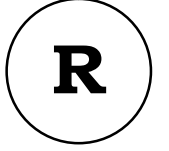


CRL.P NO. 13141/2023
IN THE HIGH COURT OF KARNATAKA: PRINCIPAL BENCH
AT BANGALORE
[INAYATHULLA N VS. STATE BY POLICE SUB INSPECTOR AND ANOTHER]



MNPJ

19.07.2024

(VIDEO CONFERENCING / PHYSICAL HEARING)

ORDER ON I.A.NO.1 OF 2024
seeking recall of the judgment dated 10.07.2024
passed in Crl.P.No.13141/2023

Office objections *qua* maintainability stands over ruled.

2. Heard Sri S. Jagan Babu, learned counsel for petitioner and Sri B.N.Jagadeesh, learned Additional State Public Prosecutor for respondent No.1. The learned counsel appearing for the petitioner submits that his submissions be treated as objections to the application.

3. This Court heard the matter and disposed this petition by its order dated 10.07.2024, by quashing the proceedings in Crime No.200/2023, which was pending before the Chief Judicial Magistrate, Bengaluru Rural District, Bengaluru.

4. Learned Additional State Public Prosecutor has moved the matter to recall the order dated 10.07.2024 on the score that the proceedings were quashed at the threshold, notwithstanding the fact that the action of the petitioner does make out an offence and the complainant, the agency – Cyber Tipline was not heard at the time when the matter stood disposed.

5. The learned Additional State Public Prosecutor would further contend that an application is filed before the concerned Court to draw in for the offence under Protection Of Children from Sexual Offences Act, 2012, as well. Therefore, it was an order passed without hearing the complainant *inter alia*, on several contentions of respondent No.1 - State not being projected by them. The affidavit filed by the State to recall the order reads as follows:-

"3. It is submitted that at the time of argument, the provision of the Protection of Children from Sexual offices Act, 2012, was not brought to the knowledge of this Hon'ble Court. It is further submitted that Section 15 of the Act says as follows:

15. Punishment for storage of pornographic material involving child.—(1) *Any person, who stores or possesses pornographic material in any form involving a child, but fails to delete or destroy or report the same to the designated authority, as may be prescribed, with an intention to share or transmit child pornography, shall be liable to fine not less than five thousand rupees, and in the event of second or subsequent offence, with fine which shall not be less than ten thousand rupees.*

(2) Any person, who stores or possesses pornographic material in any form involving a child for transmitting or propagating or displaying or distributing in any manner at any time except for the purpose of reporting, as may be prescribed, or for use as evidence in court, shall be punished with

imprisonment of either description which may extend to three years, or with fine, or with both.

(3) Any person, who stores or possesses pornographic material in any form involving a child for commercial purpose shall be punished on the first conviction with imprisonment of either description which shall not be less than three years which may extend to five years, or with fine, or with both, and in the event of second or subsequent conviction, with imprisonment of either description which shall not be less than five years which may extend to seven years and shall also be liable to fine."

4. It is submitted that though the Protection of Children from Sexual Offences Act, 2012 has not been invoked in the FIR investigation, there is no impediment to invoking the said provision during the course of the investigation. However, this issue was not brought to the notice of this Hon'ble Court. Therefore, this Hon'ble Court has quashed the proceedings against the petitioner.

*5. It is submitted that the Hon'ble Supreme Court has seized the issue on hand in the case of **Just Rights for Children alliance & Another v. S.Harish & others** – Special Leave Petition (Criminal) Diary No.8562 of 2024. The Hon'ble Apex Court has reserved the order in this matter by order dated 19-04-2024.*

6. It is submitted that the order passed in this case, especially when the matter is seized with the Apex court, sends a wrong signal to society and causes a serious impact on society.

7. It is submitted that the complaint in this case is the office in CID that deals with the Cyber Tip Line information. However, the petitioner has not made the complainant party. Therefore, the complainant was not heard in this case.

Prayer

WHEREFORE, the respondent-State most humbly prays that this Hon'ble Court may be pleased to recall the

order dated 10-07-2024 in the above criminal petition may be recalled in the interest of justice and equity."

A perusal at the contents of the affidavit would lead to its acceptance and the resultant recall of the order for the reasons rendered hereafter.

