

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL WRIT PETITION NO. 169 OF 2019**

- 1) Mr. Krishna Venkatesh
S/o Late N. Vishwanath
55 years, R/o Pequene Chivar,
Anjuna, Bardez, Goa
Presently lodged at Central Jail
Colvale, Bardez-Goa.
- 2) Carl David Holiday Resorts Pvt Ltd.
A private Limited Company, having its
office at Pequeno Chiwar,
Anjuna, Bardez, Goa
Through Petitioner No. 1 (Proprietor)

... Petitioners.***V/s.***

1. Mr. Balbhim Malvankar,
S/o Tukaram Malvankar,
48 years, R/o H. No. 56,
Kaisua, Bardez-Goa.
2. The Superintendent,
Modern Central Jail, Colvale,
Colvale, Bardez-Goa.
3. Public Prosecutor,
High Court Bldg.,
High Court of Bombay at Goa
Altinho, Panaji, Goa.

... Respondents.

Mr. K. Poulekar and Mr. Yadnyesh Kotkar, Advocates for the
Petitioner.

Mr. Pravin Faldessai, Additional Public Prosecutor for Respondents
no. 2 and 3.

Mr. Balbhim Malvankar, Respondent No. 1 in person.

Mr. S. D. Lotlikar, Senior Advocate alongwith Mr. J. Karna, Amicus Curiae.

Mr. D. J. Pangam, learned Advocate General alongwith Mr. Pravin Faldessai, learned Additional Public Prosecutor, Amicus Curiae.

**Coram : M. S. SONAK &
NUTAN D. SARDESSAI, JJ.**

Reserved on: 4th September, 2019.

Pronounced on: 11th September 2019.

Judgment: (Per M. S. Sonak, J.)

Heard Mr. K. Poulekar and Mr. Yadnyesh Kotkar for the Petitioner.

Heard Mr. Pravin Faldessai, Additional Public Prosecutor for Respondents no. 2 and 3.

Heard Mr. Balbhim Malvankar who appears in person.

Heard S. D. Lotlikar, Senior Advocate alongwith Mr. J. Karna who were requested to assist this Court as Amicus Curiae.

Heard Mr. D. J. Pangam, learned Advocate General alongwith Mr. Pravin Faldessai, learned Additional Public Prosecutor who were again requested to assist this Court as Amicus Curiae.

2. Rule. With the consent of and at the request of the learned Counsel for the parties. Rule is made returnable forthwith.

3. The Petitioners were tried and convicted by the learned Judicial Magistrate First Class at Mapusa Goa in the undermentioned four cases for offences punishable under section 138 of the Negotiable Instruments Act, 1881 ("the Act"). The conviction and sentences were imposed on one and the same date and the same time:-

(a) Criminal Case No. OA/734/NIA/P/2010/F in which by judgment and order dated 17.11.2016, the Petitioners were sentenced to undergo simple imprisonment for a period of two years and further to pay compensation to the complainant, jointly and severally, an amount of Rs.99,000/- plus interest @ 9% per annum from 12.12.2009 till full payment subject to a maximum of double of the cheque amount. In default of the payment, the Petitioners were directed to undergo simple imprisonment for a period of 6 months.

(b) Criminal Case No. OA/735/NIA/P/2010/F in which by judgment and order dated 17.11.2016, the Petitioners were sentenced to undergo simple imprisonment for a period of two years and further to pay compensation to the complainant, jointly and severally, an amount of Rs.99,000/- plus interest @ 9% per annum from 09.12.2009 till full payment subject to a maximum of

double of the cheque amount. In default of the payment, the Petitioners were directed to undergo simple imprisonment for a period of 6 months.

(c) Criminal Case No. OA/736/NIA/P/2010/F in which by judgment and order dated 17.11.2016, the Petitioners were sentenced to undergo simple imprisonment for a period of two years and further to pay compensation to the complainant, jointly and severally, an amount of Rs.99,000/- plus interest @ 9% per annum from 11.12.2009 till full payment subject to a maximum of double of the cheque amount. In default of the payment, the Petitioners were directed to undergo simple imprisonment for a period of 6 months.

(d) Criminal Case No. OA/737/NIA/P/2010/F in which by judgment and order dated 17.11.2016, the Petitioners were sentenced to undergo simple imprisonment for a period of two years and further to pay compensation to the complainant, jointly and severally, an amount of Rs.99,000/- plus interest @ 9% per annum from 10.12.2009 till full payment subject to a maximum of double of the cheque amount. In default of the payment, the Petitioners were directed to undergo simple

imprisonment for a period of 6 months.

