Gapal Dass Vs. the State

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SooperKanoon Citation : sooperkanoon.com/679974

Court : Delhi

Decided On : Oct-10-1977

Reported in : AIR1978Delhi138

Judge : T.V.R. Tatachari, C.J.,; Prithvi Raj and; Yogeshwar Dayal, JJ.

Acts : Code of Criminal Procedure (CrPC) , 1974 - Sections 386, 397, 427(1) and 482

Appeal No. : Criminal Misc. (Main) Nos. 122, 69, 169, 145, 136 and 174 of 1977

Appellant : Gapal Dass

Respondent : The State

Advocate for Def. : D.R. Sethi, ; R.N. Tikku and ; Charanjit Talwar, Advs.

Advocate for Pet/Ap. : Dinesh Mathur, amices Curia

Judgement :

Prithvi Raj, J.

1. These six petitions, Cr. Misc. (Main) Nos. 122 of 1977. 69 of 1977, 169 of 1977, 145 of 1977, 136 of 1977 and 174 of 1977, have been referred by a learned single Judge for determination of the question whether the High Court, in the exercise of its inherent powers at the instance of a party, who has a right of appeal or revision

but has not availed himself of that right, can pass an order directing that a sentence of imprisonment awarded, to such a persona on a subsequent conviction, to imprisonment when, he is already undergoing a sentence of imprisonment on an earlier conviction shall run concurrently with such previous sentence. Since the common question of law stated above arises in these petitions, it would be appropriate to dispose them of by, a single judgment.

2. All the petitioners had been convicted separately in different cases and. sentenced to various terms by the Metropolitan Magistrate, Delhi. For the purposes of this order the facts of the various cases in which the petitioners were convicted and sentenced need not be recapitulated. In fact, the petitioners themselves have avoided stating the facts in detail.

3. Sub-section (1) of S. 427 of the Cr. P. C 1973 (herein called 'the Code') envisages that 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 S. 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.

4. Sub-section (2) provides that when a person already undergoing a sentence of imprisonment for life is sentenced on a subsequent conviction to imprisonment for a term of imprisonment for life, the subsequent sentence shall run concurrently with such previous sentence.

5. It is evident from a perusal of the above section that the requirement of the law is that a person who is already undergoing a sentence of imprisonment on being sentenced to imprisonment or imprisonment for Life, on a subsequent conviction unless the , Court recording the subsequent conviction directs that the subsequent sentence Awarded shall run concurrently with the previous sentence, shall

undergo the imprisonment .or imprisonment for Life awarded on subsequent invocation at the expiration of the imprisonment to which he had been previously. sentenced. The stage for exercising this discretion is at the time Court records a subsequent conviction and inflects punishment on the accused. The exercise of this power is confined to the realm of giving a direction in what manner the subsequent sentence, when an accused is already undergoing a sentence in a previous conviction, is to be executed. No duty, how ever, is cast on the Court, in terms of this section, to consider the question of the subsequent sentence being made concurrent with the sentence the Accused was undergoing in a previous conviction. The language of the section invests the Court with a discretion albeit judicial discretion in suitable cases on subsequent conviction to direct that the sentence of imprisonment awarded on the subsequent conviction shall run concurrently with the sentence the accused was already undergoing. However, in cases Where the offences committed by an accused person, giving rise to separate trials resulting in convictions are distinct and are not intimately connected being of different genesis the Court may consider it more appropriate that the sentence awarded on subsequent conviction be allowed to take its normal. course. The discretionary power is to be exercised on the merits of the case at the time of awarding the subsequent sentence. But this power can be exercised on either the accused or the prosecution bringing to the notice of the Court recording a subsequent conviction that the accused is already undergoing sentence of imprisonment. On pronouncement of the judgment, recording a conviction and sentencing an accused to appropriate imprisonment warranted by the facts of the case the Court becomes functus officio and cannot by resort to the provisions of S. 427 on an application an accused person pass an order directing that the imprisonment awarded by it shall run concurrently with the imprisonment the accused was already undergoing at the time the Court sentenced him to imprisonment subsequently.

