

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD.**

CRIMINAL WRIT PETITION NO. 491 OF 2022

Shri. Bhaskar Shankar Wagh,
Age : 72 years, Occupation : Prisoner,
Resident of : Convicted Criminal
Prisoner No. C-8153, Yerwada Prison,
Pune, District Pune. **...Petitioner**

Versus

1. The State of Maharashtra,
Through the Secretary,
Home and Prisons Department,
Mantralaya, Mumbai.
2. The Superintendent of Jail,
Yerwada Central Prison,
Yerwada, District Pune. **...Respondents**

.....

Mr. Mukul S. Kulkarni, Advocate for the petitioner
Mr. M. M. Nerlikar, APP for respondent/State

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**CORAM : SMT. VIBHA KANKANWADI
AND
RAJESH S. PATIL, JJ.**

CLOSED FOR JUDGMENT : 27th JULY, 2022
JUDGMENT PRONOUNCED ON : 17th AUGUST, 2022

JUDGMENT [PER SMT. VIBHA KANKANWADI, J.] : -

1. Petitioner is an accused, who has been convicted in several cases and at present he is 72 years old prisoner, undergoing the conviction, seeks to invoke Article 14, 21, 226 r/w Article 227 of

the Constitution of India with a prayer to quash and set aside the calculation made by respondent no. 2 – the Superintendent of Jail, Yerwada Central Prison, Pune, in respect of period of sentence of imprisonment awarded to the petitioner with respect to Sessions Case No. 2/1991 decided on 20.02.2013 and to further direct the respondent no. 2 to reconsider the period of imprisonment as per the Judgment and also to issue writ of habeas corpus for his release in view of the completion by declaring that the period of detention has been undergone by him.

2. The factual matrix leading to the petition are, in short, as under : -

. As aforesaid, the petitioner is convicted. He has been lodged in Yerwada Central Prison, Pune, since 07.08.1994 in C.R. No.441/1990, which was the subject matter of Sessions Case No.6/1991. By Judgment and Order dated 04.08.1994, he was awarded imprisonment for life and fine of Rs. 10,14,000/- and in default sentence of imprisonment of 5 years. The State Government has granted him remission and declared that as

regards that sentence is concerned, he has undergone the sentence.

Such order was passed by respondent no. 1 – State on 21.08.2009.

The petitioner was serving in Zilla Parishad, Dhule, as Clerk and he was given charge of post of Cashier. During the period 1987-1991, several offences came to be registered against him alleging that he has committed misappropriation of funds of Zilla Parishad, Dhule. The chart of those cases and the conviction that has been awarded to him has been given as under : -

Sr.	Crime No.	Session Case No.	Date of Decision	Sentence imposed	Sentence undergone
1	441 of 1990	06 of 1991	04.08.1994	Life imprisonment and fine of Rs. 10,14,000/- in default 5 years.	Totally undergone. Directed to be released from Jail on 21.08.2009
2.	451 of 1991	120 of 1996	26.12.2001	7 years concurrently and fine of Rs. 2,25,000/- in default 3 years and 3 months.	Totally undergone.
3.	450 of 1991	99 of 1996 [2006]	31.10.2001	7 years concurrently And fine of Rs. 2,25,000/- in default 4 years.	Totally undergone.
4.	125 of 1992	115 of 1996	05.05.2005	10 years concurrently And fine of Rs. 7,50,000/- in default 6 years.	Totally undergone.
5.	136 of 1989	05 of 1991	10.03.2006	7 years And fine of Rs. 3,00,000/- in default 3 years.	Totally undergone.

6.	423 of 1990	03 of 1991	12.02.2007	10 years concurrently And fine of Rs. 5,00,000/- in default 15 years.	Totally undergone.
7.	424 of 1990	02 of 1991	20.02.2013	10 years concurrently And fine of Rs. 5,00,000/- in default 3 years.	Totally undergone.
8.	436 of 1990	07 of 1991	30.12.2015	10 years concurrently And fine of Rs. 10,00,000/- in default 7 years.	Totally undergone.