4. In all these matters it was the case of Respondent No. 1, the original complainant that the Petitioners had availed a friendly loan of Rs. 3,96,000/- for business purposes and assured repayment with interest. Further, the Petitioners, had issued four post-dated cheques dated 09.06.2017, 10.06.2017, 11.06.2017 and 12.06.2017 in the amount of Rs.99,000/- each, drawn on ICICI Bank, Mapusa Branch, Mapusa-Goa. Since the cheques were dishonoured, the Respondent No. 1 instituted the aforesaid four cases under section 138 of the said Act in the Court of Judicial Magistrate First Class at Mapusa Goa. By the aforesaid Judgment and orders delivered on the same date, at the same time by the same Magistrate, the Petitioners were convicted for offences under section 138 of the said Act and sentenced in the aforesaid terms.

5. The learned Judicial Magistrate First Class, in the aforesaid judgments and orders convicting the Petitioners did not indicate whether the sentences imposed upon the Petitioners were to run concurrently or consecutively. Accordingly, in terms of Section 427 of the Code of Criminal Procedure (CrPC), it was inferred that the Petitioners are required to suffer sentences imposed upon them consecutively and not concurrently.

6. By this Petition instituted under Article 227 of the Constitution of India read with Section 482 of the CrPC, the Petitioners seek directions that the sentences imposed upon them in all the aforesaid four cases be made to run consecutively from 27.10.2016 and not consecutively.

7. Mr. Poulekar, learned Counsel for the Petitioners submits that in the present case, learned Judicial Magistrate has not at all exercised discretion, which he was required to exercise in terms of Section 427 of CrPC. He submits that it is quite clear that the offences in respect of which four complaints came to be filed by Respondent No. 1 arise out of a single transaction by which the Petitioners took a loan of Rs.3,96,000/- from Respondent No. 1, the complainant. In these circumstances, Mr. Poulekar submits that the learned Judicial Magistrate was not only required to exercise discretion as contemplated under Section 427 of the Code of Criminal Procedure but further, direct that the sentences run concurrently. He submits that otherwise for failure to repay the loan of Rs.3,96,000/-, the Petitioners, will have to suffer incarceration of well over 10 years, which will violate the Petitioners' rights guaranteed by Article 21 of the Constitution of India. He submits that the Petitioners were incarcerated since 17.11.2016 and as on the date of issuance of Certificate dated 27.01.2019 had undergone imprisonment of two years, 8 months and 9 days. He therefore

submits that suitable directions be issued for the sentences to run concurrently with effect from 17.11.2016.

8. Mr. Poulekar, in support of his aforesaid contentions relied upon the following decisions:

- i) **Abidkhan @ Salman Mukhtar Khan Pathan v/s. State of Maharashtra & Anr.**¹
- ii) **K. Arasan & Ors, V/s. State of Tamil Nadu**².
- iii) **V. K. Bansal v/s. State of Haryana and Ors.**³
- iv) **Akash R. Deshpande v/s. State of Maharashtra**⁴
- v) **Sharad Hiru Kolambe v/s. State of Maharashtra and Ors.**⁵
- vi) **Girish Gautam S/o. Malaram Sharma V/s. State of Gujarat.**⁶

9. Mr. S. D. Lotlikar, the learned Amicus Curiae submits that this is a fit case for exercising of powers under Article 227 of the Constitution of India and Section 482 of the Code of Criminal Procedure. He submits that in cases of this nature, particularly where the matter may be pending before different Courts, it may not always be possible for the Judicial Magistrate to exercise discretion under Section 427 of the Code of Criminal Procedure. He submits that in cases where the offences arise from one and the same transaction,

1 2013 (4) Bom CR (Cri) 752.

2 2012 ((6) CTC 510

3 (2013) 7 SCC 211

4 2019 (2) Bom CR (Cri) 391.

5 AIR 2018 SC 4595.

6 Spl. Cri. Appl. No. 1730/18 & Ors. Dated 04.04.2018.

discretion is required to be exercised and sentences be made to run concurrently and not consecutively. He submits that in the present case the learned Judicial Magistrate has not exercised discretion one way or the other. He submits that the learned Magistrate was required to exercise discretion one way or the other. He submits that in such circumstances, the present Petition is not only maintainable, but further, discretion should be exercised and the sentences be ordered to run concurrently rather than consecutively.

