

**IN THE HIGH COURT AT CALCUTTA  
CRIMINAL REVISIONAL JURISDICTION  
APPELLATE SIDE**

The Hon'ble **JUSTICE SUVRA GHOSH**

**CRAN 1 of 2024  
in  
CRR 4314 of 2024**

**UBS Switzerland AG  
v/s.  
The State of West Bengal & Anr.**

For the Applicants/Opposite Parties: Mr. Ayan Bhattacharjee, Adv.,  
Mr. A.K. Dey, Adv.,  
Mr. Bhaskarmay Dey, Adv.  
Mr. Shounak Mondal, Adv.,

For the Petitioner: Mr. Sanjay Banerjee, Adv.,  
Mr. Srinivas Chatti, Adv.,  
Ms. Aishwariya Wagle, Adv.,  
Ms. Labony Ray, Adv.,

Judgment delivered on: 21-02-2025

**SUVRA GHOSH, J. :-**

1. The short question which falls for consideration before this Court in the present application is whether after disposing of a revisional application finally, this Court can recall the said order on the ground of breach of the principle of *audi alteram partem* despite the fetters of section 362 of the Code of Criminal Procedure.
2. The revisional application was preferred by the petitioner seeking quashing of an order passed by the learned Additional District Judge, 12<sup>th</sup> Court, Alipore cum learned Judge, Special Court, under the NDPS Act on 12<sup>th</sup> August, 2024 in Criminal Motion no. 213 of 2024. By the said order the learned Judge had dispensed with issuance of notice under section

105 of the Code of Criminal Procedure upon the petitioner/defacto complainant herein since the defacto complainant was found to be represented by learned advocate before the learned Chief Judicial Magistrate and was also present before the learned Judge on the relevant date. This Court, by the order passed on 4<sup>th</sup> October, 2024 considered the submission made on behalf of the petitioner and directed issuance of notice upon the defacto complainant/petitioner under section 105 of the Code of Criminal Procedure by setting aside the order dated 12<sup>th</sup> August, 2024 passed by the learned Additional Judge, Special Court. The 6<sup>th</sup> and 7<sup>th</sup> opposite parties (hereinafter referred to as the applicants) have filed the present application praying for recalling the said order dated 4<sup>th</sup> October, 2024 on the ground that reasonable opportunity of hearing was not granted to them before passing the said order.

3. Learned counsel for the applicants has submitted that no notice was served upon the applicants and no opportunity of hearing was granted to them before the order was passed. The applicants have been deprived of the right to a fair hearing, thereby violating the *audi alteram partem* rule of natural justice. The bar under section 362 of the Code of Criminal Procedure cannot operate as a fetter for recalling the order which was passed in breach of natural justice which is primordial law.
4. There is no statutory appellate remedy available to a litigant from an order passed by this Court in this jurisdiction and the provision under Article 136 of the Constitution of India is subject to taking special leave and cannot be construed to be a statutory appellate remedy. Further,

even if such remedy is available, a litigant who has suffered an order behind his back cannot be asked to avail of such remedy.

5. The provision under section 362 of the Code rests on the principle of *functus officio* and cannot place a fetter on the recalling of an order passed in breach of the principle of natural justice.
6. This Court is a Court of record in terms of Article 215 of the Constitution and has the jurisdiction to recall its own orders. The applicants pray for recalling the order and affording an opportunity of hearing to them.
7. Learned counsel has placed reliance on the authorities in A.R. Antulay v/s. R.S. Nayak & Anr. reported in (1988) 2 Supreme Court Cases 602, State of Punjab v/s. Davinder Pal Singh Bhullar reported in (2011) 14 Supreme Court Cases 770, Municipal Corporation of Greater Mumbai & Anr. v/s. Pratibha Industries Ltd. & Ors. reported in AIR 2019 Supreme Court (CIVIL) 971, Ganesh Patel v/s. Umakant Rajoria reported in 2022 Supreme Court Cases OnLine Supreme Court, 2050, Greater Noida Industrial Development Authority v/s. Prabhjit Singh Soni & Anr. reported in [2024] 2 S.C.R. 258, Rupa Ashok Hurra v/s. Ashok Hurra & Anr. reported in (2002) 4 Supreme Court Cases 388, S.L. Kapoor v/s. Jagmohan and Ors. reported in (1980) 4 Supreme Court Cases 379 and Institute of Chartered Accountants of India v/s. L.K. Ratna and Ors. reported in (1986) 4 Supreme Court Cases 537 in support of his contention.
8. Per contra, learned counsel for the petitioner has submitted that section 362 of the Code lays down a specific bar in altering or recalling an order under the Code of Criminal Procedure after the order disposes of an

application finally, except to correct a clerical or arithmetical error. Upon disposal of an application, the Court becomes functus officio and cannot sit in review of its own judgment. The order cannot be nullified/recalled merely because the rule of *audi alteram partem* was not adhered to. Breach of *audi alteram partem* by itself, cannot lead to the conclusion that prejudice is caused and infraction per se does not lead to invalidity of the order passed. Prejudice should be caused as a matter of fact, or be based upon a definite inference of likelihood of prejudice flowing from the non-observance of natural justice.

