 of the Code needs to be noted. The provision reads as follows:

"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 investigations, 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."

The two requisites postulated in Section 428 of the Code are:-

(1) During the stage of investigation, enquiry or trial of a particular case the prisoner should have been in jail at least for a certain period:

(2) He should have been sentenced to a term of imprisonment in that case.

If the above two conditions are satisfied then the operative part of, the provision comes into play i.e. if the sentence of imprisonment awarded is longer than the period of detention undergone by him during the stages of investigation, enquiry or trial, the convicted person need undergo only the balance period of imprisonment after deducting the earlier period from the total period of imprisonment awarded.

Section 428 of the Code was brought on the statute book for the first time in 1973. It was incorporated in the light of the proposal put forward by the Joint Select Committee. It was noticed by the Committee that in many cases the accused persons are kept in prison for a very long period as under-trial prisoners and in some cases the period spent in jail by under-trial prisoners far exceeded the sentence of imprisonment ultimately awarded. It was also noticed by the Committee with concern that large number of prisoners in the over-crowded jails of the country were under-trial prisoners. Provision was introduced to remedy the unsatisfactory state of affairs, by providing for setting off the period of detention as under-trial prisoners against the sentence of imprisonment imposed on the accused. Views of the Committee were expressed in following words:

"The Committee has noted the distressing fact that in many cases accused persons are kept in prison for very long period as undertrial prisoners and in some cases the sentence of imprisonment ultimately awarded is a fraction of the period spent in jail as undertrial 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 undertrial 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 undertrial 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 undertrial 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."

In Government of Andhra Pradesh and Anr. v. Anne Venkatesware and Ors., supra it was observed that Section 428 provides for set off of the period of detention of an accused as an under-trial prisoner against the term of imprisonment imposed on him on conviction. It only provides for a "set off' but does not equate an "under-trial detention or the 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 outs things on the same footing for all purposes.

A preventive detention as was held in Rex v. Halliday (1917) AC 260-268" is not punitive but precautionary measure." The object is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved, nor any charge is formulated: and the justification of such detention is suspicion or reasonable probability and there is no criminal conviction which can only be warranted by legal evidence. In this sense it is an anticipatory action. Preventive justice requires an action to be taken to prevent apprehended objectionable activities. In case of punitive detention the person concerned is detained by way of punishment after being found guilty of wrong doing where he has the fullest opportunity to defend himself, while preventive detention is not by way of punishment at all, but it is intended to prevent a person from indulging in any conduct injurious to the society. This position was noticed by this Court in Mr. Kubic Dariusz v. Union of India and Ors., AIR (1990) SC 605.

In Government of Andhra Pradesh and Anr. v. Anne Venkatesware and Ors., (supra) this Court observed as follows:

"It is true that section speaks of the "period of detention" undergone by an accused person, but it expressly says that the detention mentioned refers to the detention during the investigation, enquiry or trial of the case in which the accused person has been convicted. The section makes it clear that the period of detention which it allows to be set off against the term of imprisonment imposed on the accused on conviction must be during the investigation, enquiry or trial in connection with the "same case" in which he has been convicted. We, therefore, agree with the High Court that the period during which the writ petitioners were in preventive detention cannot be set off under Section 428 against the term of imprisonment imposed on them."

The view was reiterated by a three-Judge Bench of this Court in Champalal Puniaji Shah v. State of Maharashtra, [1982] 1 SCC 507. Though learned counsel for the petitioner tried to distinguish the last named two cases on the footing that they related to post conviction detention, we do not think that the same is really of any consequence in view of the settled legal position that detention under the preventive detention laws is not punitive but is essentially a precautionary measure intended to prevent and intercept a person before he commits an infra-active act which he had done earlier.

The petition is without any merit and is dismissed.