3. The petitioner has given the copies of the Judgments. It will have to be mentioned that he had filed Criminal Appeal No. 19/2002, challenging his conviction before this Court. It was heard along with other appeals, which were filed by co-accused, by this Court (Single Bench) and came to be decided on 06.05.2011. His appeal came to be partly allowed. His conviction for the offence punishable under Section 409 of the IPC was maintained, however, conviction under Section 477 A r/w 120 B was set aside. Thereafter he had also filed Criminal Appeal No. 482/2001 challenging his conviction and sentences in Special Case No.99/1996 passed by learned Special Judge, Dhule and this Court by decision dated 05.09.2014 was dismissed. Another Criminal Appeal No. 283/2006 was filed by him challenging the

conviction in Special Case No. 5/1991 and this Court by Judgment and Order dated 27.03.2008, dismissed the said appeal.

It appears that the said appeal was also decided along with the appeal filed by wife of the petitioner. In Special Case No. 2/1991, the learned Special Judge by Judgment and Sentence dated 20.02.2013 has sentenced the petitioner to suffer rigorous imprisonment for a period of 10 years for the offences under Indian Penal Code and for offences under Prevention of Corruption Act, the sentence was to suffer RI for 7 years. Fine in all of Rs. 2,00,000/- has been awarded and in case of default in payment of fine of each of it, he has been directed to suffer RI for further period of 3 years. Thus, it can be seen that on several occasions, in different cases, the petitioner has been convicted by different Special Judges. In Special Case No. 2/1991, the learned Special Judge in clause 9 of the operative order has stated that “all the sentences imposed in the said case were to run concurrently”. The petitioner is referring to all the copies of the judgment of convictions which he has annexed as Annexure ‘A’, and the Annexure ‘B’ is the communication by the State Government to respondent no. 2 dated 21.08.2009 stating that the petitioner should be released on completion of 24 years of imprisonment

sgp

including all remissions, subject to the good conduct in the prison upto the aforesaid time of his release. Order passed by the Government on 21.08.2009 has been annexed. It was in connection with his conviction in Sessions Case No. 6 of 1991. The petitioner contends that if the operative parts of the judgment of convictions and sentences (in all cases) should have been directed to run concurrently i.e. including the default sentences. In spite of direction of sentences to run concurrently in clause '9' of the operative part in Sessions Case No. 2/1991, the Jail Authorities are treating the sentences as consecutively and, therefore, he has been directed to undergo sentence of 47 years of imprisonment and 15 years of default sentence. It is stated that he had solicited the reasons for the conclusion of the Jail authorities but they have not been provided to him. It was then the respondent no. 2 had addressed communication to learned Sessions Court / Special Judge, Dhule, seeking opinion about the actual period of sentence the petitioner is required to undergo and, therefore, the petitioner is seeking directions on the count that the respondent no. 2 is miscalculating the sentence. The default sentences ought to have been directed to run concurrently with the sentences those have been imposed in each case.

4. Heard learned Advocate Mr. Mukul S. Kulkarni for the petitioner and learned APP Mr. M. M. Nerlikar for the respondent/State.

5. It has been vehemently submitted on behalf of the petitioner that the point involved in the case is in respect of running of in default sentences imposed upon the petitioner in various cases as concurrently. He relied on Section 427(2) of Code of Criminal Procedure and submitted that when the petitioner was already undergoing sentence of imprisonment for life then the subsequent conviction for a term would run concurrently with previous sentence. Here the word 'sentence' has been used and not as 'substantive sentence'. Therefore, the default sentences would run concurrently amongst each other in respect of the offences under which in a case those have been awarded as well as with the default sentences in the previously convicted case. In order to buttress his submissions, he has taken us to Section 53 of the Indian Penal Code, which describes 'punishments'. He submitted that as per Section 53 of the IPC, the punishments to which offenders are made liable under the said Code, are imprisonment for life and

sgp

imprisonment of the two descriptions, namely, rigorous and simple, which are given separately. Therefore, if we read Section 53 of IPC together with Section 427(2) of Cr.P.C., then the legislature intended to say that even the default sentences should run concurrently. He also submitted that Section 63 of IPC provides that where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited but shall not be excessive. Then we will have to consider Section 64 of IPC which prescribes the outer limit that is required to be adhered to by the Courts in every case of an offence punishable with imprisonment as well as fine, then in case of non-payment of fine such imprisonment in default shall not be in excess of any other imprisonment to which he may have been sentenced. Therefore, if we consider both these sections and the interpretation that has been done by respondent no. 2, then it would certainly exceed to 14 years of imprisonment (after remission), which has been already undergone by the petitioner. The petitioner is 72 years old at this stage and if he is directed to undergo as per the calculation made by respondent no. 2, then he still has to undergo imprisonment of 55 years 39 months. In fact, the petitioner has actually undergone 38 years 3 months and 11

sgp

days' of imprisonment when the respondent no. 2 has issued a certificate in the month of September-2021. He cannot be asked to languish in Jail for the rest of his life. The interpretation that has been made by respondent no. 2 of Section 427 of Cr.P.C. is wrong and, therefore, the sentence has to be interpreted in respect of the Judgment and conviction that has been awarded in Sessions Case No. 2/1991, as concurrently and not consecutively.

