ORISSA HIGH COURT: CUTTACK

I.A. No. 2162 of 2021

(Arising out of CRLMC No. 2123 of 2021)

AFR Siba Bisoi & Others ..… Petitioners

-Versus-

State of Odisha …... Opp. Party

Advocate(s) appeared in this case :-

For Petitioners	:	M/s. Jugal Kishore Panda, S.S. Dash, B. Karna & A.P. Dash, Advocates
For Opp. Parties	:	Mr. S.K. Mishra, Addl. Standing Counsel.

CORAM
JUSTICE SASHIKANTA MISHRA

ORDER
15th March, 2022

SASHIKANTA MISHRA, J. The present application has been filed by the State seeking recall of order dated 18.11.2021 passed in the above CRLMC mainly on the ground that such order was obtained by the accused-petitioners by misleading the Court.

2. The aforementioned CRLMC was filed by the petitioners under Section 482 Cr.P.C. to challenge the orders dated 06.09.2020/08.09.2020, 02.03.2021 and 03.05.2021 passed by the

learned Sessions Judge-cum-Special Judge, Malkangiri in T.R. Case No. 94 of 2020. It was contended by the petitioners that they were arrested in connection with Mathili P.S. Case No. 125 of 2020 on 06.09.2020 and remanded to judicial custody on the same day and as such, the stipulated period of 180 days for completion of investigation was due to expire on 03.03.2021. Learned Special Judge acting on a petition filed by the I.O. and the Special P.P. on 02.03.2021 extended the said period by 60 days. Accordingly, the extended period was due to expire on 01.05.2021. On the said date, the accused persons were neither produced before the learned Special Judge nor their indefeasible right to be released on default bail was informed to them, even though charge sheet had not been filed. Charge sheet was submitted two days later, i.e., on 03.05.2021, which was accepted and the petitioners were further remanded ignoring thereby their indefeasible right under Section 167(2) of Cr.P.C.

3. This Court considering the averments made in the CRLMC petition and submissions made on behalf of the petitioners as also taking into consideration the petition filed by the I.O. seeking extension of time to submit charge sheet, wherein the date of expiry of 180 days was mentioned as 03.03.2021, held that the extended period was due to expire on 01.05.2021 and since the accused persons were not produced before the Court nor they were informed of their right of being released on bail despite non-submission of charge sheet, allowed the application granting liberty to the petitioners to move the trial court for bail with further direction that they shall be released on bail on such terms and conditions as may be fixed by the trial court including the condition that they shall personally appear before the trial Court on each date of

posting of the case without fail.

4. In the instant I.A., the State has taken the stand that the accused persons were remanded on 07.09.2020 and thereby, 180 days was due to expire on 06.03.2021 and not 03.03.2021. The I.O. prayed for extension of time by filing a petition on 27.02.2021, which was allowed on 02.03.2021 for a period of 60 days, which was due to expire on 05.05.2021. Charge sheet was submitted on 03.05.2021. On such basis, it is alleged that the accused persons deliberately misrepresented facts to mislead the Court to obtain the order in their favour and therefore, the said order should be recalled.

5. The accused petitioners have not filed any written objection to the I.A. but preferred to make oral arguments through their counsel.

6. Heard Mr. S.K. Mishra, learned Addl. Standing Counsel for the State and Mr. J.K. Panda, learned counsel for the petitioners in the CRLMC.

7. Mr. S.K. Mishra, learned Addl. Standing Counsel has argued that the averments contained in the CRLMC petition are product of misrepresentation of facts, inasmuch as, it is stated that the accused persons were arrested on 06.09.2020 but were produced on 08.09.2020 and accordingly, 180 days period was due to expire on 03.03.2021. Taking the same as the period of completion of 180-day period, the extended period has been mentioned as 01.05.2021 and since charge sheet was submitted on 03.05.2021, the same is portrayed as submission after expiry of two days. Mr. Mishra further draws attention of the Court to the date chart filed by learned counsel for the petitioners, which is on record, wherein the above facts have been clearly noted. According to Mr. Mishra, the petition for extension of

time was filed and allowed before expiry of the 180 day period and charge sheet was also submitted before expiry of the extended period and therefore, no indefeasible right whatsoever accrued in favour of the petitioners for being released on default bail. But by completely misrepresenting such facts they have obtained the order, which is nothing but a fraud played on the Court and therefore, the order should be recalled.