6. By the very nature of the powers of the appellate or revisional Court, it would be open to an accused person to contend in. appeal or revision that the sentence awarded to him on subsequent conviction when he was already undergoing imprisonment may be ordered . to, run concurrently with the sentence that he was already undergoing. The higher, Court in the exercise of its appellate or revisional

jurisdiction can pass such orders as are within the province of the trial Court. But such a contention would be open to an accused on the. failure of the trial Court in applying its mind properly to pass an order envisaged by the provisions of S. 427 However, if an accused does not bring to the notice of the Court when the subsequent sentence is imposed on him that he was already undergoing a sentence in an earlier case, he cannot make a grievance at a subsequent stage that the sentence imposed on him on his subsequent conviction being not made to run concurrently with the sentence that he was already undergoing was in any manner bad in law or vitiated. Sentence imposed on the accused on , subsequent' conviction according to the provisions of S. 427(l) shall commence at the expiration of the imprisonment, to which he had been previously convicted unless made concurrent with the previous sentence. An accused may be content and satisfied with his subsequent sentence passed while he was undergoing imprisonment in an earlier case and may choose not to bring to the notice of the Court the latter fact. In such a case it cannot be said that the sentence imposed on subsequent conviction is unsustainable. Keeping in view, however, the sea change that the concept of penology has undergone in recent times because of the emphasis on reforming an accused rather than penalize him it would be appropriate, nay desirable that the factum of the accused undergoing imprisonment in an earlier case be brought to the notice of the Court by the prosecution as well, at the time sentence is imposed on him in a subsequent case so that the Court may pass appropriate order in the Light of the information laid before it. It may be clarified that in terms S. 427(1) of the Code casts no such obligation on the prosecution. Nonetheless, the prosecution would be acting in good grace to apprise the Court of the fact of the accused undergoing sentence in an earlier case even if the accused fails in his duty to bring the said act to the Court's notice. There may however, be cases in which even on the, failure of the accused. to bring to the notice of the Court, the fact of his undergoing imprisonment at the time as subsequent conviction is recorded and a sentence is passed against him, it may be possible to contend. before a higher Court in appeal or revision that the facts of the case warranted the subsequent sentence being ordered, to run. concurrent with the sentence already being undergone. The failure of the accused in such case shall not be allowed to be set up as a shield to his

prayer before a Court of appeal or revision on the appeal or revision being filed that the subsequent sentence. imposed on him be directed to run concurrent with the sentence he was already undergoing.

7. In order to determine the question under consideration as to what is the scope of the inherent powers of the High Court becomes relevant. The Inherent powers of the High Court inhere in it because of its being at, the apex of the judicial set-up in a State. The inherent powers of the High Court, preserved by S. 482 of the Code, are to be exercised In making orders as may be necessary to give effect to any order under the Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. S. 482 envisages that nothing in , Code shall be deemed to Limit or affect the inherent powers of the High Court exercised by it with the object of achieving the above said three results. It is for this reason that S. 482 does not prescribe the contours of the inherent powers of the High Court which are wide enough to be exercised in suitable cases to afford relief to an aggrieved party. While exercising inherent powers it has to be borne in mind that this power cannot. be exercised in regard to matters specifically covered by the other provisions of the Code. (See, R. P. Kapur. v. State of Punjab, : 1960 CriLJ1239). This principle of law had been reiterated succinctly by the Supreme Court recently in Palaniappa Gounder v. State of Tamil Nadu, : 1977 CriLJ992 . Therein examining the scope of S. 482 it was observed' that a provision which saves the inherent powers of a Court cannot override any express provision in the statute which saves that power. Putting it in another form the Court observed that if there is an express provision in a statute governing a particular subject there is no scope for invoking or exercising the inherent powers of the Court because the Court ought to apply the provisions of the statute which are made advisedly to govern the particular subject-matter.

8. This question having been settled authoritatively it is not open to the petitioners to invoke the inherent powers of this Court having failed to avail of their right of appeal or revision. Inherent powers of the Court preserved in S. 482 of the Code and as held in a catena of cases are to be exercised, namely, (1) for giving effect to any order passed under the Code, or (2) to prevent abuse of the process of any Court or (3) otherwise to secure the ends of justice.

9. In not making the sentence awarded to an accused on a subsequent conviction to run concurrently with the sentence which the accused was already undergoing at the time of his subsequent conviction no order is required to be passed by the High Court in the exercise of its inherent powers to give effect to the order passed by a Court as the said order of the Court is enforceable on its own strength. Such an order being a legal order within the competence of the Court cannot be said to be an abuse of the process of the Court. Since it is open to a Court not to make the sentence awarded on a subsequent conviction run concurrent with the sentence the accused was already undergoing no injustice can be said to have the said to have been occasioned by such an order necessitating the exercise of the inherent powers of the ends of justice.