10. Mr. Lotlikar places for consideration the following decisions:

- i) **O. M. Cherian alias Thankachan v/s. State of Kerala & Ors.**⁷
- ii) **V K Bansal v/s. State of Haryana & anr**⁸.
- iii) **M R Kudva v/s. State of A.P.**⁹
- iv) **State of Punjab v/s. Madan Lal.**¹⁰
- v) **Mohd. Akhtar Hussain alias Ibrahim Ahmed Bhatti v/s. Assistant Collector of Customs (Prevention), Ahmedabad & Anr.**¹¹
- vi) **Boucher Pierre Andre v/s. Supreintendent, Central Jail, Tihar, New Delhi & Anr.**¹²
- vii) **Navnit Madhukar Naik v/s. State of Maharashtra.**¹³

7 (2015) 2 SCC 501

8 (2013) 7 SCC 211.

9 (2007) 2 SCC 772

10 (2009) 5 SCC 238.

11 (1988) 4 SCC 183.

12 (1975) 1 SCC 192.

13 2013 SCC Online Bom 282.

11. Mr. D. Pangam, the learned Advocate General, however, submitted that the present Petition is not maintainable, particularly since the Petitioners exhausted the remedies of appeal and revision but failed to secure any modification in the sentence awarded by the learned Judicial Magistrate First Class. He submits that entertaining such Petitions would virtually amount to exercising powers of review, which powers are not at all vested in courts constituted under the CrPC. He relies on **M. R. Kudva v/s. State of Andhra Pradesh**¹⁴ and **Ranjit Singh v/s. Union Territory of Chandigarh And Another**¹⁵ in support of his contention.

12. Mr. Pangam submits that the scheme of Section 427 is that the sentences have to run consecutively as a rule. However, only in exceptional cases can the courts direct that sentences run concurrently. He submits that in the facts of the present case, discretion was quite correctly not exercised in favour of the sentences running concurrently. He submits that the learned Magistrate, was trying four different and distinct cases and to such a situation, there was really no question of section 427 of the CrPC being applied. He submits that section 427 of the CrPC applies to sentencing of an offender already sentenced for another offence.

13. Mr. Pangam submits that the decisions of this Court in

¹⁴ (2007) 2 SCC 772

¹⁵ (1991) 4 SCC 304

Abidkhan @ Salman Mukhtar Khan Pathan (supra) and **Akash R. Deshpande** (supra) may require reconsideration, as the question of maintainability of petition of this nature was not considered or addressed from all perspectives. He submits that both these Judgments also do not consider the effect of provisions under section 429 of CrPC. He therefore urges a reference to a full bench for reconsideration of the said two decisions.

14. After having considered the various contentions in the context of the provisions in CrPC, we are of the opinion that the case of the Petitioners is fully covered by the decisions of the division bench of this Court in **Abidkhan @ Salman Mukhtar Khan Pathan** (supra) and **Akash R. Deshpande** (supra). In addition, the case of the Petitioners finds support from the decisions of the Hon'ble Supreme Court in **V K Bansal** (supra) and **State of Punjab v/s. Madanlal**¹⁶. Accordingly, in the facts of this case, we are not persuaded to seek any reference but rather, we feel that we should follow such decisions and grant relief to the Petitioners.

15. The factual position in these matters is not disputed. From the material on record, it is quite apparent that offences arise from one and the same transaction. The Petitioners were convicted and sentenced on the same date and at the same time by Judgment

¹⁶ 2009 5SCC 238.

and Orders dated 17.11.2016 referred to in para 3 of this Judgment and Order. The perusal of the Judgment and Order indicate that the learned Magistrate has not even adverted to the provisions of Section 427 of Cr PC or exercised discretion one way or the other on the issue as to whether the sentences ought to be made to run concurrently or consecutively. The Petitioners then instituted criminal appeals, accompanied by applications, seeking condonation of delay before the Sessions Court. However, the applications seeking condonation of delay came to be dismissed for want of prosecution. The Petitioners then instituted revision applications before this Court, again accompanied by applications for condonation of delay. However, on 11.7.2019, the Petitioners withdrew such applications.

