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C.R.R 1981 of 2021

In Re : Nakul Bera @ Nakul Chandra Bera petitioner

Mr. N S Ghosh
Ms. S Chatterjee
Mr. Sourav Mondal

..... for the petitioner

Mr. S G Mukherjee, Id PP
Mr. P P Das
Mr. M F A Begg

..... for the State

1. Petitioner was convicted in ST 1(11)/2011 for commission of offence punishable under section 376 IPC and under sections 3/4/6/7 of Immoral Traffic (Prevention) Act and sentenced to various periods of imprisonment maximum being rigorous imprisonment for 10 years. In a subsequent trial being ST 03(September)/11 the petitioner was again convicted for commission of offences punishable under sections 366/366A/367/ 372/34 IPC and under sections 3/4/5/6 and 9 of the Immoral Traffic (Prevention) Act. On such counts he was sentenced to suffer rigorous imprisonment for various periods, maximum being 10 years.

2. Petitioner had assailed the conviction and sentence in the two cases in separate appeals being Criminal Appeal No. 333 of 2013 and Criminal Appeal No. 126 of 2015 with Criminal Appeal No. 199 of 2015. The appeals were dismissed and the conviction and sentence in both the cases were upheld. While dismissing the appeals though the petitioner was given a privilege that the sentence awarded in each case shall run

concurrently under section 31 Cr.P.C. there was no direction that the sentences awarded in the two cases shall run concurrently in terms of section 427 Cr.P.C.

3. After the disposal of the appeals petitioner took out the present petition praying that the sentences awarded in the two cases be directed to run concurrently.

4. Issues which arise in the petition are as follows:-

- (i) Whether the petition seeking the aforesaid relief is maintainable;
- (ii) Do the cases justify a direction under section 427(1) Cr.P.C. that the subsequent sentence should run concurrently with the prior sentence?

5. With regard to first issue Mr. Ghosh submits a direction under section 427(1) Cr.P.C that the sentence arising from the subsequent conviction should run concurrently does not amount to review of the judgment. He relies on **Shersingh vs. State of MP¹** and **Bihari Lal vs. State NCT Delhi²**.

6. Section 427 Cr.P.C reads as follows:-

“427. Sentence on offender already sentenced for another offence.-

(1) When a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or imprisonment for life, such imprisonment or imprisonment for life shall commence at the expiration of the imprisonment to which he has been previously sentenced, unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence: Provided that where a person who has been sentenced to imprisonment by an order under section 122 in default of furnishing security is, whilst undergoing such sentence, sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately.

¹ 1989 Cri. LJ 632

² 2015 SCC OnLine Del 11828

(2) 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.”

7. Sub-section 1 of the section 427 provides when a person who is already undergoing a sentence of imprisonment is sentenced on a subsequent conviction, the subsequent sentence (including a sentence of life imprisonment) shall commence after the expiry of imprisonment arising from the prior conviction unless the Court directs the subsequent sentence shall run concurrently with the previous sentence.

8. A tabular chronology of the convictions and sentences awarded to the petitioner in the two cases are as follows:-

ST 1(11)/2011 (1st case)

Date of arrest	Date of delivery of judgment	Conviction and sentence u/s	Affirmed on	CRA No.
29.11.2009	15.3.2013	376 IPC & 3/4/6/7 Immoral Traffic (Prevention) Act; maximum sentence of R.I. for ten years, other sentences to run concurrently	13.6.2018	CRA 333 of 2013

ST 03(September)/2011 (2nd case)

Date of arrest	Date of delivery of judgment	Conviction and sentence u/s	Affirmed on	CRA no.
24.4.2009	13.2.2015	366/366A/367/372/34 IPC & 3/4/5/6/9 Immoral Traffic (Prevention) Act; maximum sentence of R.I. for ten years, other sentences to run concurrently	16.8.2018	CRA 126 of 2015 with CRA 199 of 2015

9. In view of the fact that this Court has disposed of the criminal appeals affirming the conviction and sentence awarded in both the cases, it is argued section 362 Cr.P.C. bars the Court to alter/revise its earlier judgment and direct the subsequent sentence shall run concurrently with the sentence arising from the prior conviction.