8. In response, Mr. J.K. Panda, learned counsel appearing for the petitioners contends that the petition (I.A.) is not maintainable in law for the reason that as per Section 362 of Cr.P.C. , the Court has no power to recall its own order after the same has been pronounced as it would amount to sitting in appeal over its own order. It is further contended that the cause title of the I.A. mentions that the same is an application under Rule 27-A of Chapter-VI of Orissa High Court Rules, which applies to civil cases but not criminal cases. The petition, according to Mr. Panda, is not maintainable on the above score also. Mr. Panda has, however, neither admitted nor denied the contentions raised by learned State Counsel with regard to alleged misrepresentation of dates noted above.

9. Since a question has been raised with regard to maintainability of the instant application, it would be in fitness of things to deal with the same at the outset before delving into the merits of the contentions put forth before this Court.

10. Mr. Panda has referred to Section 362 of Cr.P.C., which reads as under:

> *"362.* ***Court not to alter judgement****. 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."

There can hardly be any dispute as regards the statutory prohibition referred above. But then, the question is, whether such prohibition is absolute. Further, how does such prohibition operate viz-a-viz the inherent power of the High Court?

The question whether the bar under Section 362 would impinge upon the inherent power of the High Court under Section 482 Cr.P.C. was considered by the apex Court in the case of **R. Rajeshwari vs. H.N. Jagdish** reported in 2008 (4) SCC 82**,** wherein it was held that although a specific bar has been created in regard to exercise of the jurisdiction of the High Court to review its own order and ordinarily, exercise of jurisdiction under Section 482 of the Code of Criminal Procedure would be unwarranted but in some rare cases, the High Court may do so where a judgment has been obtained from it by practicing fraud on it.

Even otherwise, Section 362 of the Code places a bar on the Court to 'alter' or 'review' its order or judgment. Once the judgment is pronounced and signed the Court becomes *functus officio* and therefore, no further alteration or review of the same is permissible save and except to correct clerical or arithmetical errors. However, what is sought by the State in the instant IA is not alteration or review but 'recall' of the entire order on grounds as have been noted hereinbefore. In other words, if the IA were to be allowed, it would mean complete abrogation of the order and restoring the parties to the position they were prior to passing of the order.

There is thus, an inherent distinction between alteration or review and recall of an order. In the case of **Habu v. State of Rajasthan** reported in AIR 1987 Raj 83: 1986 SCC OnLine Raj 54, a full bench of the Rajasthan High Court held that power to recall is different from power of altering or reviewing the judgment.

In **Pushpangathan v. State of Kerala** reported in 2015(3) KLT 105, the Kerala High Court held that, Section 362 Cr.P.C does not affect the power of High Court under Section 482 Cr.P.C. to recall a judgment or order, if legal grounds are properly established by the party complaining.

11. The position that emerges from a reference to the case laws noted above is that the bar under Section 362 of Cr.P.C. is not absolute and in any case, does not apply in case of recall of the order. There is no dispute that the inherent power of the High Court under Section 482 of Cr.P.C. can be exercised if any of the three conditions exist, namely, to give effect to any order under the Code, to prevent abuse of the process of Court or to secure the ends of justice. In case any of the three conditions exist, the High Court would be justified in exercising its jurisdiction. Therefore, the objection raised by Mr. Panda with regard to maintainability of the I.A. is not tenable. However, whether such course of action is justified in facts and circumstances of the instant case, shall be discussed later.

12. As regards the argument that the wrong provision has been mentioned in the I.A., namely Rule 27A of the Orissa High Court Rules, the same is also not tenable for the reason that even assuming that a wrong provision has been quoted, the same will not nullify the entire petition as the Court has to consider the petition along with its

prayer as a whole. It is also well settled that the wrong nomenclature or erroneous citation of a provision of law cannot debar a party from having its application considered by the Court if it is otherwise legally maintainable.

13. Having dealt with the preliminary objections raised by Mr. Panda, the Court shall now proceed to deal with the merits of the case, i.e., whether the facts and circumstances of the case justify exercise of power of recall of the order passed earlier.

14. A reference to the order sheet of the case in the lower Court reveals that the accused persons were forwarded and remanded to custody on 08.09.2020. Though Mr. Panda has drawn attention of the Court to a purported interpolation of the date to suggest that the date of remand was 06.09.2021 but was interpolated as 08.09.2021, the same appears to be baseless having regard to the fact that on the body of the forwarding report of the I.O., the presiding officer has endorsed his signature by putting the date as 08.09.2020. Such being the case, the calculation of the 180 day period and the 60 day extended period would be as follows:

> *09.09.2020 – 30.09.2020 = 22 days (Excluding the date of remand)*
> *October, 2020 = 31 days – 53 days*
> *November, 2020 = 30 days – 83 days*
> *December, 2020 = 31 days – 114 days*
> *January, 2021 = 31 days – 145 days*
> *February, 2021 = 28 days – 173 days*
> *March, 2021 = 7 –* ***180 days (07.03.2021)***
> *08.03.2021 – 31.03.2021 - 24 days*
> *April, 2021 = 30 days – 54 days*
> *May, 2021 = 6 –* ***60 days (06.05.2021)***
> *Thus, 180 days expired on 07.03.2021 and 60 days expired on 06.05.2021.*

15. As has already been stated hereinbefore, the averments made in the original petition under Section 482 Cr.P.C. are at variance from the above calculation and so also is the date chart submitted by the counsel for the petitioners at the time of hearing, which is on record. Surprisingly, in the petition dated 27.02.2021 filed by the I.O. seeking extension of time to complete investigation, it is stated that "the stipulated period of investigation, i.e. 180 days is going to be completed on 03.03.2021".

Considering the submissions made by learned counsel for the petitioners and in the absence of any serious objection with regard to the calculation of the relevant dates made on behalf of the State, this Court held that charge sheet was submitted two days after expiry of the extended period and since, the accused persons had not been produced nor their right to be released on default bail informed to them, the CRLMC was allowed by holding that they were entitled to be released on bail.

It is obvious that the aforesaid order was passed by this Court on erroneous premises, i.e. miscalculation of the relevant dates. Learned Addl. Sanding Counsel has submitted that the above fact came to his knowledge on being informed by the I.O. much later, therefore, the I.A. has been filed seeking recall of the order.

16. Such being the factual position emerging from the above narration, two aspects need to be considered. Whether it can be said that the petitioners are guilty of misrepresenting facts deliberately to obtain a favourable order and if so, what recourse is available for the Court to take in the case.

17. Coming to the first point as noted above, it is the case of the

petitioners that they were arrested on 06.09.2020, but were forwarded on 08.09.2020. This contention is difficult to accept because the order dated 08.09.2020 reveals that the accused persons were forwarded to the Special Judge in his residential office at 5 a.m., on which date they were remanded for a period of 15 days. Significantly, none of the accused persons complained of the alleged detention in police custody from 06.09.2020, more so, when the remand advocate was present as noted by learned Special Judge in his order. Therefore, there can be no doubt that the accused persons were remanded to judicial custody on 08.09.2020 and as such, the date of expiration of 180 days would be 07.03.2021. The accused persons in their application under Section 482 Cr.P.C. have stated that the period of 180 days 'is going to' expire on 03.03.2021. It cannot be believed that the accused persons were not aware of the date of their first remand so as to be able to calculate the expiry of the stipulated period of 180 days more so when they are represented by advocates, as is evident from the order sheet. That apart in the date chart also, the same thing has been stated. It is quite possible that the petitioners have tried to take advantage of the fact that the I.O. has wrongly mentioned the date as 03.03.2021 in his petition for extension of time. Therefore, this Court is unable to persuade itself to believe that it was a bonafide error on the part of the accused persons to miscalculate the date, rather, having regard to all the facts and circumstances noted hereinabove, it becomes more than evident that they had done so deliberately in order to obtain a favourable order. This is nothing but playing fraud on the Court. It goes without saying that but for such deliberate mis-presentation this Court would not have passed the order in question.

18. It is the oft-repeated and a salutary principle of law that fraud and justice never dwell together (*fraus et jus nunquam cohabitant).* In the case of **S.P.Chengalvaraya Naidu (dead) by L.Rs. vs. Jagannath (dead) by L.Rs. and others** reported in **AIR 1994 SC 853,** the apex Court held as follows:

> *"7. xxx xxx xxx xxx xxx The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The Courts of law are meant for imparting justice between the parties. One who comes to the Court must come with clean hands. We are constrained to say that more often than not, process of the Court is being abused. Property-grabbers, tax-evaders, bank- loan-dodgers and other unscrupulous persons from all walks of life find the Court process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person whose case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation."*
>
> *Further, in para-8, it has been held as follows:-*
> *" xxx xxx xxx xxx xxx A litigant, who approaches the Court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the Court as well as on the opposite party."*

19. Again, in the case of **A.V. Papayya Sastry and others vs. Govt. of A.P.** and others, reported in (2007) 4 SCC 221, it was held as follows:

> *"21. Now, it is well-settled principle of law that if any judgment or order is obtained by fraud, it cannot be said to be a judgment or order in law. Before three centuries, Chief Justice Edward Coke proclaimed:*
> *"Fraud avoids all judicial acts, ecclesiastical or temporal."*
> *22. It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the court, tribunal or authority is a nullity and non-est in the eye of the law. Such a judgment, decree or order-by the first court or by the final court-has to be treated as nullity by every court, superior or*

inferior. It can be challenged in any court, at any time, in appeal, revision, writ or even in collateral proceedings."

20. The above salutary principle has been reiterated time and again by the apex Court in several decisions, all of which need not be referred to.

Thus, an order obtained by fraud cannot be allowed to subsist as it would amount to perpetrating a gross illegality. Even otherwise, the High Court, as a Court of record, has inherent power to correct the record. It, as a Court of record, has a duty to keep its records correctly and in accordance with law. In case any apparent error is noticed by the High Court or brought to its notice in respect of any orders passed by it, the High Court has not only the power but a duty to correct it. This is a plenary power of the High Court being a superior Court and a Court of record. The above view was taken by the Punjab and Haryana High Court in the case of **Sher Mohd. Khan vs. Madan Lal and another,** reported in 2013 (4) RCR (Criminal) 5: 2011 (7) LRC 434 (P&H).

21. It must also be kept in mind that in the instant case, the order in question was passed exercising power under Section 482 of the Code which is indisputably, a plenary power. Therefore, once it comes to light that the party concerned was not entitled to the order passed in its favor, which is nothing but an abuse of the process of Court, it would be perfectly legal as also justified in invoking the very same power under Section 482 of the Code so as to prevent such abuse and to secure the ends of justice.

True, such power has to be exercised sparingly but if the circumstances so warrant, the Court is expected to rise to the occasion to set right the wrong in view of what has been discussed hereinbefore.

In course of hearing, a feeble attempt was made by learned counsel for the petitioners that since the accused persons have not misused their liberty after being released, no adverse order should be passed as it would amount to cancellation of the bail granted to them.

This is an untenable argument because cancellation of bail by invoking power under Section 439(2) of the Code is entirely different from the power of setting aside an unjustified, illegal or perverse order as is being sought to be done in the instant case. The above view was taken by the apex Court in the case of **Puran vs. Rambilas and another,** reported in (2001) 6 SCC 338.

From the forgoing narration, it becomes evident that the accused petitioners were not entitled to default bail but had obtained such order by deliberately misrepresenting facts before this Court. As such, the order in question cannot be allowed to subsist and deserves to be set aside.

22. Before parting with the case, this Court deems it proper to observe that the IO being a responsible police officer in charge of investigating an offence as heinous as one under the NDPS Act carrying stringent punishment, is not expected to show such irresponsible conduct in calculating the time-period for completion of investigation while making prayer for extension of such time. There is no gainsaying about the ill-effect of such callousness and irresponsible conduct. The case at hand is a case in point. This Court therefore hopes and trusts that the higher police authorities shall take note of this lapse and issue necessary instructions to be followed by the IOs, particularly in NDPS cases.

23. In the result, the I.A. is allowed. The order dated 18.11.2021

passed by this Court in the instant case is hereby recalled. In view of the finding that the petitioners are not entitled to default bail, the bail bonds executed by them in the Court below be cancelled and NBWs be issued to take them into custody forthwith.

24. A copy of this order be communicated to the lower Court forthwith. A copy be also forwarded to the Director General of Police, Odisha for his information and necessary action.

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Sashikanta Mishra,
Judge

Orissa High Court, Cuttack
The 15th March, 2022/ A.K. Rana