6. In the order dated 10-07-2024, reasons so rendered for quashing the proceedings by this Court, are as follows:

"7. The afore-narrated facts, lie in a narrow compass. What leads to registration of crime, is an alert in the cyber Tipline that the petitioner watching a particular website on his mobile between 3:50 p.m. to 4:40 p.m. This results in registration of the complaint. The complaint reads as follows:

"ಮೇಲ್ಕಂಡ ವಿಷಯಕ್ಕೆ ಸಂಬಂಧಿಸಿದಂತೆ ತಮ್ಮಲ್ಲಿ ಕೇಳಿಕೊಳ್ಳುವುದೇನೆಂದರೆ ಮಾನ್ಯ ಸರ್ವೋಚ್ಚ ನ್ಯಾಯಾಲಯದ ನಿರ್ದೇಶನದ ಅನ್ವಯ ಕೇಂದ್ರ ಸರ್ಕಾರವು 2018 ರಲ್ಲಿ ಮಹಿಳೆಯರ ಮತ್ತು ಮಕ್ಕಳ/ಇತರೆ/ಮಕ್ಕಳ ವಿರುದ್ಧ ಲೈಂಗಿಕ ಅಪರಾಧಗಳನ್ನು ತಡೆಗಟ್ಟುವ ನಿಟ್ಟಿನಲ್ಲಿ ಪ್ರತ್ಯೇಕವಾದ (CCPWC) & (NCCRP) & (NCMEC) ಪೋರ್ಟಲ್‌ಗಳನ್ನು ತೆರೆದಿದ್ದು, ಕರ್ನಾಟಕ ರಾಜ್ಯಕ್ಕೆ ಸಂಬಂಧಿಸಿದಂತೆ ಮಕ್ಕಳ ವಿರುದ್ಧ ಲೈಂಗಿಕ ಅಪರಾಧಗಳನ್ನು ಕುರಿತು ಕೇಂದ್ರ ಸರ್ಕಾರದ (MHA) ದವರು ಸಂಗ್ರಹಿಸಿದ ಮಾಹಿತಿಯನ್ನು ಕೇಂದ್ರ ಸರ್ಕಾರದ ಎನ್.ಸಿ.ಆರ್.ಬಿ. ಮೂಲಕ ಪೋರ್ಟಲ್ ನಲ್ಲಿ/ಸಿಡಿಯಲ್ಲಿ ಸೈಬರ್ ಅಪರಾಧಗಳಿಗೆ ಸಂಬಂಧಿಸಿದಂತೆ ದೂರುಗಳನ್ನು ಪರಿಶೀಲಿಸಿ ಕ್ರಮ ಕೈಗೊಳ್ಳಲು ಸಿಬಿಡಿ ಘಟಕಕ್ಕೆ ಕಳುಹಿಸಿದ್ದ ಸದರಿ ದೂರುಗಳನ್ನು ಸದರಿಯವರು ಸಿಡಿಯಲ್ಲಿ ಪಡೆದುಕೊಂಡು ಅವುಗಳನ್ನು ತಾಂತ್ರಿಕವಾಗಿ ಪರಿಶೀಲಿಸಿ ಅದರಲ್ಲಿರುವ ಗೌಪ್ಯ ಮಾಹಿತಿ ವಿಶ್ಲೇಷಣೆ ಮಾಡಿ ಸಂಬಂಧಪಟ್ಟ ಸೇವಾದಾರರಿಂದ (Service Provider) ಮಾಹಿತಿಯನ್ನು ಕ್ರೋಢೀಕರಿಸಿ, ಟಿಪ್ ಲೈನ್ ನಂಬರ್-120928689 ರ ಸಿಡಿಯಲ್ಲಿರುವ ಮಾಹಿತಿಯನ್ನು ಪರಿಶೀಲಿಸಲಾಗಿದ್ದು, ಆರೋಪಿ ದಿನಾಂಕ: 23/03/2022 ರಂದು ಮಧ್ಯಾಹ್ನ 03.50 ಗಂಟೆಯಿಂದ ಸಂಜೆ 4.40 ಗಂಟೆಯವರೆಗೆ ಮಕ್ಕಳ ಅಶ್ಲೀಲತೆ ಭಾವಚಿತ್ರ/ವಿಡಿಯೋ ವೀಕ್ಷಣೆ ಮಾಡಿರುವ ಬಗ್ಗೆ ಇದರೊಂದಿಗೆ ಲಗತ್ತಿಸಿಕೊಂಡಿರುವ ಆರೋಪಿಯ ಐ.ಪಿ.ವಿಳಾಸದಿಂದ ಹಾಗೂ ಇತರೆ ಮಾಹಿತಿಯನ್ನು ಒಳಗೊಂಡಿರುವುದು