10. Section 362 Cr.P.C reads as follows:-

“362. Court not to alter judgment.- Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error.”

11. In ***Md. Samim vs. The State***³ a Special Bench of this Court, inter alia, held that section 427 Cr.P.C. is not the sole repository of power to direct concurrent running of sentences. There is no prohibition on the High Court to invoke its inherent powers and issue direction for concurrent running of sentences. But the Bench was not called upon to decide whether section 362 Cr.P.C. would operate as a bar in exercise of its inherent powers when the High Court had already affirmed the subsequent conviction and sentence in appeal.

12. This issue was considered by a Division Bench of Madhya Pradesh High Court in ***A. S. Naidu vs. State of Madhya Pradesh***⁴. The Bench held that a direction for concurrent running of the subsequent sentence (already affirmed in appeal) in exercise of inherent powers does not amount to review of its earlier decision. Subsequently, a Full

³ 1991 SCC OnLine Cal 248

⁴ 1974 SCC OnLine MP 60

Bench of Madhya Pradesh High Court in **Shersingh** (supra) reiterated the proposition that inherent power of the Court under section 482 Cr.P.C. may be invoked at any stage to direct concurrent running of the subsequent sentence. Relying on a catena of decisions of various High Courts, the Bench disapproved the ratio of the Delhi High Court in **Gopal Dass v. State**⁵ in the following words:-

“5. The consensus of judicial opinion of different High Courts seems to be that inherent powers of the High Court can be invoked under section 482 even if the trial court or the appellate or revisional court has not exercised its discretion under Section 427(1) of the Code. The inherent powers of the High Court is not in any way fettered by the provisions of Section 427(1) and it can be invoked at any stage even if there is no such order passed under Section 427(1) by the trial Court or appellate or revisional court and even though the conviction has become final, A Division Bench of the Calcutta High Court in J. K. Banerjee v. The State, AIR 1955 Cal 632, has held "with regard to sentences passed on different dates in respect of different convictions of the accused by Courts other than the High Court, the High Court has power under Section 561-A to order that they may run concurrently." Section 561-A of the old Code of 1898 is identical to Section 482 of the present Code. The Patna High Court in Baijnath v. State AIR 1961 Pat 138, has held that High Court can later direct sentences to run concurrently under Section 561-A but not under Section 397. Section 369 is no bar. The Andhra Pradesh High Court in Venkanna v. State of Andhra Pradesh: AIR 1964 AP 449, has held that High Court can order sentences to run concurrently in two different cases against the same accused by invoking inherent powers under section 561A read with Section 435 and 397(1) of the Code. A Full Bench of the Allahabad High Court in Mulaim Singh v. State 1974 CriLJ 1397, held that High Court is competent under Section 561-A to direct that the sentence of imprisonment under a subsequent conviction shall run concurrently with a previous sentence. A Division Bench of this Court in A. S. Naidu v. State of M.P., 1975 CriLJ 498, has held that the power to make the two sentences run concurrently under Section 397(1) of the old Code (S. 427 of the present Code) could, be exercised at any time when the matter was brought to the notice of the Court by an application or otherwise, since no modification of the judgment itself was involved, in the exercise of such a power, though it further held that the question of exercising the power