6. Learned advocate appearing for the petitioner has relied upon the decision by this Court on 06.04.2022 in **Criminal Writ Petition No. 53 of 2021 (Mahadev Asaram Sillode vs. The State of Maharashtra and others)**. In this case, after taking note of the other pronouncements of this Court as well as Hon'ble Apex Court, it has been observed thus:

However, sub-section (2) of Section 427 of Cr.P.C. provides that when the offender already undergoing a sentence of imprisonment for life is sentence on a subsequent conviction to imprisonment for a term or imprisonment for life, the subsequent sentence shall run concurrently with such previous sentence. It is well settled that the imprisonment for life is a sentence for the remainder of the life of the offender unless the remaining sentence is commuted or remitted by the appropriate authority. This being so, the earlier sentence of imprisonment for life must be understood as life imprisonment for remainder of the life and therefore, the subsequent sentence of imprisonment for a term or for life cannot run consecutively. The provisions of sub-section (1) of Section 427 of Cr.P.C. lays down the general rule and sub section (2) of Section 427 is specific provisions directing the

subsequent sentence to run concurrently under certain circumstances.

7. It has been further observed after taking into consideration the facts of the case that the trial court had failed to consider the provisions of Section 427(2) of Cr.P.C., despite the earlier conviction of life imprisonment brought to the notice of the said Court that; the said case would squarely fall within the ambit of the provisions of Section 2 of Section 427 of Cr.P.C. Sub-section 2 of Section 427 of Cr.P.C. is in the nature of an exception to the general rule enacted in sub-section 1 of Section 427. Therefore, after considering the meaning and purpose of sub-sections 1 and 2 of Section 427, the object of enacting sub-section 2; this Court allowed the said writ petition directing that the subsequent conviction to run concurrently with the earlier conviction.

8. Learned Advocate for petitioner has further relied on the decision in **State of Maharashtra and Ors. vs. Najakat Alia Mubarak Ali** reported in **AIR 2001 SC 2255**, wherein interpretation of Section 482 of Cr.P.C. was made by the three Judges' Bench of the Apex Court. Learned Advocate for the petitioner submitted that the purpose of Section 427 and 428 are,

sgp

therefore, required to be considered, and in para no. 39 it has been observed thus :

39. Discretion of treating under-trial detention period may be relevant consideration for the Court while passing orders in terms of Section 427 of the Code but the accused cannot be permitted to claim set off the under-trial period undergone by him in connection with other cases. Powers of the Court to impose sentences should not be allowed to be regulated at the instance or discretion of the accused.

9. Based on these submissions, the learned advocate for the petitioner pressed for allowing the petition and treat the period of imprisonment undergone by the petitioner as the conviction for the default of sentence also, which has to run concurrently and not consecutively.

10. The learned APP has strongly opposed the petition and submitted that the petitioner has faced trial in eight cases and in all those eight cases, he has been convicted. In appeal, his conviction in one or the two sections might have been set aside but the conviction in the major sections has been upheld in those appeals which have been decided by this Court. As per the communication by respondent no. 2 dated 18.07.2022, which has been produced on record, is in respect of eight cases in which

petitioner has been convicted. Petitioner has been sentenced in all those cases to undergo imprisonment of 122 years with fine of Rs.36,14,000/- and the default sentence would go as per the calculation to 58 years 3 months. The amount of fine in all cases has not been paid by the petitioner. No doubt, as regards his conviction in Sessions Case No. 6/1991 wherein he was awarded imprisonment for life, the State by order dated 21.08.2009, has granted remission. It has been ordered that the Government has remitted the portion of the sentence of imprisonment of life which is in excess of 24 years of total imprisonment including all remissions, subject to the completion of actual imprisonment of 14 years in the case is accepted and the prisoner to be released in that case. After the petitioner had asked respondent no. 2 for his release, clarification was sought by letter dated 18.06.2022 by respondent no. 2 to the convicting court. Reply has been received from the learned District Judge-3 and Additional Sessions Judge, Dhule, on 23.06.2022, which has also been produced on record and it has been clarified that as regards the substantive sentences are concerned, the case would fall under Section 427(2) of Cr.P.C. As regards Special Case No. 2/1991 is concerned, it has been mentioned that the wordings of the operative part are clear and

sgp

under various offences under which in that case the petitioner was convicted, those sentences would run concurrently. In Special Case No. 13/1991, it was clarified by the Special Public Prosecutor that in that case the petitioner was on bail. Respondent no. 2 is also relying on the Jail manual, part-II of which deals with execution of sentences and orders of the Court. Para 19 reads thus:-