10. Shri Dinesh Mathur, the learned counsel appearing amices curiae for the petitioner, however, strenuously contended that in a case where the accused was satisfied with his conviction and sentence awarded on a subsequent conviction while undergoing a sentence in an earlier case, he need not challenge the same in appeal or revision. That being so, the forum by way of appeal or revision was not available to him for securing an order in terms of S, 427(1) of the Code. It was submitted that provisions for filing the appeals are to be found in Chapter Xxix of the Code. S. 372 of the Code, he submitted, prescribes no appeal shall lie from any judgment or order of a criminal Court except as provided for by the Code or by any other law for the time being in force. According to S. 375, the counsel contended, conviction sentence passed on a plea of guilty was met open to challenge in appeal white this Court to secure S. 376 bars appeal in petty cases enumerated therein. It was urged, according to the said section there shall be no appeal by a convicted person in a case (1) where a Court of Session or a Metropolitan Magistrate passes only a sentence of imprisonment for a term not exceeding three months or of fine not exceeding two hundred rupees, or of both such imprisonment and fine or (2) where a Magistrate of the First Class passes only a sentence of fine not exceeding one hundred rupees, or (3) where, in a ease tried summarily, a Magistrate empowered to act under S. 260 passed only a sentence of fine not exceeding two hundred rupees, though the proviso to the section, it was submitted, enables an accused to bring an appeal against any such sentence if any other punishment is combined with it with a rider that such

sentence shall not be appealable merely on the ground (1) that the person convicted is ordered to furnish security to keep the peace, or (2) that a direction for imprisonment in default of payment of fine is included in the sentence, or (3) that more than one sentence of fine is passed in the case, if the total amount of fine does not exceed the amount here in before specified in respect of the case. Not to speak of the various bars to the filing of an appeal, enumerated above, it was submitted, from the perusal of the powers of the appellate Court envisaged by S. 386 it is evident that if an accused was satisfied with his conviction and sentence, he cannot be allowed relief in terms of S. 427(1). According to sub-clause (b) of S. 386, goes the argument, in an appeal from a conviction the appellate Court may (1) reverse the finding and sentence and acquit or discharge the accused, or order him to be retried by a Court of competent jurisdiction subordinate to such appellate Court or committed for trial, or (2) alter the finding, maintaining the sentence, or (3) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same. Further according to clause (e) of the said section the appellate Court may make any amendment or any consequential or incidental order that may be just or proper. Sub-cls. (a), (c) and (d) of S, 386 it was urged were not applicable to an appeal from conviction. It was accordingly submitted that a bare perusal of the provisions of S. 386 shows that an accused in appeal if he chose not to challenge the conviction and the sentence could not seek relief contemplated by S. 427(1) of the Code by invoking the appellate jurisdiction of the Court. It was contended that in an appeal against conviction an appellate Court could either reverse the finding and sentence and acquit or discharge the accused, or order the case to be retried by a Court of competent jurisdiction subordinate to the appellate Court or order the case to be retried by a Court of competent jurisdiction subordinate to the appellate Court or committed for trial or maintaining the sentence may alter the finding or with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same but the power under sub-clause (b) of S. 386 does not enable an appellate Court to direct that the sentence awarded to the appellant on his subsequent conviction while he was undergoing sentence in an earlier case shall run concurrent with the earlier sentence. We do not agree. Within the four corners of clause (b) of S. 386 we do not find any

impediment or bar in the way of an appellate Court to pass a direction contemplated by the provisions of S. 427(1). When an accused while undergoing a sentence of imprisonment or imprisonment for Life awarded in an earlier case is sentenced by a trial Court on a subsequent conviction, the trial Court may, on being apprised of the information that the accused is already undergoing a sentence in a previous conviction invoking the said provision of S. 427(1) in consequence of the information furnished in its discretion, direct that the sentence awarded to the accused on his subsequent conviction shall run concurrent to the sentence he was already undergoing in an earlier case. If the trial Court by invoking the provisions of S. 427(1) can give the requisite direction contemplated by the said section it is not understood how a bar can be read in the power of the appellate Court to examine the reasons which lead the trial Court to decline the prier of the accused and on finding the reasons given being not in consonance with the exercise of judicial discretion to grant the necessary relief even on dismissing the appeal, maintaining the conviction and the sentence.

11. Such a relief is also open to an accused by invoking the revisional powers of the High Court or Sessions Court. A perusal of the provisions of S. 397 of the Code shows that the subject-matter of a revision is wider than the subject-matter of an appeal. S. 397 of the Code reads as under:-

'397 (1). The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness. legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

Explanation: All Magistrates, whether executive or judicial and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purpose of this sub-section and of S. 398.