⁵ AIR 1978 Delhi 138

under its inherent jurisdiction in such a case does not arise, meaning thereby that power under Section 427(1) could be exercised at any time and not necessarily while deciding the case on merits as the Court does not become functus officio. Considering the aforesaid decision of this Court, a Full Bench of the Delhi High Court in Gopal Dass v. State AIR 1978 Delhi 138, held that the decision of this Court in A. S. Naidu's case is no longer good law in view of the judgment of the Supreme Court in Bijli Singh v. State Cr. A. No. 2/64 decided on 20-10-1964, though the judgment passed in Bijli Singh's case is not available but the ratio of the judgment seems to be that after delivering the judgment or order, criminal court becomes functus officio and cannot review its order, so it can be said to that extent the decision of this Court in A. S. Naidu's case (supra) is incorrect, but the Division Bench decision can be upheld by saying that the power could be invoked by the High Court under its inherent jurisdiction. The Full Bench of the Delhi High Court has also held that the above-mentioned rulings of the other High Courts are also no longer good law in view of the decision of the Supreme Court in R. P. Kapur v. State of Punjab (1960 CriLJ 1239) (supra) that inherent powers cannot be exercised in regard to the matters specifically provided under the Code i.e. when there is a specific provision under Section 427 for making subsequent sentence concurrent with the earlier sentence, this power cannot be invoked under section 482. The Full Bench, however, opined that in suitable cases the court is not precluded from treating a petition filed under Section 482 of the Code as a petition filed under Section 397 of the Code and grant necessary relief if so warranted by the exigencies and the facts of the case, thereby the Full Bench meant that though inherent powers cannot be invoked but the courts can, by invoking its revisional power, pass suitable orders for making the subsequent sentence concurrent with the earlier sentence. The Full Bench overlooked that power under Section 482 is much wider and is not subject to restrictions placed for invoking suo motu powers of revision under Section 397.

6. Subsequently, a Full Bench (Division Bench) of the Kerala High Court in *Mani v. State of Kerala* 1983 Cri LJ 1262, has held that when no direction is given by the trial court that the sentences were to run concurrently, direction can be issued by the High Court under inherent powers even if the stage of exercising discretion Under Section 427(1) of the Code is over, in circumstances which would serve the purposes mentioned in Section 482. Unfortunately, in this decision the Full Bench decision of the Delhi High Court was not brought to its notice. But recently a Division Bench of the Andhra Pradesh High Court in *V. Venkateswarlu v. State of A.P.* 1987 Cri LJ 1621 held that when two convictions and sentences are passed against accused by two different courts and orders have become final on an application by accused under Section 482 that those sentences may be run

concurrently, the High Court is competent to issue such direction. It distinguished the Full Bench decision of the Delhi High Court in Gopal Dass v. State 1978 Cri LJ 961 (supra) holding that the Supreme Court neither in R. P. Kapur v. State of Punjab (1960 Cri LJ 1239) nor in Palaniappa Gounder v. State of Tamil Nadu 1977 Cri LJ 997 (SC) (supra) has gone to the extent in laying down that the inherent powers cannot be exercised at all in such circumstances. The Division Bench also mentioned that it may be that the subsequent convicting Court was not apprised about the existence of the previous sentence. At any rate ordering of sentence to run concurrently does not amount to altering the finding. It may be noted that Section 31 of the Code provides for ordering the sentences to run concurrently in a given case. Likewise, under Section 427 while awarding a sentence in a subsequent case in respect of the person who is already undergoing sentence in previous case, a discretion is given to the subsequent convicting Court to give such a direction and order the sentence to run concurrently with the previous sentence. The Division Bench also noted that the Delhi Full Bench case has laid down that even after such a sentence has become final nothing prevents the High Court from exercising suo motu revisional jurisdiction and give necessary direction as provided Under Section 427 of the Code. Therefore, in view of the overwhelming decisions that power under Section 482 can be invoked to make the subsequent sentence run concurrently with the earlier sentence, the decision of the Delhi High Court in Gopal Dass v. State (supra) does not appear to have laid down the correct law."

[emphasis supplied]

13. It may not be out of place to note that a Single Bench of the Delhi High Court in **Bihari Lal** (supra) has approved the view of the Full Bench of Madhya Pradesh High Court in **Shersingh** (supra).