19. **Sequence of sentences when they include both rigorous imprisonment and life imprisonment :-** If a warrant directs that any person shall undergo two or more sentences on separate charges such sentences when consisting of imprisonment or life imprisonment shall commence, the one after the expiration of the other, in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently (Section 35, Criminal Procedure Code). When any person already undergoing a sentence of imprisonment, or life imprisonment is sentenced to imprisonment, or life imprisonment, the sentences shall be served, the one after the expiration of the other, in order of award, unless the Court awarding a sentence of life imprisonment shall direct that such sentence of life imprisonment shall take effect immediately (Criminal Procedure Code, Section 397), or unless the prisoner is an escaped convict, in which case the provisions of Section 396 of the Criminal Procedure Code will apply.
- (ii) Sentences imposed in default of payment of fine cannot run concurrently. They shall always be carried out on the expiration of substantive sentence or sentences whether or not the latter are annexed to the sentences in lieu of payment of fine.

. Therefore, the in-default sentences cannot be asked to run concurrently.

11. Learned APP has relied on the decision in **Ranjit Singh Vs. Union Territory of Chandigarh & Anr.** reported in 1991 CRI. L. J. 3354, it has been observed thus :

Sub-sec.(1) of S. 427 deals with an offender who while undergoing sentence for a fixed term is subsequently convicted to imprisonment for a fixed term or for life. Sub-sec. (1) says that in such a situation, the date of expiry of the first sentence which the offender is undergoing being known, 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. It is well-settled that imprisonment for life is a sentence for the remainder of the life of the offender unless the remaining sentence is commuted or remitted by the appropriate authority. This being so at the stage of sentencing by the Court on a subsequent conviction, the earlier sentence of imprisonment for life must be understood in this manner and, therefore, there can be no question of a subsequent sentence of imprisonment for a term or for life running consecutively which is the general rule laid down in sub-sec. (1) of S. 427. A person having only one life span, the sentence on a subsequent conviction of imprisonment for a term or imprisonment for life can only be superimposed to the earlier life sentence and certainly not added to it since extending the life span of the offender or for that matter anyone is beyond human might. It is this obvious situation which is stated in sub-sec. (2) of S. 427 since the general rule enunciated in sub-sec. (1) thereof is that without the Court's direction the subsequent sentence will not run concurrently but consecutively. Sub-section (2) is in the nature of an exception to the general rule enacted in sub-sec. (1) of S. 427 that a sentence on subsequent conviction commences on expiry of the first sentence unless the Court directs it to run concurrently.

12. He further relied upon **V. K. Bansal vs. State of Haryana and another** reported in (2013) 7 SCC 211, wherein it has been held in clear terms, "The direction regarding concurrent running of

sentence shall be limited to the substantive sentence only. The sentence which the appellant has been directed to undergo in default of payment of fine/compensation shall not be affected by this direction. This is so because Section 427 Cr.P.C. does not permit a direction for the concurrent running of the substantive sentences with sentences awarded in default of payment of fine/compensation".

13. Further, again in **Sharad Hiru Kolambe vs. State of Maharashtra and others** reported in 2019 All.M.R. (Cri) 448. The Hon'ble Apex Court after taking into consideration the provisions in Section 63, 64 of IPC, Section 30, 31, 421, 427, 428 and 429 of Cr.P.C. has held that the default sentences for non-payment of fine cannot be ordered to run concurrently. Note was taken in respect of the Full Bench decision of the Madras High Court in *Donatus Tony Ikwanusi v. Investigating Officer, NCB, South Zonal Unit, Chennai* reported in 2013 CRI. L. J. 1938. It has been observed **Sharad Hiru Kolambe** (supra) thus;