(2) The powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.

(3) If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them.

12. Powers of revision exercised by a Sessions Judge are prescribed in Section 399. sub-section (1) thereof lays down that in the case of any proceeding the record of which has been called for by himself, the Sessions Judge may exercise all or any of the powers which may be exercised by the High Court under sub-section (1) of S. 401. Sub-section (2) of S. 399 envisages that where any proceeding by way of revision is connected before a -sessions Judge under sub-section (1), the provisions of sub-secs. (2), (a), (4) and (5) of S. 401 shall, so far as may be, apply to such proceeding and references in the said sub-sections to the High Court shall be construed as references to the Sessions Judge. Sub-section (3) of S, 309 makes the decision of the Sections Judge final in relation to a person mowing an application for revision before the Sessions Judge. Such a person is and entitled to take further proceeding by way of revision before a High Court or any other Court.

13. High Court's powers of revision are enumerated in 401 of the Code, Sub-section (1) Where of prescribes that in the case of any proceeding the record of which has been called for by itself for by itself or which otherwise comes to its knowledge, the high court may m in its discretion exercise any of the powers conferred on a court of appeal by Ss. 386, 389. 390 and 391 or o a court of session by S. 307 and,. When the judges composing the court of revision are equally divided in opinion , the case shall be disposed of in the manner provided by S. 392 Provisions S. 386 relevant to the disposal of these petitions had been noted by us in an earlier part of this judgment S. 389 empowers the appellate court pending disposal of the appeal to suspend the sentence passed against the applicant and direct his release an bail or on. his own bond.. 8. 390 empowers the appellate Court in an appeal from acquittal to direct arrest of the accused and the

Court may commit him to prison pending disposal of the appeal or admit him to bail.

14. Section 301 enables the, appellate Court to take further evidence or direct it to be taken by a Magistrate, or whet! the appellate Court is a High Court by a Court of Session or a magistrate .Section 307 enables the Court to which an accused had been committed to tender pardon to him with a view to obtaining at the trial the evidence of any. Person supposed to have been. directly or indirectly concerned in, or privy to, the offence. Section 392 prescribes the procedure for disposing of the matter where the Judges of the Court of appeal are equally divided. We had noted the provisions of the above-said. section with a view to bring out in its full impact the High Court's powers of revision envisaged in S. 401 of the Code. Sub-section (3) of S. 401 forbids any order being made under this section to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his defense. Sub-section (3) prescribes that in this section shall be deemed too arise a High Court to convert a finding of acquittal into one of conviction while according to sub-section (4) of Section 401 no proceeding by way of revision shall be entertained at the instance of the party, who had not availed of the right of appeal if under the Code an appeal is provided. However, under sub section (5) whereunder the Code an appeal lies but an application for revision has been made to the High Court, by any person and the High Court is, satisfied that such application was made under if erroneous belief that no appeal lies thereto and that it is necessary in the interest, of Justice so to do, the high Court may treat the application for revision as petition of appeal and deal. With the same accordingly.

15. The powers of revision exercisable by a Sessions Judge, as set out in S. 399 are co-extensive with the High Court's, power of revision enumerated under S. 401. A combined reading of Ss. 397, 399 and 401 of the Code reveals that records in revision are called, for in order that Court may, after examining the same pass an appropriate order to correct by revision what may appear to be an incorrect. illegal or improper order passed by a , subordinate Court. Power. of revision contemplates a kind of supervisory. Jurisdiction over the subordinate Courts to correct any illegal or improper order in cases, where no appeal is provided for. In

revision there are no visible limits on the powers of the Court to correct illegal or improper orders. Even in a case where. the accused has act sought relief in terms of Section 427(1) of the Code from the trial Court, it would be open to him, to seek such. a relief by invoking the revisional powers of the Court on showing justifiable. reasons for his omission.

16. There can be no dispute that the discretion vesting in a trial Court under S. 427(1) has to be exercised on sound judicial basis and an order which proceeds on other considerations in declining the request of the accused to make his sentence awarded on subsequent conviction to run concurrent with the sentence he was undergoing at the time of his subsequent conviction, would be improper or open to challenge in revision.