14. We have considered the judgments delivered in the criminal appeals. Though the Court was aware of the prior conviction of the petitioner no argument had been advanced nor any finding returned with regard to issuance of appropriate direction under section 427(1) Cr.P.C. for concurrent running of the sentences. This issue is raised for the first time in the present petition. Section 427(1) Cr.P.C. empowers a Court to

direct subsequent sentence awarded to a convict who is undergoing a prior sentence to run concurrently. Ordinarily, such power is to be exercised by the trial Court or the appellate/revisional Court. However, there is no prohibition in law for such power to be exercised even after the judgment of conviction and sentence has become final. Inherent powers under section 482 Cr.P.C. are to be exercised “ex debito justitiae” i.e. to meet the ends of justice. In the event consecutive running of sentences leads to an onerous or oppressive situation, inherent powers of the High Court can always be invoked to direct concurrent running of sentences in two or more cases.

15. Thus, the High Court in appropriate cases may exercise its inherent powers issue direction for concurrent running of sentences awarded in two cases even after the judgment of conviction and sentence has become final or affirmed in appeal by it. In doing so, the High Court does not alter, modify or review its earlier judgment delivered in appeal when no argument was advanced with regard to the concurrent running of the subsequent sentence and/or any finding is recorded with regard thereto.

16. Subsequent consideration of the prayer for concurrent running of sentences would not call for review of the findings recorded in the appellate judgment, namely, validity of the conviction or quantum of sentence awarded. This issue relates to the order of execution of the subsequent sentence vis-à-vis

the earlier one. Any direction in that regard would not impact the findings/conclusions recorded in the earlier judgment and run foul of section 362 Cr.P.C. Hence, we hold the petition is maintainable.

17. Next comes the parameters which would justify a direction for concurrent running of the subsequent sentence. Bare reading of section 427 Cr.P.C would show ordinarily a sentence arising from a subsequent conviction when the convict is already undergoing an earlier sentence would run consecutively i.e. after the expiry of the earlier sentence unless in appropriate cases the Court directs otherwise.

18. Discretion of the Court to direct concurrent running of sentences depends on a variety of factors. In ***Md. Zahid vs. State through NCB***⁶, the Apex Court while analyzing the aforesaid provision, inter alia, laid down the following principles governing judicial discretion:-

“33. Thus from the aforesaid decisions of this Court, the principles of law that emerge are as under:—

(i) if a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment, such subsequent term of imprisonment would normally commence at the expiration of the imprisonment to which he was previously sentenced;

(ii) ordinarily the subsequent sentence would commence at the expiration of the first term of imprisonment unless the court directs the subsequent sentence to run concurrently with the previous sentence;

(iii) the general rule is that where there are different transactions, different crime numbers and cases have been decided by the different judgments, concurrent sentence cannot be awarded under Section 427 of Cr.PC;

⁶ 2021 SCC OnLine SC 1183

(iv) under Section 427(1) of Cr.PC the court has the power and discretion to issue a direction that all the subsequent sentences run concurrently with the previous sentence, however discretion has to be exercised judiciously depending upon the nature of the offence or the offences committed and the facts in situation. However, there must be a specific direction or order by the court that the subsequent sentence to run concurrently with the previous sentence.”

[emphasis supplied]

19. Analysis of the factual matrix of the two cases is necessary to determine whether in light of the aforesaid principles a direction for concurrent running of sentences is justified.

20. In the first case i.e. ST 1(11)/11 on 24.02.2009 police raided the hotel of the petitioner. Three victims were recovered. Evidence of the victims show that they had been kept in the hotel against their will for sexual exploitation. One of them (PW 10) stated that she had also been raped by the petitioner. Relying on their deposition and other evidence on record petitioner had been convicted under Section 376 of the Indian Penal Code and under Sections 3/4/6/7 of Immoral Traffic (Prevention) Act and awarded a maximum sentence of ten years of rigorous imprisonment on 15.03.2013. While undergoing the sentence he was again convicted in ST 03(September)/2011 on the accusation that he along with others were trafficking five girls, some of whom were under eighteen years, in a Maruti Van to Digha for sexual exploitation. Accordingly, he was convicted under sections 363/363A/367/372/34 of the Indian Penal Code and under Sections 3/4/5/6/9 of Immoral Traffic (Prevention) Act and was awarded a maximum sentence of rigorous

imprisonment for ten years on 13.02.2015. Both the judgments have been upheld in appeal.