13. If the term of imprisonment in default of payment of fine is a penalty which a person incurs on account of non-payment of fine and is not a sentence in strict sense, imposition of such default sentence is completely different and qualitatively distinct from a substantive sentence. We must

hasten to add that it is not the case of the appellant that default sentences awarded to him must run concurrently with substantive sentence imposed on him. His case is that all default sentences must inter se run concurrently. Imposition of fine, especially when certain minimum quantum is prescribed and/or mandatory imposition of fine is contemplated, has some significance. Theoretically, if the default sentences awarded in respect of imposition of fine in connection with two or more offences are to be clubbed or directed to run concurrently, there would not be any occasion for the persons so sentenced to deposit the fine in respect of the second or further offences. It would effectively mean imposition of one single or combined sentence of fine. Such an exercise would render the very idea of imposition of fine with a deterrent stipulation while awarding sentence in default of payment of fine to be meaningless. For example, in the present case, in respect of three distinct offences punishable under the provisions of the MCOC Act, fine came to be imposed. Such fine going by the relevant provisions had to be at a minimum scale of Rs.5 lakhs. If the default sentences awarded in respect of each of those three counts under the MCOC Act are directed to run concurrently, the accused may not be inclined to deposit fine in respect of two out of those three counts. If imposition of fine and prescription of mandatory minimum is designed to achieve a specific purpose, the very objective will get defeated if the default sentences were directed to run concurrently. It is precisely for this reason that unlike Section 31 and 427 of the Code, which specifically empower the concerned court to direct concurrent running of substantive sentences, Section 64 of the IPC does not stipulate such discretion. The language of said Section 64 rather mandates that the sentence awarded for non-payment of fine "imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence". Similar is the intent in Section 30, 428 and 429(2) of the Code as discussed above. The rigour of the provisions is such that even if a person gets the benefit of commutation of a sentence, the sentence in default of payment of fine shall be in excess or in addition.

14. We must at this juncture deal with Full Bench decision of the Madras High Court in *Donatus* (supra). After considering the decision of the Bombay High Court in *Emperor v. Subrao Sesharao*, AIR (1926) Bom. 62, and

earlier decision of the Madras High Court in *P. Balaraman v. State*, (1990) MLJ (Cri) 534 and decisions of this Court in *Shantilal v. State of M.P.* (supra) and *Shahejadh Khan Mahebub Khan Pathan v. State of Gujarat* (supra), the High Court held that there cannot be concurrent running of more than one default sentences. It was rightly observed as under:-

“20. The principle laid down by the Hon’ble Apex Court in the decisions cited supra makes it crystal clear that imposition of the term of imprisonment in default of payment of fine is not a sentence and it is a penalty which a person incurs on account of non-payment of fine. It is also made clear that if such default sentence is imposed, undoubtedly, an offender must undergo unless it is modified or varied in part or whole in the judicial proceedings. Therefore, there is no power for the Court to order the default sentences to run concurrently. The Hon’ble Apex Court also made it clear that when such a default sentence is imposed, a person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount.”

The conclusion regarding concurrent running of default sentence was as under:

“18. It is relevant to state that there are provisions under the code, as pointed out earlier, to order the substantive sentences to run concurrently and the legislature specifically excluded such power to the Court in respect of ordering the default sentences to run concurrently. The Court cannot add or substitute any additional words to any particular provision of the Code. It is not for the Court to take up the work of legislation and the Court can only apply the provision contained under the Code as it is. It is well-settled in a catena of decisions that the term of imprisonment in default of payment of fine cannot be deemed to be a sentence, but a penalty which is incurred on account of non-payment of fine.”

15. In the circumstances, we reject the submission regarding concurrent running of default sentences, as in our considered view default sentences, inter se, cannot be directed to run concurrently. However, considering the financial condition of the appellant, a case is certainly made out to have a sympathetic consideration about the quantum of default sentence.