17. The principle of law having been settled, forbidding exercise of inherent powers in regard to matters specifically covered by the other provisions of the Code, the petitioners having not sought the relief now sought to be procured in these petitions by filing an appeal or revision cannot be permitted to circumvent. the provisions of law in pressing these petitions in view of the decision of the Supreme Court in R. P. Kapur's ease. : 1960 CriLJ1239 (supra) as also in Palaniappa. Gounder's case : 1977 CriLJ992 (supra) the view taken in Mullapudi Venkanna v. The State of Andhra Pradesh, : AIR 1964 AP449 ; Jainta Kumar Banerjee v. State, : AIR1955 Cal632 ; BaliNath Kurmi v. State, : AIR1961 Pat138 ; and Mulaim Singh v. State 1974 Cri Li 1397 (All) (FB) that High Court, in the exercise of its inherent powers can order the sentences imposed on an accused person to run concurrently cannot be supported.

18. Reference here may be made to case Mahabir Beldar v. State, : AIR1965 Pat178 , wherein it was held that inherent powers of the High Court are not to be exercised for the purpose of passing an order contemplated by S. 397(1) of the Cr. P. C. 1898 (herein called the old Code'). The provisions of this section it may be noted are in pari materia with the provisions of S. 427 of the Code.

19. Before parting with this case in fairness to the learned counsel for the petitioners it would be appropriate here to note the other cases on which reliance was placed by him.

20. In A. S. Naidu v. State of Madhya Pradesh 1975 Cri Li 498 (Madh Pra), a Division Bench of the Madhya Pradesh High Court took the view that the power to make the two sentences run concurrently under sub-section (1) of S. 397 of the old 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, and that the question of exercising the power under its inherent jurisdiction in such a case does not arise.

21. The Division Bench ruled out resort to the exercise of inherent powers of the Court as according to it the relief sought was covered by the specific provisions of the old Code, S. 397(1). The relief sought, it as held, could be granted within the ambit of the said section without recourse to the inherent jurisdiction of the Court as in so doing no review of the judgment was involved. The Bench's view that it would be proper to exercise this power at the time of deciding the case itself on merits whether on appeal or otherwise but the Court cannot be said to have become functus officio, and as such not competent to exercise the power when the case had already been decided on merits, is no longer good law in view of the judgment of their Lordships of the Supreme Court in Bijli Singh v. State, Criminal Appeal No. 2 of 1964, decided on 26th Oct., 1964, noted by the learned single Judge in his reference order.

22. Case Ulfat Rai v. State, 1970 Cri Lj 767 (All), wherein Allahabad High Court in rejecting the contention that the High Court at the time when the jail appeals of the petitioners against the subsequent conviction and sentence were placed before the Judge in Chambers, did not pass any order on the question of the subsequent sentences being made concurrent with the earlier sentence and so the High Court could not review its previous order by resort to the provisions of Section 397 (1) of the old Code, observed that making the sentences concurrent would not amount to changing the nature of the sentence; that the above said section casts a duty on the Court to consider the question of the subsequent sentence being made concurrent when the offender had already been sentenced for another offence earlier and was undergoing imprisonment; and that the High Court in the exercise of power under S. 397(1) could make the sentence run concurrent cannot be said

to lay down correct law in view of the ratio of Bijili Singh's case (Criminal Appeal No. 2 of 1964, D/- 26-10-1964) (SC) (supra). Besides, from a reading of S. 397(1) of the old Code, we are unable to spell out any duty being cast on the Court to consider the question of the subsequent sentence being made concurrent when the offender had already been sentenced for another offence earlier and was undergoing imprisonment,

23. Case, Kanhaya v. Harimohan, 1973 Cri Li 1846 (All), wherein the Allahabad High Court by exercising its inherent jurisdiction saved in S. 561-A of the old Code the provisions of which were in pari materia with the provisions of Section 482 of the Code, set aside the impugned order in that case is of no assistance to the petitioners as the impugned order was held to have been passed without jurisdiction. It was in that view of the matter that the Court observed that ordinarily the High Court does not exercise its inherent powers where an alternative remedy is open but it was not an absolute fetter on the exercise of its inherent powers and set aside the impugned order being without jurisdiction.

24. Our answer to the reference accordingly is that the petitioners having not availed of the remedy of appeal or revision are precluded from invoking the inherent powers of this Court in seeking the redress sought in these petitions. It may be made clear here that in suitable cases, however, the Court is not precluded from treating a petition filed tinder S. 482 of the Code as a petition filed under S. 397 of the Code and grant necessary relief if so warranted by the exigencies and the facts of the case.

25. The petition will now be laid before a learned single judge to dispose them of on merits of the each individual petition in the Light of our answer to the reference.

26. Before concluding we place on record our appreciation for Shri Dinesh Mathur who appearing amices curiae for the petitioners assisted this Court and argued the case with great ability.

27. Answered accordingly.