ಕಂಡು ಬಂದಿದ್ದು, ಸಿಡಿಯಲ್ಲಿರುವ ಮಾಹಿತಿಯನ್ನು Extension, Hosakote. ಮೊಬೈಲ್ ಸಂಖ್ಯೆ 7019087692 ಆಗಿದ್ದು, ಈ ಬಗ್ಗೆ ದೂರು ದಾಖಲಿಸಿ ಆರೋಪಿಯ ವಿರುದ್ಧ ಕಾನೂನು ರೀತಿಯ ಸೂಕ್ತ ಕ್ರಮ ಜರುಗಿಸಲು ಈ ಮೂಲಕ ನಿವೇದಿಸಿಕೊಂಡಿರುತ್ತೆ.”

This complaint, leads to registration of a crime in Crime No.200/2023 for offence punishable under Section 67B of the IT Act. Whether watching pornography material would attract Section 67B of the IT Act, is what is required to be noticed. Section 67B of the IT Act, reads as follows:

"67 B Punishment for publishing or transmitting of material depicting children in sexually explicit act, etc. in electronic form.

Whoever,-

(a) publishes or transmits or causes to be published or transmitted material in any electronic form which depicts children engaged in sexually explicit act or conduct or

(b) creates text or digital images, collects, seeks, browses, downloads, advertises, promotes, exchanges or distributes material in any electronic form depicting children in obscene or indecent or sexually explicit manner or

(c) cultivates, entices or induces children to online relationship with one or more children for and on sexually explicit act or in a manner that may offend a reasonable adult on the computer resource or

(d) facilitates abusing children online or

(e) records in any electronic form own abuse or that of others pertaining to sexually

explicit act with children, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with a fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees"

Provided that the provisions of section 67, section 67A and this section does not extend to any book, pamphlet, paper, writing, drawing, painting, representation or figure in electronic form-

(i) The publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper writing, drawing, painting, representation or figure is in the interest of science, literature, art or learning or other objects of general concern; or

(ii) which is kept or used for bonafide heritage or religious purposes

Explanation: For the purposes of this section, "children" means a person who has not completed the age of 18 years."

Section 67B of the IT Act punishes those persons who would publish, transmit the material depicting children in sexually explicit acts in electronic form. The soul of the provision is publishing or transmitting of material depicting children in sexually explicit act.

8. The allegation against the petitioner is that he has watched a pornographic website. This, in the considered view of the Court, would not become publishing or transmitting of material, as is necessary under Section 67B of the IT Act. At best, as contended, the petitioner could be a porn addict,

*who has watched pornographic material. Nothing beyond this, is alleged against the petitioner. If the facts are pitted against the ingredients necessary to drive home Section 67B of the IT Act, what would unmistakably emerge is, further proceedings cannot be permitted to be continued, as it would become an abuse of process of law. It would be apposite to refer the judgment of the Apex Court in the case of **STATE OF HARYANA v. BHAJANLAL**¹, wherein it has held as follows:*

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

¹ **1992 Supp(1) SCC 335**

(4) *Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.*

(5) *Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.*

(6) *Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.*

(7) *Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."*

The Apex Court in the afore laid postulates holds that even if the facts that forms the complaint is accepted as true, it would not make out any offence. In such cases, even investigation should not be permitted to be continued. Therefore, the impugned proceedings cannot be permitted to be continued, as it does not make out an offence under Section 67B of the IT Act."

(Emphasis supplied)

7. There appears to be an error committed by this court in the interpretation of Section 67B Information Technology Act, 2008 ('the Act' for short) which mandates that one who publishes, transmits or causes to be published or transmitted

any material in any electronic form which depicts children engaged in sexually explicit act or conduct would make it an offence. Since the petitioner had not transmitted or published or intending to publish any such material, the crime came to be quashed.

8. Section 67B (b) reads as follows:

"(b) creates text or digital images, collects, seeks, browses, downloads, advertises, promotes, exchanges or distributes material in any electronic form depicting children in obscene or indecent or sexually explicit manner or"

It punishes a person who creates text or digital images, collects, seeks, **browses**, downloads, advertises, promotes, any obscene or indecent material depicting children in a sexually explicit manner. The petitioner has admittedly **browsed** a child pornographic website which would contain sexually explicit material of children, for about 50 minutes. Section 67B(b) makes it an offence against any person who **browses** child pornographic material. The word '**browse**' in Section 67B of the Act assumes certain significance as it partakes the character of aiding such material. Therefore, the order that was passed only noticing Section 67B(a) was an error. Making Section 67B (a) applicable to the case at hand

led to quashment of the proceedings against the petitioner as even if it is construed to be as true that the petitioner has viewed pornographic material it would not make out an offence under Section 67B(a) of the Act is what was observed while passing the order.