16. In somewhat similar circumstances, the division bench of this Court in **Abid Khan** (supra) has ruled that it was the duty of the learned Magistrate to exercise discretion in terms of Section 427 of the Cr PC and further, looking to the facts situation in the said matter, the division bench of this Court proceeded to hold that the exercise of discretion in the said matter should have resulted in a direction for the sentences to run concurrently and not consecutively. In such situation, the Division Bench ruled that the Court can, entertain a petition under section 226 of the Constitution of India and also invoke its inherent powers under section 482 of the Cr PC even after

a party may have exhausted remedy of appeals available under the Cr PC. Therefore, it is not correct to say that the issue of maintainability was not decided by the division bench in **Abid Khan** (supra).

17. To the same effect is the decision of the division bench of this Court in the case of **Akash R. Deshpande**, where again, the division bench relied upon **Abid Khan** (supra) took a view that sentences in such circumstances ought to have been made to run concurrently and not consecutively. Here again, in para 20, the division bench squarely considered the issue of maintainability of writ petition in such circumstances and held that such writ petition is maintainable.

18. In **K. Arasan & Ors** (supra), the issue which arose before the division bench of the Madras High Court was whether the inherent powers of the High Court under section 482 of Cr PC can be extended to issue a direction ordering the sentences imposed in a latter case on conviction to run concurrently with the sentence imposed in a former case as provided under section 427 of the Cr PC. This was in fact on a reference made to resolve two conflicting views expressed by a Single Judge of the Madras High Court.

19. One of the learned Single Judges of the Madras High

Court, in the case of **A. Palanisamy @ Khaitan V/s. Inspector of Police**¹⁷ after placing reliance upon the decision of the Hon'ble Supreme Court in **M. R. Kudva** (supra) held that in the event Section 427 of Cr PC was not invoked in the original case or in appeal, a separate application filed under Section 482 of Cr PC was not maintainable.

20. Another Single Judge of the Madras High Court in **A. Paulraj v/s. Maria Chellammal and others**¹⁸ has taken contrary view by placing reliance upon the decision of the larger bench of the Hon'ble Apex Court in the case of **Madanlal** (supra) and held that remedy by invoking section 482 of Cr PC, is indeed available. In such circumstances, the division bench of the Madras High Court in **K. Arasan** (supra), approved the view taken by the learned Single Judge in **A. Paulraj**, particularly since such view was consistent with the decision of the larger bench of the Hon'ble Apex Court in **Madanlal** (supra). The division bench noted that the view in **A. Paulraj** (supra) that the application under section 482 of Cr PC is maintainable in such circumstances was consistent with the view taken by the division bench of the Andhra Pradesh High Court in **V. Venkateshwarlu v/s. State of Andhra Pradesh**¹⁹ as well as view taken by the Full Bench of Madhya Pradesh High Court in

¹⁷ [2011] 4 MLJ (CrL.) 813.

¹⁸ 2011 4 MLJ (CrL.) 798

¹⁹ 1987 CrLJ 1621

Shersingh V/s. State of Madhya Pradesh.²⁰

21. Accordingly, by following the aforesaid decisions, we hold that the present petition is indeed maintainable in the peculiar facts and circumstances of the present case. We note that many a times conviction may be recorded and sentences imposed by different courts on different dates, particularly in matters related to offence under section 138 of the Negotiable Instruments Act. In such a situation, the Magistrate trying one of the cases may not even be aware of the parallel proceedings in some other Court. In such circumstances, it may not be possible for the learned Magistrate to exercise discretion in terms of Section 427 of the Cr PC. The view that the Petition under Article 226 of the Constitution of India read with 482 of Cr PC be maintainable in such circumstances, will perhaps address the situation arising in cases where convictions are recorded and sentences are imposed by two or more courts on different dates.

22. In **V. K. Bansal** (supra), the Hon'ble Apex Court was again concerned with the order made by the High Court declining the prayer made by the Appellant for a direction in terms of section 427 read with section 482 of CrPC for sentences awarded to the Appellant in connection with cases under section 138 of the

²⁰ 1989 CLJ 632.

Negotiable Instruments Act filed against him, to run concurrently. The facts in the said case were that the Appellant was a Director in a group of Companies which had secured financial assistance from Haryana Financial Corporation. Several cheques had been issued towards repayment of this financial assistance which, however, were dishonoured on the ground of insufficiency of funds. The Corporation instituted complaints under section 138 of the Negotiable Instruments Act against the Appellant in his capacity as Director of the borrowing companies. These complaints were tried by the learned Judicial Magistrate at Hissar culminating in the conviction of the appellant and sentences imposed which ranged between 6 months in some cases and one year in some cases were imposed on the appellant, besides imposition of different amounts in fine in each complaint and default sentence in the event of non-payment of amount awarded in each one of those cases. The Appellant's appeals were dismissed by the Sessions Judge or in some cases, were partly allowed by way of reduction of sentences from one year to 9 months. The Appellant then preferred 17 revision petitions, out of which 15 were dismissed and 2 were pending.