14. Learned APP also submits that, in fact, this Court in **Ramesh Krishna Sawant v. State of Maharashtra** reported in 1995 CRI. L. J. 1702, was of the opinion that when three sentences in three different cases arising out of different transactions for which different crime numbers pertaining to different police stations were instituted against the petitioner and the cases were decided by separate judgments then the sentences cannot be ordered to run concurrently. He also relied on the decision by Apex Court in **Mohd Zahid vs. State through NCB** (Criminal Appeal No. 1457 of 2021) decided on 07.12.2021 and submitted that it has been held in para 9 and 10, which reads thus : -

9. 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;
 - (iv) under Section 427 (1) of Cr.P.C. 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.
10. Applying the law laid down by this Court in the aforesaid decisions and the principles of law enumerated hereinabove to the facts of the case on hand, the submissions on behalf of the appellant – accused that his subsequent sentence to run concurrently with the previous sentence is to be rejected outright. In the present case the appellant has been convicted with respect to two different transactions, there are different crime numbers and the cases have been decided by the different judgments. Therefore, the appellant is not entitled to any benefit of concurrent sentence under Section 427 of Cr.PC. As observed hereinabove, there is no specific order or direction issued by the court while imposing the subsequent sentence that the subsequent sentence to run concurrently with the previous sentence.

15. The learned APP, in fact, submitted that the writ petition itself is not maintainable, which seeks to invoke the constitutional powers of this Court under Article 226 and 227 of the

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Constitution of India. The Full Bench of Punjab and Haryana High Court in **Jang Singh Vs. State of Punjab** reported in LAWS (P&H)–2007–10–25 relying upon the decision in **M. R. Kudva v. State of A.P.** reported in AIR 2007 SC 568, held that when the appeals preferred against order of conviction and sentence were dismissed by the High Court then again any application filed before the High Court invoking Section 482 of Cr.P.C. or 427 of Cr.P.C. for making the sentences run concurrently, will not lie. Learned APP, therefore, submitted that under these circumstances the petition deserves to be dismissed.

16. Before we go to the question as to whether the writ petition is maintainable or not and whether the interpretation tried to be posed by the learned advocate for the petitioner is possible and benefit of the same can be given to the petitioner, we would like to place a fact on record that Criminal Appeal No. 311/1996 challenging his conviction in Special Case No. 6/1991, Criminal Appeal No. 482/2001 challenging his conviction in Special Case No. 99/1996, Criminal Appeal No. 283/2006 challenging his conviction under Special Case No. 5/1991, Criminal Appeal No. 19/2002 challenging his conviction under Special Case No. sgp

220/1996 filed by the petitioner have been decided by this Court. However, Criminal Appeal No. 492/2005 challenging his conviction in Special Case No. 115/1996, Criminal Appeal No. 108/2007 challenging his conviction in Special Case No. 3/1991, Criminal Appeal No. 63/2016 challenging his conviction under Special Case No. 7/1991 are still pending before this Court. The office of this Court has reported that as per CIS, no Criminal Appeal has been filed by the petitioner challenging his conviction in Special Case No. 2/1991. This fact was got confirmed through the learned Advocate for the petitioner also.

17. Now the petitioner wants to take advantage of clause no.9 in the operative part of Special Case No. 2/1991. The clause no. 9 reads thus :

“9] The substantive sentences to all the accused Nos. 1, 3, 6, 7 and 8 shall run concurrently.”

18. Present petitioner was accused no. 1 in that case. Thus, it is very much clear that only substantive sentences were directed to be run concurrently. Further, it appears that the previous convictions were brought to the notice of the Special Judge,

however, it has not been stated anything about running of the substantive sentences in the case in his hand with those previous convictions. Clause no. 9 in the operative order of Special Case No. 2/1991 is restricted to the offences in which the Special Judge held the petitioner guilty in that case. However, it is to be noted that a clarification was sought from the concerned Court and by said letter dated 23.06.2022, the opinion has been given that it would run concurrently with conviction in earlier cases but it is restricted to the substantive sentence. It can be seen that Special Case No. 2/1991 came to be decided on 20.02.2013 whereas, as per order passed by the Government, regarding remission in respect of the sentence awarded in Sessions Case No. 6/1991 for imprisonment for life which was on 21.08.2009. Government had considered that, case is made out for granting remission i.e. fulfilling all the yardsticks by that time. Under such circumstance, when the petitioner came to be convicted on 20.02.2013 in Special Case No. 2/1991, there is no question of running of the substantive sentence awarded in the same to run with the already undergone conviction/imprisonment in Sessions Case No. 6/1991; but it appears that the petitioner was in Jail and, therefore, he would have been entitled to the set off.