21. Mr. Ghosh argued that the gist of accusation involves abduction and sexual exploitation of women in both the cases. Women were kept in the same hotel. Hence, the offences were committed in the course of same transaction and a direction for concurrent sentencing is justified. The factual matrix of the two cases shows the involvement of the petitioner in an organized crime racket. On various dates he along with different associates had kidnapped/abducted various women and forcibly subjected them to sexual exploitation. The criminal activities though similar in nature took place on different dates and with the assistance of different co-accused. Victims recovered in the two cases are different. They were recovered on different dates i.e. 24.02.2009 and 20.04.2009 respectively. The circumstances leading to their recovery were also different. While in the first case victims were recovered from the hotel, in the second case they were recovered from a vehicle while they were being transported for the purpose of sexual exploitation. These facts clearly show that the offences though similar did not occur in the course of the same transaction which would have justified simultaneous trial.

22. Reference to ***Iqram vs. The State of Uttar Pradesh & Ors.***⁷ is inapposite. In the said case the accused had been convicted in separate cases for pilferage of electricity on different

⁷(2023) 3 SCC 184

dates with regard to the same premises. Consecutive sentencing entailed a total term of imprisonment for eighteen years which was disproportionately high compared to the maximum sentence that could have been awarded for the offence. Noticing the disproportionate period of imprisonment the accused would suffer if the sentences were to run consecutively vis-à-vis the nature of offence, the Apex Court gave direction for concurrent running of sentences.

23. But, noting the gravity and nature of offence i.e. illicit possession of narcotics above commercial quantity, the Court in ***Md. Zahid*** (supra) refused to direct concurrent running of sentences. In doing so, the Court took note of impact of such offences on society as a whole. The present cases involve trafficking of women including minors. Petitioner is a serial offender who was a member of an organized crime racket and had abducted, raped and trafficked several women. Victims in the two cases are not the same. They were recovered on different dates and under different circumstances. Co-accused in both the cases are different. Offences though similar were committed by a habitual offender on different dates and involve different victims. They give rise to independent causes of action and have been tried separately. Sentences awarded in these trials cannot be directed to run concurrently under section 427(1) Cr.P.C. without considering the gravity and nature of the offence, maximum punishment that may be awarded upon conviction and the impact of such offence on society including possibility of

re-offending. When offences involving trafficking of women for sexual exploitation are committed by members of an organized crime racket the possibility of re-offending is most likely and would ordinarily discourage exercise of discretion in favour of concurrent sentencing. Petitioner has already been given the privilege of set off in respect of undertrial detention against substantive sentences awarded in each case. Sentences on each count in both the cases have also been directed to run concurrently. Maximum sentence which could have been awarded is life imprisonment. In this backdrop, consecutive running of the subsequent sentence after set off does not render the total period of imprisonment to be served disproportionate to the nature of offence and/or the maximum sentence prescribed for the same. Under such circumstances, further privilege of concurrent running of the subsequent sentence is not called for.

24. We direct as follows:-

- i) *In the 2nd case i.e. ST-03(September)/2011, petitioner will be entitled to set off for the period of undertrial detention commencing from the date of arrest i.e. 24.04.2009 till his conviction and sentence in the 1st case, i.e. ST -1(11)/11 on 15.03.2013 against the substantive sentence awarded to him in the 2nd case vide judgment and order dated 13.02.2015 affirmed in CRA 126 of 2015 with CRA 199 of 2015;*
- ii) *Thereafter, remainder of the sentence awarded in the 2nd case i.e. ST-03(September)/2011 shall run after*

the expiry of the sentence awarded in the 1st case i.e.

ST -1(11)/11.

25. Correctional home authorities shall calculate the total period of imprisonment to be served by the petitioner in the light of the aforesaid directions.

26. Revision petition is accordingly disposed of.

27. Department is directed to communicate a copy of this order to the Superintendent, Midnapore Central Correctional Home for due compliance.

(Ajay Kumar Gupta, J.)

(Joymalya Bagchi, J.)