23. The Hon'ble Apex Court, in the aforesaid circumstances, by referring to its earlier decision in **Madanlal** (supra) extended the benefit of section 427 of Cr PC and directed that the substantive sentences awarded to the Appellants ought to have been directed to

run concurrently since, the offence, arose out of one and the same transaction, i.e. repayment of loan to the Financial Corporation. However, the Hon'ble Apex Court made it clear that the directions regarding concurrent running of sentences would be limited only to the substantive sentences. The sentences which the Appellant was directed to undergo in default of payment of fine/compensation was not to be affected. The Hon'ble Apex Court expressly observed that this distinction was being made because the provisions of section 427 of CrPC did not permit a direction of concurrent running of substantive sentences when sentences awarded in default of payment of fine/compensation.

24. According to us, taking into consideration the decision of the Hon'ble Supreme Court in **V. K. Bansal**, again, it is not necessary to propose that the decisions in **Abid Khan** (supra) and **Akash R. Deshpande** (supra) be placed before the Hon'ble the Chief Justice to consider reference to a Full Bench.

25. In **Madanlal** (supra) all the transactions related to the family of the respondent and the matter related to different cheques issued by the respondent to the complainant. For this purpose separate complaints were filed. The convictions were in terms of section 138 of the said Act. The application was filed under section 482 read with section 427 of the Cr PC seeking prayers that

quantum of conviction awarded may be permitted to run concurrently in respect of three convictions and the sentences imposed. The High Court directed that the sentences imposed by the Sessions Judge and the Judicial Magistrate were to run concurrently challenging such view, the State of Punjab instituted Special Leave Petition.

26. The Hon'ble Apex Court, however, upheld the view taken by the High Court that the substantive sentences in such cases should to run concurrently and not consecutively. The Hon'ble Apex Court approved the basic rule of thumb over the years, i.e. the transaction rule for concurrent sentences. This rule provides that if a given transaction constitutes two offences under two enactments generally, it is wrong to award consecutive sentences. It is proper and legitimate to award concurrent sentences. But this rule has no application if the transaction relating to offences is not the same or the facts constituting the two offences are quite different.

27. The Hon'ble Apex Court referred to its earlier decision in **State of Maharashtra v/s. Najaket**²¹ in which it was held that it is apposite to point out that very often it had happened when an accused is convicted in one case under different counts of offences and sentenced to different terms of imprisonment under each such

²¹ 6 SCC 311

count, all such sentences are directed to run concurrently. The idea behind it is that the sentence to be suffered by him for one count of offence will, in fact be imprisonment for other counts as well. The Hon'ble Apex Court finally upheld the view taken by the High Court for concurrent running of sentences.

28. Applying the aforesaid principles to the facts of the present case, we are satisfied that the Petitioner is entitled to some relief by way of direction that the substantive sentences imposed upon him vide Judgments and Orders dated 17.11.2016, referred to in paragraph 3 of this Judgment and Order, must run concurrently and not consecutively. This is because there is no doubt that all the offences for which the Petitioner stands convicted and sentenced, arise out of a single transaction. However, we clarify that this direction shall apply only in relation to the substantive sentences and not in relation to in-default sentences imposed upon the Petitioner.

29. This Petition is, accordingly, disposed of with a direction that the substantive sentences imposed upon the Petitioner in the Judgments and Orders dated 17.11.2016, referred to in paragraph 3 of this Judgment and Order, shall run concurrently and not consecutively. However, we clarify that this direction shall apply only in relation to the substantive sentences and not in relation to in-default sentences imposed upon the Petitioner, which shall

consequently run consecutively.

30. Rule is made partly absolute in the aforesaid terms. There shall be no order as to costs.

31. Before we part, we note and record our gratitude to the excellent assistance rendered to us by both, Mr. S.D. Lotlikar, learned Senior Advocate and Mr. D.J. Pangam, learned Advocate General for the State of Goa, in this matter.

32. All concerned to act on the basis of an authenticated copy of this Judgment and Order.

NUTAN D. SARDESSAI, J.

M. S. SONAK, J.

msr.