9. Inherent power under section 482 of the Code is intended to prevent abuse of the process of the Court and to secure the ends of justice and cannot be exercised to do something which is expressly barred under the Code, *moreso*, when there is no change in circumstance. Even if *audi alteram partem* is to apply, it may be a good ground to seek interference from an appellate forum and not from the same forum. Since the order was passed by exercise of inherent power of the Court upon hearing the petitioner at length, the Court has become functus officio and cannot review the same on merits. It is not the case of the applicants that the order was obtained by practising fraud on the Court or suppressing material facts and an order granted upon due consideration of the facts and material on record cannot be reviewed. Learned counsel has distinguished the judgments relied upon by the applicants and has prayed for dismissal of the application.
10. Learned counsel has placed reliance on the authorities in Abdul Basit @ Raju & Ors. v/s. Mohd. Abdul Kadir Chaudhary reported in [(2014) 10

Supreme Court Cases 754], Dipak Kumar Mondal & Ors. V The State of West Bengal [2023 Supreme Court Cases Online Cal 1706], Grindlays Bank Ltd. v/s. Government Industrial Tribunal & Ors. [1980 (supp) Supreme Court Cases 420], State of U.P. v/s. Sudhir Kumar Singh and Ors. [(2021) 19 Supreme Court Cases 706], Simrikhia v/s. Dolley Mukherjee and Chhabi Mukherjee and Ors. [1990 INSC 73], State of Punjab v/s. Davinder Pal Singh Bhullar [(2011) 14 Supreme Court Cases 770] and Suresh T. Kilachand v/s. Sampat Shripat Lambate [1991 Supreme Court Cases OnLine Bom 448] in support of his contention.

11. The petitioner/complainant preferred the revisional application assailing an order passed by the learned Judge, Special Court under the NDPS Act, 12<sup>th</sup> Court, Alipore on 12<sup>th</sup> August, 2024 in Criminal Motion no. 213 of 2024. By the said order, the learned Judge dispensed with issuance of notice under section 105 of the Code of Criminal Procedure with an observation that the learned counsel for the petitioner/complainant was found present before the learned Court on the relevant date. By an order passed on 4<sup>th</sup> October, 2024 this Court allowed the revisional application without service of notice upon the opposite parties and set aside the order impugned dated 12<sup>th</sup> August, 2024 and also directed issuance of notice upon the petitioner/complainant under section 105 of the Code of Criminal Procedure. Since the order was passed without an opportunity of hearing being granted to the opposite parties, the opposite parties seek recalling of the order and an opportunity of hearing on the ground of violation of natural justice.

12. At the outset, section 362 of the Code of Criminal Procedure is required to be set out:-

*“362. Court not to alter judgment. - 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 of final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error.”*

13. The provision restricts the Court from altering or reviewing its judgment or final order except to correct a clerical or arithmetical error.

14. The difference between recall and review has been dealt with by the Hon'ble Supreme Court on various occasions. In the words of the Hon'ble Supreme Court in Ganesh Patel (supra), an application for recall of an order is maintainable as it is an application seeking a procedural review and not a substantive review to which section 362 of the Code would be attracted. The authority in State of Punjab (supra) demonstrates that a judgment pronounced in violation of principles of natural justice or without giving an opportunity of hearing to the party affected by it amounts 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 provision of section 362 of the Code 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.

15. Learned counsel for the applicants/opposite parties has placed reliance on a catena of judgments to demonstrate that the provision of section 362

of the Code would yield to the principle of natural justice which is an inalienable facet of Article 14 of the Constitution of India.

16. The authority in *Grindlays Bank Limited* relied upon by the petitioner/complainant distinguishes between a procedural review and a review on merits and observes that no review lies on merits unless a statute specifically provides for it. However, a review due to a procedural defect must be corrected by the same Court to prevent abuse of its process.
17. The authority in *State of U.P (supra)* deals with prejudice caused to a person complaining of breach of natural justice. The judgment says that when such person does not dispute the case against him, no prejudice can be said to have been caused.
18. In the present case, the applicants/opposite parties, not being aware of the revisional application since no notice was served upon them, the question of estoppel, acquiescence, waiver, non-challenge or non-denial does not arise.
19. In the authority in *Simrikhia (supra)*, a second application filed under section 482 of the Code filed after dismissal of the earlier application was considered as a review of the earlier application, contrary to section 362 of the Code. The *ratio decidendi* of the said authority can be distinguished from the fact situation of the present case.
20. Last but not the least, the High Court being a Court of record in terms of Article 215 of the Constitution of India, the jurisdiction to recall its own order is inherent by virtue of the fact that it is a superior Court of record.

This has been recognised in several judgments of the Hon'ble Supreme Court including that of Municipal Corporation of Greater Mumbai (supra).

21. In view of the law laid down by the Hon'ble Supreme Court in the authority in State of Punjab (supra), this Court is inclined to hold that allowing the revisional application ex parte without granting an opportunity of hearing to the applicants/opposite parties is de hors the principles of audi alteram partem and has resulted in violation of natural justice. Under such circumstance, the bar under section 362 of the Code shall not operate and inherent power of this Court can be exercised to recall the order and grant an opportunity of hearing to the applicants/opposite parties.
22. Accordingly, CRAN 1 of 2024 is allowed.
23. The order dated 4<sup>th</sup> October, 2024 in CRR 4314 of 2024 is set aside.
24. The revisional application is restored to its file and number.
25. Let the matter appear under the heading "Fixed Matters" on 18<sup>th</sup> March, 2025.
26. Urgent certified website copies of this judgment, if applied for, be supplied to the parties expeditiously on compliance with the usual formalities.

**(Suvra Ghosh, J)**