9. Section 67B(b) as observed hereinabove which makes **browsing** child pornographic sites also punishable was not noticed. Therefore, merely because the petitioner has not transmitted any child pornographic material, it would not absolve the petitioner from the offence under Section 67B(b) of the Act as the offence alleged is not in particular, but entire Section 67B. Therefore, it is an error apart from the fact that the complainant was not heard.

10. The issue now would be, whether this Court could review / recall a final order passed under Section 482 of the Cr.P.C. or it would be a bar under Section 362 of the Cr.P.C. In the considered view of the Court, Section 482 of the Cr.P.C. being inherent powers to prevent injustice, cannot be controlled by other provisions under the Code particularly, of Section 362 of the Cr.P.C.

11. It would become apposite to refer to the three Judge Bench judgment of the Apex Court in the case of **NEW INDIA ASSURANCE COMPANY LIMITED v. KRISHNA KUMAR PANDEY – (2021) 14 SCC 683**, wherein it is held as follows:

*"9. However, Mr Ranji Thomas, learned Senior Counsel appearing for the respondent strenuously contended that in view of the embargo spelt out in Section 362 of the Code, there was no power for the High Court to alter or review the judgment rendered earlier in the revision filed by the respondent, except for the correction of a clerical or arithmetical error. In this regard, the learned Senior Counsel for the respondent placed strong reliance upon the judgment of this Court in State of Punjab v. Davinder Pal Singh Bhullar [State of Punjab v. Davinder Pal Singh Bhullar, (2011) 14 SCC 770 : (2012) 4 SCC (Cri) 496 : (2012) 4 SCC (Civ) 1034 : (2014) 1 SCC (L&S) 208] . **It is his contention that the High Court was right in rejecting the application filed by the appellant under Section 482CrPC for recall/review of its earlier order, as the High Court did not have the power to do so.***

*10. But the above contention of the learned Senior Counsel for the respondent is fallacious for two reasons. The first is that Section 362 of the Code is expressly subjected to "what is otherwise provided by the Code or by any other law for the time being in force." Though this Court pointed out in Davinder Pal Singh [State of Punjab v. Davinder Pal Singh Bhullar, (2011) 14 SCC 770 : (2012) 4 SCC (Cri) 496 : (2012) 4 SCC (Civ) 1034 : (2014) 1 SCC (L&S) 208] **that the exceptions carved out in Section 362 of the Code would apply only to those provisions where the court has been expressly authorised either by the Code or by any other law but not to the inherent power of the court, this Court nevertheless held that the inherent power of the Court under Section 482CrPC is saved, where an order has been passed by the criminal court, which is required to be set aside to secure the ends of justice, or where the proceeding amounts to abuse of the process of court.** In para 46 in particular, this Court held in Davinder Pal Singh [State of Punjab v. Davinder Pal Singh Bhullar, (2011)*

14 SCC 770 : (2012) 4 SCC (Cri) 496 : (2012) 4 SCC (Civ) 1034 : (2014) 1 SCC (L&S) 208] as follows : (SCC p. 795)

"46. If a judgment has been pronounced without jurisdiction or in violation of principles of natural justice or where the order has been pronounced without giving an opportunity of being heard to a party affected by it or where an order was obtained by abuse of the process of court which would really amount to its being without jurisdiction, inherent powers can be exercised to recall such order for the reason that in such an eventuality the order becomes a nullity and the provisions of Section 362CrPC would not operate. In such an eventuality, the judgment is manifestly contrary to the audi alteram partem rule of natural justice. The power of recall is different from the power of altering/reviewing the judgment. However, the party seeking recall/alteration has to establish that it was not at fault."

11. *The case on hand is one where the respondent secured an order from the High Court, behind the back of his employer that his conviction will not have an impact upon the service career of the respondent. The High Court did not have the power to pass such an order. If at all, the High Court could have invoked, after convicting the respondent, the provisions of the Probation of Offenders Act, 1958, so that the respondent could take shelter, if eligible, under Section 12 of the said Act. In this case, the High Court ventured to do something which it was not empowered to do. Therefore, the respondent cannot take umbrage under Section 362CrPC. The second reason why the argument of the learned Senior Counsel for the respondent is fallacious is that the respondent himself was a beneficiary of what he is now accusing the appellant of. As we have stated earlier, the criminal revision petition filed by the respondent in Cr.R. No. 402 of 2012 was disposed of by the High Court by a judgment dated 29-6-2012 [Rajkumari Pandey v. State of M.P., 2012 SCC OnLine MP 4397] . Thereafter the respondent moved a miscellaneous application in Criminal Case No. 8951 of 2012 purportedly for the correction of the order. There was neither an arithmetical nor a clerical error in the judgment of the High Court, warranting the invocation of Section 362CrPC. The respondent cleverly borrowed the language of Section 362CrPC to affix a label to his petition and the High Court fell into the trap. After having invited an order, which, by the very same argument of the respondent, could not have been passed, it is not open to the respondent today to contend that*

there was no jurisdiction for the High Court to pass such an order. It is nothing but a case of pot calling the kettle black."

The Apex Court holds that power to recall and review an order can be exercised under Section 482 of the CrPC and Section 362 would not operate as a bar in certain circumstances. Later, the Apex Court in **DAXABEN v. STATE OF GUJARAT – 2022 SCC OnLine SC 936**, has held as follows:

"21. In Krishna Kumar Pandey (supra) this Court referred with approval, to the judgment of this Court in State of Punjab v. Davinder Pal Singh Bhullar⁶ where this Court held that the High Court was not denuded of inherent power to recall a judgment and/or order which was without jurisdiction, or in violation of principles of natural justice, or passed without giving an opportunity of hearing to a party affected by the order or where an order was obtained by abusing the process of Court which would really amount to its being without jurisdiction. Inherent powers can be exercised to recall such orders.

22. The High Court rightly found, in effect, that it had the inherent power to recall a judgment and/or order which was without jurisdiction or a judgment and/or order passed without hearing a person prejudicially affected by the judgment and/or order. The High Court, however, fell in error in not recalling the order dated 20th October 2020. The High Court did not address to itself, the question of whether it had jurisdiction to quash a criminal complaint under Section 306 of the IPC, which is a grave non-compoundable offence, entailing imprisonment of ten years, on the basis of a settlement between the parties.

23. The High Court erred in declining the prayer of the Appellant for recalling its order dated 20th October 2020, passed without hearing the wife of the deceased only because the original informant/complainant, a cousin brother and an employee of the deceased had been heard. Hearing a cousin-cum-employee of the deceased cannot and does not dispense

with the requirement to give the wife of the deceased a hearing. The wife of the deceased would have greater interest than cousins and employees in prosecuting accused persons charged with the offence of abetting the suicide of her husband.

*24. Be that as it may, since the initial order dated 20th October 2020 is also under challenge in these appeals, it is really not necessary for this Court to delve deeper into the question of whether a final order passed under Section 482 of the Cr.P.C. quashing an FIR could have, at all, been recalled by the High Court, in the absence of any specific provision in the Cr.P.C. for recall and/or review of such order. **The High Court has, in effect, held that in exceptional circumstances, such orders can be recalled, in exercise of the inherent power of the High Court, to prevent injustice.**"*

(Emphasis supplied)

The Apex Court holds that in exceptional circumstances a final order passed under Section 482 of the Cr.P.C. can be recalled in exercise of inherent power of the High Court to prevent injustice. The circumstances considered by the Apex Court permitting recall of an order to prevent injustice are four fold. Two of the folds are present in the case at hand. One fold being violation of principles of natural justice and the other is, prevention of injustice. Two such circumstances in the case at hand are that the complainant/the agency Cyber tipline which tracks browsing child pornographic website is not made a party and, therefore, was not heard in the matter, apart from the fact that the allegation against the petitioner clearly makes out an

offence under Section 67B(b) of the Act. The other circumstance is to prevent injustice. If Section 67B(a) was only looked into, it would have become unjust, as Section 67B(b) was the one that was applicable to the case at hand.

12. Errors do happen; to err is human; we Judges are also humans, infallibility is not known to humanity and, therefore at times we are fallible. Fallibility is not alien to the functions that judges perform. To rectify the error is the compulsion of the judicial conscience. To eternalize or immortalize the error, after coming to know of it, is no heroism. In the aforesaid circumstances answering the judicial conscience, compelling enough it is, apart from it being legally expedient, I deem it appropriate to recall the order dated 10th July, 2024 passed in Criminal Petition No.13141 of 2023, restore the petition to file for being re-heard.

**Sd/-
JUDGE**