

**(1993) 03 OHC CK 0007**

**In the Orissa High Court**

**Case No :** Original Jurisdiction Case No. 738 of 1993

Amiya Kumar Mohanty and Another

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

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**Date of Decision :** 31-03-1993

**Acts Referred:**

Constitution of India, 1950 — Article 226, 227

Criminal Procedure Code, 1973 (CrPC) — Section 209

**Citation :** (1993) 1 OLR 532

**Hon'ble Judges :** B.L. Hansaria, C.J.; S.K. Mohanty, J

**Bench :** Division Bench

**Advocate :** D. Panda, for the Appellant; S.K. Das, Government Advocate, for the Respondent

**Final Decision :** Dismissed

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## Judgement

B.L. Hansaria, C.J.—The petitioners are facing trial under the Narcotic Drugs and Psychotropic Substances Act, 1985. Their case is that they have been kept under illegal confinement as by no legal order they have been remanded to custody. Shri Panda submits that the SDJM, under whose orders, as would appear from the xerox copy of the jail warrant dated 8-1-1993 filed by the learned Additional Standing Counsel, they were kept in custody, was not competent to ask the Officer-in-charge of the jail to do so, because by the date this order was passed, the SDJM had no power of commitment, of which reference has been made in the jail warrant. This point has been taken by the learned counsel because though the earlier view of this Court was that in cases governed by the aforesaid Act, a Sessions Judge cannot take cognizance without commitment, a Full Bench of this Court subsequently overruled that decision and held by majority that commitment is not necessary and the Sessions Judge can take cognizance of the offence without commitment. Shri Panda submits that this position was known to the learned SDJM on the date the commitment order was made, which is dated 4-1-1993. The extract of the order-sheet dated 16-12-1992 would show that he received a communication of the Chief Judicial Magistrate, Koraput addressed to

the District Judge that no commitment in such cases shall be necessary henceforth and the case records are to be submitted to the Sessions Judge for the needful. From the order of 4-1-1993, however, we find that the records were received back from the office of the Sessions Judge, Koraput requiring re-submission of the same after commitment.

2. It thus appears that there were two contrary directions-one by the Chief Judicial Magistrate, who, perhaps, being aware of the Full Bench decision asked the SDJM to send the records without commitment, and the other by the office of the Sessions Judge, which sent back the records desiring commitment, which may be because of the fact that the office of the Sessions Judge had not become aware of the decision of the Full Bench. Be that as it may, as at one stage the view taken by this Court was that commitment was necessary and as this decision was reversed subsequently, if in the meantime relying on the earlier decision commitment order was passed u/s 209, Cr PC, we do not think if we would be justified in stating that the commitment has to be taken as a non-est in the eye of law. Such" types of mistake, if the commitment order at hand can be so characterised, do happen when a view taken by a superior Court which is binding on the subordinate judiciary is altered ; and to keep pace with the altered law, some time is needed. But, some people move fast and some slow. We are inclined to think that in such a situation de facto doctrine should operate whose normal field of operation is when a valid order passed by a duly constituted officer comes under challenge on the ground that the appointment of the officer itself was not in accordance with law, because of which a writ of quo warranto is issued. To take care of the order which had been passed by the officer before his appointment had been declared illegal, de facto doctrine is pressed into service, which has to be, because otherwise all the orders passed by such officer would have become illegal and non-operative. The doctrine of de facto had come up for examination in detail by the apex Court in Gokaraju Rangaraju Vs. State of Andhra Pradesh, which was cited with approval in Beopar Sahayak (P) Ltd. and Others Vs. Vishwa Nath and Others, . and State of U.P. Vs. Rafiquddin and Others, .

3. Shri Panda then submits that even while committing the petitioners, no order of remand was passed, as would appear from the order dated 4-1-1993. As to this, we would first observe that Section 209(b). Cr PC states that subject to the provisions of the Code relating to bail, when a case is committed to the Court of Session, the Committing Court shall remand the accused to custody during and until the conclusion of the trial. There is no requirement about passing of any specific order in this regard. Shri Das, learned Government Advocate, brings to our notice in this context the jail warrant, to which we have referred earlier, in which the SDJM has asked the Officer-in-charge of jail to receive the petitioners into his custody and to produce them before the said Court when so required. This direction of the SDJM to keep the petitioners in custody has to be taken as remand of the petitioners to custody. Absence of mention about this in the order of 4-1-1993 has not been taken by us to be sufficient to hold that the SDJM had

not exercised the power of remand conferred by Section 209(b), Cr PC.

4. In this connection, we may also state that Form No. (M) 54 finding place in this Court's General Rules and Circular Orders (Criminal) Volume-II, which deals with what has to find in the communication to be sent to the Officer-in-charge of jail while exercising power u/s 209, Cr PC the aforesaid jail warrant being in the language of this form only requires the Jail Officer to receive the person concerned into custody and produce him before the Court to which he is committed when so desired. As to this form, Shri Panda submits that had been prescribed before Section 209, CrPC had been amended by Act 45 of 1978. That amendment, however, related to Clause (a) of Section 209, whereas we are concerned with Clause (b). The amendment has, therefore, in no way diluted or affected or made redundant or irrelevant the contents of the aforesaid form.

5. In the aforesaid premises, the two submissions advanced by Shri Panda cannot be accepted. So, it cannot be held that the petitioners are under illegal confinement. The petition is, therefore, dismissed.

6. Let a copy of this order be sent to all the Sessions Judges of the State.

S.K. Mohanty, J.

7. I agree.