19. The main question that has been posed here is about 'running in-default sentences concurrently' in respect of those cases in which the petitioner has been sentenced to pay fine and in-default sentence has been imposed. In fact, in view of the decisions by the Apex Court in **V. K. Bansal** (supra) and **Sharad Hiru Kolambe** (supra), it appears to be not *res integra*. In **Sharad Kolambe** (supra), the Hon'ble Apex Court had considered the provisions of Section 63 and 64 of IPC as well as Section 30, 31, 421, 427, 428 and 429 of Cr.P.C. The observations in para nos. 9 and 10 are also important and then taking into consideration the references made in Section 31 and 427 of Cr.P.C. regarding the substantive sentences and power on the courts to direct concurrent running of more than one sentence, a question was posed as to whether Section 64 of IPC and Section 30 of Cr.P.C. which deal with imprisonment for non-payment of fine intentionally do not specify running of the default sentences concurrently or it was an accidental flaw or there was any different idea behind not making such specific provision. Then the aforesaid discussion in paragraph nos. 13 and 14 has been made and the conclusion that has been made in para no. 13 categorically states that the default sentences

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inter se cannot be directed to run concurrently. When in one case itself the court cannot direct that the in-default sentences should run concurrently (meaning thereby it has to be consecutively); how it can be allowed or awarded in subsequent convictions in which fine has been directed to be imposed along with in-default sentences. The answer to this question would be in the negative. In **Ramesh Sawant** (supra) this Court had taken the view that in default sentence cannot be directed to run concurrently, when it is differently awarded in different cases. In fact, this was the crux of the question which arose before the Full Bench of the Madras High Court and the note of the said decision has been taken in **Sharad Kolambe** (supra). The interpretation of Sec. 427(2) of Code of Criminal Procedure made by learned Advocate for petitioner cannot be accepted, as it has been already interpreted by Hon'ble Apex Court. Further, we can observe that, when this Court had heard and decided some of the appeals of the petitioner, no such prayer was made on behalf of the petitioner and in fact the other appeals are still pending, wherein the sentence that has been awarded against the petitioner is under challenge. The sentence which is under challenge in an appropriate proceeding cannot be the subject matter of a separate writ petition. The powers of this
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Court under Article 226 and 227 of the Constitution of India cannot be so exercised, when the substantive sentence is under challenge under appropriate provisions of law.

20. Now turning towards the point in respect of maintainability of the writ petition, in view of the decision relied upon by learned APP in **Jang Singh** (supra). We agree with the view taken by Hon'ble Madras High Court. As already we have observed that some of the appeals filed by the petitioner are still pending and the conviction has not attained finality. Petitioner cannot make use of the decision in **Mahadev Sillode** (supra), wherein it has been observed by this Court that the power of *certiorari* under Article 226 of the Constitution of India is available for correcting the gross error of jurisdiction. In that case, there was no such fact that any other case of that petitioner was pending before this Court as an appeal. The observations in **Najakat Alia Mubarak Ali** (supra) are also not applicable here in view of the fact that the Apex Court has mainly dealt with Section 428 of Cr.P.C. there. In fact, paragraph no. 39 therein gives caution to the courts, where to make sentence concurrently or consecutively.

21. The principles of law laid down in **Mohd. Zahid** (supra) are important. At the cost of repetition, it can be said that the interpretation that has been tried to be made on behalf of the petitioner, in respect of Section 427(2) of Code of Criminal Procedure; to be read along with Section 53, 63 and 64 of Indian Penal Code, cannot be accepted. The word “imprisonment for a term” used in sub-section 2 of Section 427 of Cr.P.C. does not include the imprisonment that has been imposed in default of payment of fine. If the intention of the legislature was so, then it could have been specifically stated. We cannot make such interpretation, in absence of specific words. We will have to consider all the necessary provisions together. When that sentence is to be imposed as a ‘penalty’, then it cannot be ordered to be run concurrently either *inter se* in the said case or with the previous conviction. It would be very easy then for a convict to avoid payment of fine in subsequent convictions or even in respect of the same case wherein payment of fine has been ordered in different offences along with in-default sentence. We must take into consideration the provisions in Jail Manual. Petitioner has not challenged those provisions in Jail Manual as violative of fundamental rights or to declare them as *ultra virus*.

22. For the aforesaid reasons, we hold that this is not a fit case wherein we should exercise our powers under Article 226 and/or 227 of the Constitution of India. When the conviction has been awarded by competent court, and the petitioner has failed to show that the calculation done by the respondent No. 2 is illegal or wrong, then his detention cannot be said to be violating the fundamental rights enshrined under Article 14 as well as 21 of Constitution of India.

23. Criminal Writ Petition stands dismissed.

[RAJESH S. PATIL]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE