

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
INTERIM APPLICATION NO. 162 OF 2022
IN
CRI. APPLICATION NO. 1458 OF 2019

1) Dr. P. Varavara Rao,

2) Vernon Stanislaus Gonsalves

3) Arun Thomas Ferreira

All Applicants are at present in
Judicial Custody and lodged at
Taloja Central Prison, Navi Mumbai

....Applicants

Versus

1) The State of Maharashtra,
2) The ACP Swargate,
Pune City, Pune.

2A) The Director General,
National Investigation Agency,
CGO Complex, Lodhi Road,
New Delhi.

...Respondents

Mr.Sudeep Pasbola a/w. Mr. Neeraj Yadav, Ms. Sushan Abraham and Mr. Barun Kumar i/b Mr. R. Sathyanarayanan for applicants.

Mrs.A.S.Pai, P.P. a/w. Mrs. Sangita D. Shinde, APP for State.

Mr.Sandesh Patil a/w. Mr.Chintan Shah and Mr. Vishal Gautham for National Investigation Agency (NIA).

**CORAM : S.S. SHINDE &
N. J. JAMADAR, JJ.**

RESERVED ON : 22nd MARCH, 2022

PRONOUNCED ON : 4th MAY, 2022.

JUDGMENT : (PER N.J. JAMADAR, J.)

1. The applicants-original applicant Nos.6 to 8 in Criminal Application No. 1458 of 2019, which was decided by this Court, alongwith Criminal Bail Application No.2024 of 2019 (Sudha Bharadwaj Vs. National Investigation Agency and Anr.) by judgment and order dated 1st December 2021 seek review of the said judgment, to the extent Criminal Application No.1458 of 2019 came to be rejected thereunder.

2. By the said judgment and order dated 1st December 2021, this Court was persuaded to allow Criminal Bail Application No. 2024 of 2021, preferred by Sudha Bharadwaj, the co-accused in NIA Special Case No. 871 of 2020, arising out of FIR No. 4 of 2018, initially registered with Vishrambag Police Station, for the offences

punishable under sections 120B, 121, 121(A), 124(A), 153A, 505(1) (b) of Indian Penal Code, 1860 ('the Penal Code') and sections 13, 16, 17, 18, 18-B, 20, 38, 39 and 40 of the Unlawful Activities (Prevention Act), 1967 ('UAPA'). The applicant therein was ordered to be released on default bail.

3. The applicants assert that they are entitled to same relief as has been granted to the co-accused Sudha Bharadwaj.

4. The review application arises in the backdrop of the following facts :

(a) In the above-numbered crime, the applicants were arrested on 28th August 2018. Charge-sheet against the applicants and Sudha Bharadwaj, co-accused/applicant in Criminal Bail Application No.2024 of 2021 was filed on 21st February 2019.

(b) The applicants preferred an application before the learned Additional Sessions Judge, Pune (Exh.169) on 21st June 2019 with the assertion that the applicants were in custody since 28th August 2018 and cognizance of the offence had not been taken. Since the applicants were in detention for well over 180 days, without cognizance having been taken by the

competent Court, all applicants are entitled to be released on bail under the provisions of section 167(2) of the Code of Criminal Procedure, 1973 ('the Code') read with section 43-D(2) of the UAPA.

(c) The said application was rejected by the learned Sessions Judge by an order dated 5th September 2019. The applicants preferred Criminal Application No.1458 of 2019 with a prayer to quash and set aside the order passed by the learned Sessions Judge, dated 5th September 2019 and declaration that the learned Sessions Judge had no power to take cognizance of the offence and the said cognizance was bad in law and illegal.

(d) It would be contextually relevant to note that in Criminal Bail Application No.2024 of 2021, the applicant therein had assailed the extension of period for investigation under section 43D-(2) of the UAPA on the ground that the learned Judge who granted the extension on 26th November 2018 was not legally empowered to grant such extension and take cognizance of the offence.

(e) The applicant therein further contended that since the applicant had applied for release on default bail under section 167(2) of the Code, prior to the filing of the charge-sheet, the applicant had a right to be released on default bail and ought have been so released on 26th November 2018. It was further contended that even if the period of house arrest was excluded from consideration, the period of 90 days would have expired on 25th January 2019 and since the charge-sheet was filed on 21st February 2019, whilst the bail application of the applicant (Sudha Bharadwaj) was still pending on that day, the applicant ought to have been released on bail.

5. After an elaborate consideration and analysis of the governing provisions and precedents, this Court was persuaded to allow the Criminal Bail Application No.2024 of 2019 of the co-accused-applicant and reject the Criminal Application No.1458 of 2019 of the instant applicants.

6. We deem it appropriate to extract the observations in the concluding paragraphs of the said judgment, which read as

under :

143 In the case at hand, with the declaration that the learned Additional Sessions Judge (Shri K.D. Vadane) had no jurisdictional competence to extend the period of detention under section 43-D(2)(b) of UAPA, the very substratum of the prosecution case that the right to default bail did not ripe into an indefeasible right, as the period of detention was extended, gets dismantled. The hard facts which thus emerge so far as the application of Sudha Bharadwaj are : (i) that the period of detention of 90 days (excluding the period of house arrest) expired on 25th January, 2019; (ii) no charge-sheet was lodged; (iii) there was no lawful order of extension of period of detention; and (iv) an application preferred by Sudha Bharadwaj for default bail awaited adjudication.

144 The matter can be looked at from a slightly different perspective. As the period of detention was extended by the learned Additional Sessions Judge by 90 days, the applicant-Sudha Bharadwaj could not have applied for default bail after 25th January 2019 till the filing of the charge-sheet. Therefore, it cannot be urged that the applicant-Sudha Bharadwaj did not make an application during the said period and thus she did not avail the right of default bail. On the touchstone of the guarantee of personal liberty under Article 21 of the Constitution, in our view, to deprive the applicant-Sudha Bharadwaj of the indefeasible right on the premise that the application preferred on 26th November 2018 (Exh. 43) was premature, would be taking a too technical and formalistic view of the matter. In our view, all the requisite conditions to release the applicant-Sudha Bharadwaj on default bail stood fully satisfied.

145 As regards the entitlement of the applicant Nos.1 to 8 in Application No.1458 of 2019 for default bail, a brief revisit to the facts would be in order.

- (i) The applicant Nos.1 to 5, namely, Sudhir Prahlad Dhawale, Rona Wilson, Surendra Gadling, Dr. Shoma Sen and Mahesh Raut were arrested on 6th June 2018.
- (ii) Charge-sheet against applicant Nos. 1 to 5 was filed on 15th November 2018.

(iii) Applicant Nos. 6 to 8, namely P. Varavara Rao, Vernon Gonsalves and Arun Ferreira were arrested on 28th August 2018.

(iv) Charge-sheet against the applicant Nos. 6 to 8 in Criminal Application No.1458 of 2019 and Sudha Bharadwaj Bharadwaj, applicant in Criminal Bail Application No. 2024 of 2021, was filed on 21st February 2019.

146 Evidently, neither applicant Nos.1 to 5 claimed to have filed an application for default bail under section 167(2) of the Code, after the expiry of initial period of 90 days from the date of their production before the learned Additional Sessions Judge on 7th June 2018 till the filing of the charge-sheet on 15th November 2018. Nor the applicant Nos.6 to 8 preferred such application till the filing of the supplementary charge-sheet, qua them on 21st February 2019, after the expiry of initial period of 90 days.

147 The applicants have, however, approached the Court with a case that the applicants were detained beyond the period of 180 days without the cognizance of the offences having been taken by the competent Court. We have extracted the averments in paragraph Nos. 4 to 6 of the application. The applicants premised their claim for default bail on the aspect of defect in taking cognizance of the offences. For the applicants, the learned Additional Sessions Judge could not have taken cognizance without the case having been committed by the learned Magistrate.

148 In the aforesaid view of the matter, the learned Advocate General and the learned Additional Solicitor General were on a firm ground when they urged that the applicants in Application No.1458 of 2019 did not 'avail of' the right of default bail, by filing an application, within the meaning of section 167(2) of the Code. We have seen that where the accused fails to apply for default bail when the right accrues to him and subsequently a charge-sheet is filed before the Magistrate, the right to default bail would get extinguished as it cannot be said that the accused 'availed of' his right to be released on default bail.

149 In this view of the matter, so far as the applicant Nos. 1 to 5 in Application No.1458 of 2019, the aspect of legality or otherwise of the extension of period of

detention is of no relevance as the applicants did not avail of the said right to be released on default bail before the charge-sheet was filed against them on 15th November 2018. In the case of applicant Nos. 6 to 8, though we have held that the order passed by the learned Additional Sessions Judge on the report (Exh.33) on 26th November 2018 was without jurisdiction, yet the said declaration is of no assistance to the applicant Nos.6 to 8 as they did not avail of the right to be released on default bail by filing an application, after the expiry of the initial period of 90 days and before the lodging of the charge-sheet on 21st February 2019. Resultantly, a crucial condition of 'availing of' the right so as to cement it as an indefeasible right, has not been fulfilled and the right stood extinguished by the filing of the charge-sheet on 21st February 2019. Failure to take cognizance or defect in jurisdiction in taking cognizance, once the charge-sheet was laid, does not entail the consequence of default bail.

150 The conspectus of aforesaid consideration is that the Application No.1458 of 2019 preferred by Sudhir Prahlad Dhawale and 7 others is liable to be rejected. Whereas the Bail Application No. 2024 of 2021 preferred by Sudha Bharadwaj deserves to be allowed.

7. In the backdrop of the aforesaid observations and decision, the applicants have preferred this application with the assertion that the conclusion arrived at by this Court that the applicants had not availed the right to be released on default bail, after expiry of initial period of 90 days, is incorrect. An error has crept in the observations to that effect, in paragraph Nos.146 and 149, extracted above, and the said error being factual one, it is necessary to correct the record of the Court.

8. The applicants claimed that they had also preferred Bail applications Nos.4965 of 2018 (applicant No.1), 4966 of 2018, (applicant No.2), and 4967 of 2018 (applicant No.3) for default bail, on 30th November 2018.

9. In fact, the order dated 6th November 2019, passed by the Sessions Judge, Pune, rejecting the application for default bail under section 167(2) read with section 43D(2) of the UAPA refers to Criminal Bail Application Nos.4966 of 2018, 4965 of 2018 and 4967 of 2018, the application preferred by the co-accused, Sudha Bharadwaj at Exh.43, and application No.163 and 164. Therefore, it is necessary to correct the factual errors in paragraph No.146 and 149, extracted above, and grant default bail to the applicants, as well.

10. We have heard Mr.Sudeep Pasbola, the learned counsel for the applicants, Mr.Sandesh Patil, the learned counsel for the NIA and Mrs. A.S. Pai, the learned Public Prosecutor for the State. We have also perused carefully the grounds in this application and its accompaniments.

11. At the outset, Mr.Pasbola, the learned counsel for the applicants submitted that the fact that section 362 of the Code contains an interdict against the review of the judgment or final

order except to correct a clerical or arithmetical error does not preclude the High Court from correcting an error as the High Court is a Court of record. Thus, this Court, according to Mr.Pasbola, would be within its rights in exercising the review jurisdiction so as to correct an apparent error and prevent the miscarriage of justice.

12. To lend support to this submission, Mr.Pasbola placed reliance upon the judgments in the cases of *M.M. Thomas Vs. State of Kerala & Anr.*¹, *Master Construction Co. (P) Ltd. Vs. State of Orissa and Anr.*², *Lilly Thomas and Ors. Vs. Union of India and Ors.*³, *Meena and Anr. Vs. Manager, Bajaj Allianz General Insurance Co. Ltd. & Ors.*⁴, *State of Maharashtra & Anr. Vs. Anil*⁵, *Mohd. Wasi and Anr. Vs. State*⁶, *Manoharan Vs. State*⁷, *Shivdev Singh & Ors. Vs. State of Punjab & Ors.*⁸, *Thahsildar Vs. Pottakalathi Ramkrishnan*⁹ and *Laxman Bapurao Ghaiwane Vs. State of Maharashtra*¹⁰,

13. We deem it appropriate to refer to few of these judgments. In

1 (2001) 1 SCC 666

2 AIR 1966 SC 1047

3 (2000)6SCC 224

4 (2019) SCC OnLine Bom. 1569

5 (2020) SCC OnLine Bom. 8948

6 (2000)6 SCC 224

7 (2020) 5 SCC 782

8 AIR 1963 SC 1909

9 RP. No.1220-2019 in WP(C)-32652-2018 Dt.17-02-2020

10 2012 SCC OnLine Bom.2313

the case of ***Shivdev Singh & Ors.*** (Supra), the Constitution Bench of the Supreme Court enunciated that it is sufficient to say that there is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every Court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it.

14. In the case of ***M.M. Thomas*** (Supra), the Supreme Court again considered the following question :

Does it mean that the High Court has no power to correct its own orders, even if the High Court is satisfied that there is error apparent on the face of the record?

15. The Supreme Court answered the aforesaid question in the affirmative with the following observations :

“14 *The High Court as a Court of Record, as envisaged in Article 215 of the Constitution, must have inherent powers to correct the records. A Court of Record envelopes all such powers whose acts and proceedings are to be enrolled in a perpetual, memorial and testimony. A Court of Record is undoubtedly a superior court which is itself competent to determine the scope of its jurisdiction. The High Court, as a Court of Record, has a duty to itself to keep all its records correctly and in accordance with law. Hence, if any apparent error is noticed by the High Court in respect of any orders passed by it the High Court has not only power, but a duty to correct it. The High Court's power in that regard is plenary. In Naresh Shridhar Mirajkar & Ors. v. State of Maharashtra & Anr, a nine Judge Bench of this Court has recognised the aforesaid superior statue of the High Court as a court of plenary jurisdiction being a Court of Record.*”

.....

17 *If such power of correcting its own record is denied to the High Court, when it notices the apparent*

errors its consequence is that the superior status of the High Court will dwindle down, Therefore, it is only proper to think that the plenary powers of the High Court would include the power of review relating to errors apparent on the face of record.

16. In the case of ***Municipal Corporation of Greater Mumbai & Anr. Vs. Pratibha Industries Ltd. & Ors.***¹¹, the Supreme Court reiterated the position in law as under :-

10 Insofar as the High Courts' jurisdiction to recall its own order is concerned, High Courts are courts of record, set up under Article 215 of the Constitution of India. Article 215 of the Constitution of India reads as under:-

“Article 215. High Courts to be courts of record.— Every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.”

It is clear that these constitutional courts, being courts of record, the jurisdiction to recall their own orders is inherent by virtue of the fact that they are superior courts of record. This has been recognized in several of our judgments.

17. The position in law is thus crystallized to the effect that the High Court, being a Court of record, is vested with the jurisdiction to recall or review an order, if it is satisfied that an apparent error has crept in, in its order and it is necessary to correct the same for preventing miscarriage of justice.

18. Mr.Sandesh Patil, the learned counsel for the NIA attempted to draw a distinction between power to recall or review the order,

¹¹ (2019) 3 SCC 203

where initially the jurisdiction is exercised under Article 226 of the Constitution of India and not under section 482 of the Code. Since the order under review has been passed on an application under section 482 of the Code, according to Mr.Patil, the bar under section 362 of the Code, cannot be obviated by resorting to inherent power under section 482 of the Code.

19. To bolster up this submission, Mr.Patil placed reliance on the judgment of the Supreme Court in the case of ***Simrikhia Vs. Dolley Mukherjee and Chhabi Mukherjee and Anr.***¹², wherein the interplay between jurisdiction under sections 362 and 482 of the Code was expounded in the following words :

5 Section 362 of the Code expressly provides that 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 save as otherwise provided by the Code. Section 482 enables the High Court to make such order 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. The inherent powers, however, as much are controlled by principle and precedent as are its express powers by statute. If a matter is covered by an express letter of law, the court cannot give a go-by to the statutory provisions and instead evolve a new provision in the garb of inherent jurisdiction.

....

7 The inherent jurisdiction of the High Court cannot be invoked to override bar of review under section 362. It is clearly stated in Sooraj Devi v. Pyare Lal, [1981] 1 SCC 500 that the inherent power of the court cannot be exercised for doing that which is specifically

12 (1990) 2 SCC 437

prohibited by the Code. The law is therefore clear that the inherent power cannot be exercised for doing that which cannot be done on account of the bar under other provisions of the Code. The court is not empowered to review its own decision under the purported exercise of inherent power. We find that the impugned order in this case is in effect one reviewing the earlier order on a reconsideration of the same materials. The High Court has grievously erred in doing so. Even on merits, we do not find any compelling reasons to quash the proceedings at that stage.

20. Reliance was also placed on the judgments in the cases of *Hari Singh Mann Vs. Harbhajan Singh Bajwa and Others* ¹³ and *State of Punjab Vs. Davinder Pal Singh Bhullar and Others* ¹⁴, wherein the aforesaid limitation on the exercise of inherent power under section 482 in the context of the interdict contained in section 362 of the Code was enunciated.

21. We do not deem it appropriate to delve deep into the controversy as regards the source of exercise of power to recall or review the order. In our view, being a Court of record and having plenary jurisdiction, if the High Court is satisfied that the order to be reviewed suffers from a manifest error, which is not required to be unearthed by an elaborate process of reasoning and such an order leads to injustice, the High Court would be justified in exercising the power to recall or review the order or pass such

13 (2001) 1 SCC 169

14 (2011) 14 SCC 770

order as may be found expedient in the facts of the given case.

22. This take us to the moot question as to whether the judgment and order in the case at hand warrants review.

23. We have indicated the premise on which the applicants approached this Court in Criminal Application No.1458 of 2019. In the judgment under review itself, we had noted that the applicants sought default bail by filing application (Exh.169) before the learned Sessions Judge, on the premise that the orders granting remand, authorizing detention of the accused and taking cognizance were all illegal. For the sake of clarity, we deem it appropriate to extract the observations in paragraph Nos.51 and 52 of the judgment under review, wherein we had reproduced the contents of paragraphs 4 to 6 of the application (Exh. 169) preferred by the applicants before the learned Sessions Judge :

51 In the backdrop of the nature of the challenge to the prayer of the applicants, in this application, it may be apposite to note the stand of the applicants in the application (Exh.169) before the learned Additional Sessions Judge. The averments in paragraph Nos.4 to 6 of the application make the stand of the applicants abundantly clear.

“4 That cognizance of the present offence has not been taken, and that this Hon’ble Court has no jurisdiction to take cognizance of the offence at this stage, as no Court of Session can take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate.

5 That, it is only when the present case is

committed to the Court of Session by a Magistrate, and after cognizance of the present offence has been taken that the applicants/accused may be remanded in custody under any provision in law other than Section 167 Cr.P.C.

6 That, in the absence of cognizance being taken of the present offence and in the absence of committal by a Magistrate, the applicants/accused, having been in detention for well over one hundred and eight days, are entitled to be released on bail as per the provisions of S.167(2) Cr.P.C. r/w S. 43-D(2) of UAPA."

52 It becomes evidently clear that it was the stand of the applicants before the learned Additional Sessions Judge that the charge-sheet ought to have been filed before the learned Magistrate, and, thereafter, the case ought to have been committed to the Court of Sessions, and, only thereupon, the cognizance of the offences could have been taken, and that having not been done, according to the applicants, they were entitled to be released on bail.

(underline added)

24. The learned Sessions Judge rejected the application for default bail observing that the charge-sheet came to be filed within the extended period and once the charge-sheet is filed, the accused cannot claim default bail on the ground that cognizance had not been taken within the period of 180 days.

25. In Criminal Application No.1458 of 2019 also the applicants reiterated that the applicants' aforesaid stand that the learned Sessions Judge, Pune could not have assumed jurisdiction and, consequently, the orders granting remand and authorizing custody would all become illegal. It was the stand of the

applicants that the Sessions Judge could not have taken cognizance of the offence otherwise than following the provisions of section 193 of the Code. The applicants, thus, prayed for setting aside the order dated 5th September 2019 passed by the learned Sessions Judge.

26. What is conspicuous by its absence in the application (Exh.169) before the learned Sessions Judge and in Criminal Bail Application No.1458 of 2019 before this Court, is the fact that the applicants had preferred an application for default bail after the expiry of initial period of 90 days and before filing of the charge-sheet on 21st February 2020. That constitutes the fundamental distinction in the application of the applicant in Criminal Bail Application No.2024 of 2021 (Smt.Sudha Bharadwaj) and application of the instant applicants.

27. Specifically noting this distinction, we had observed in paragraph No.134 of the judgment and order dated 1st December 2021, under review, as under :-

“134 In the light of significant distinction on the factual score, the claim of the applicants in both the applications warrants independent consideration.....”

28. When confronted with the aforesaid fact-situation, Mr.Pasbola, the learned counsel for the applicants fairly conceded

that it was not the stand of the applicants before this Court, while deciding the Criminal Application No.1458 of 2019 that the applicants had also preferred application for default bail after the expiry of initial period of 90 days and they were also entitled to be released on default bail, on the said count, like the applicant in Criminal Bail Application No.2024 of 2021.

29. We must record that hearing in Criminal Bail Application No.2024 of 2021 was initially concluded and, thereafter, the Bail Application No.1458 of 2019 was heard. The applicants had the benefit of the submissions canvassed in Criminal Bail Application No.2024 of 2021. Yet, the fact that the applicants had also filed applications for default bail was not brought on the record by the Court. Nor oral submission was canvassed.

30. As is evident from the observations in the judgment under review, extracted above, the application of the applicants proceeded on a totally different premise. The attack was on the ground that though charge-sheet was filed within the extended period, yet cognizance was not taken within the said period and, therefore, the applicants were entitled to be released on default bail.

31. The situation which thus emerges is that the case now

sought to be urged in the review application was nowhere pleaded or canvassed before the Court till the application came to be decided.

32. On the basis of the material which was placed before us, over which there is no controversy, we observed in paragraph 146 of the judgment that *neither applicant Nos. 1 to 5 claimed to have filed an application for default bail.....nor the applicant Nos.6 to 8 preferred such application till filing of the supplementary charge-sheet.* In our view, our observations in paragraph Nos.146 to 149 to the extent they reflect upon the applicants herein having not availed of right to be released on default bail, are based on the record which the applicants had placed before us.

33. To put it in other words, the case now sought to be urged was not at all argued, much less, pleaded before the Court. The copies of bail application Nos.4965 of 2018, 4966 of 2018 and 4967 of 2018, which are annexed to the Review Application, were neither placed before the Court nor referred to in Criminal Application No.1458 of 2019. We, therefore, find it difficult to accede to the submission on behalf of the applicants that a factual error had crept in. A re-hearing of the matter on a point which was not at all urged, is impermissible in law, under the

guise of review. Nor can review be claimed or asked for merely for a fresh hearing or canvassing a totally new submission. It is trite that disguised as a review, it is not permissible even for an erroneous decision to be, “re-heard and corrected”.

34. Thus, in our view, no case for exercise of review jurisdiction is made out. Since an apprehension was expressed that the observations in paragraph No.146 and 149 of the judgment and order, under review, extracted above, may operate to the prejudice of the applicants, we clarify that the observations were based on the case pleaded, documents placed and submissions canvassed before us, while deciding the said application.

35. With the aforesaid clarification, we are inclined to reject the application.

36. Hence, the following order :

O R D E R

The application stands rejected.

[N. J. Jamadar, J.]

[S.S. Shinde, J.]