IN THE GAUHATI HIGH COURT
(THE HIGH COURT OF ASSAM, NAGALAND,MEGHALAYA, MANIPUR, TRIPURA, MIZORAM AND ARUNACHAL PRADESH)
SHILLONG BENCH

Crl. Ptn. (SH) No. 55 of 2011

Shri. Shiv Kumar Agarwal
Son of (L) Rukmananand Mandavewala,
Resident of Bishop Cotton Road,
Shillong, East Khasi Hills, Meghalaya.

..... **PETITIONER**

-versus-

1.The State of Meghalaya represented by the Secretary to the Government of Meghalaya, Home (Police) Department Shillong.

2. Shri. Sajjan K Tharad,
Son of (L) P. Tharad,
C/o M/S Mahado Stores,
Bara Bazar, Shillong.

3. Shri. Jugal Kishor Sharma,
Son of Ram Gopal Sharma,
Sweet Shop
Bara Bazar, Shillong.

4. Shri. Nirmal Kumar Sharma,
Son of (L) Ram Pratap Sharma
Bara Bazar, Shillong.

5. Shri. Ram Gopal Runthala
Son of (L) R.L. Runthala,
Cherra Bus Stand,
Bara Bazar, Shillong.

6. Shri. Bajrang Lal Sharma,
Son of (L) S.P. Sharma,
Chandgothia Building
Bara Bazar, Shillong.

7. Shri. Ramesh Pipalwa,
Son of (L) C.L. Sharma,
Pipalwa Automobile,
Bara Bazar, Shillong.

8. Shri. Rajendra Sharma,

M/S Meghalaya Hotel,
Garikhana, Shillong.

9. Shri. P.D. Chokhani,
Son of (L) J.P. Chokhani,
Paltan Bazar, Shillong.

10 Shri. Santosh Chachan,
Son of (L) Gajanan Chachan,
Garikhana, Shillong.

11. Shri. Gauri Shankar Sharma,
Mawlonghat, Shillong.

12. Shri Sanjay Khemani,
Son of (L) D.D. Khemani,
Qualapati, Shillong

..... **RESPONDENTS**

BEFORE
THE HON'BLE MR JUSTICE T VAIPHEI

Advocate for the Petitioner	:	Mr.HS. Thangkhiew,Sr. Adv Mr. L. Khyriem Mr. P. Nongbri Mr. N. Mozika Mr. L. Byrsat Ms. A. Thangkhiew Mr. PW Nongbri
Advocate for the Respondents	:	Mr. ND Chullai, Public Prosecutor : Mr. MF Qureshi.
Date of Hearing	:	11.09.12
Date of Judgment and Order	:	30-10-2012

JUDGMENT AND ORDER

Whether a Magistrate can take cognizance of a non-cognizable offence punishable under Section 500 IPC on the basis of the police

report submitted by the police under Section 173(2) Code of Criminal Procedure (CrPC) while investigating both a cognizable offence and a non-cognizable offence under Section 155(4) CrPC even after the accused is discharged from the cognizable case, is the moot point in this criminal petition under Section 482 CrPC.

2. The controversy arose when, on 14-11-2005, the respondents No. 2, 3 and 4 lodged an FIR before the Officer-in-Charge of Shillong Sadar Police Station alleging that the petitioner and his associates have printed pamphlets and distributed them in and around Shillong calling them as anti-social elements, etc. with the intention to create enmity, hatred and ill-will between different communities and people and that the publications have damaged their reputation and prestige in the market. Again, on 16-11-2006, another FIR was lodged by the same respondents over the same allegations. Both the FIRs were jointly registered as Shillong Sadar Police Station Case No. 176(11)05 U/s 505(2)/500/34 dated 16-11-2007. On 10-2-2006, the police, after completion of the investigation, submitted the charge sheet under Section 173 CrPC before the learned Chief Judicial Magistrate, Shillong, who, after hearing the parties, framed the charges under Sections 505(2)/500 IPC. Admittedly, the offence punishable under Section 505(2) IPC is a cognizable offence, but the police did not obtain the previous sanction of the State Government or District Magistrate under Section 196(1A) CrPC for prosecuting the petitioner. This prompted him to move this Court under Section 482 CrPC for quashing the charge against him under Section 505(2) IPC. This Court in ***Criminal Petition No. 10(SH) of 2010*** passed the order dated 4-2-2011 quashing the charge against the petitioner

under Section 505(2) IPC and remanded the case to the learned Chief Judicial Magistrate, Shillong for further proceeding against him for the offence of Section 500 IPC. Before the trial court, the petitioner prayed for dropping the proceeding against him by contending that the proceeding was without jurisdiction inasmuch as the final report under Section 173 CrPC submitted by the police cannot be construed to be a complaint as the same was not filed by an aggrieved person as provided for in Section 199 CrPC. The trial court by the impugned order rejected the application. This is how this second round of litigation is launched by the petitioner.

3. Attacking the impugned order, Mr. N. Mozika, the learned counsel for the petitioner, contends that the final report under Section 173 CrPC was submitted by the police after investigation, and not on the basis of the complaint lodged by an aggrieved person and the police cannot be construed to be an aggrieved person within the meaning of Section 199 CrPC, and the taking of cognizance of the offence by the trial court when the complaint was not filed by an aggrieved person is wholly illegal and without jurisdiction. It is also the submission of the learned counsel that Section 155(4) CrPC undoubtedly permits the police to proceed with the investigation if the case relates to two or more offences in which at least one of them is a cognizable offence even if the other offences are non-cognizable offences, but this provision is a general provision which cannot override Section 199 IPC requiring a complaint to be made only by an aggrieved person, which cannot be circumvented by the police by filing a charge sheet under Section 173 CrPC: what cannot be done directly cannot be done indirectly. He further argues that the

offence of defamation is a private offence which necessarily implies that the complaint is to be lodged by a private person except in case of the President of India, Vice-President of India, Governor of a State, the Administrator of Union Territory or a Minister of the Union, or of a State, or a Union Territory or any other public servant employed in connection with the affairs of the Union of a State and the prosecution to be conducted by a private counsel and not by an Assistant Public Prosecutor, and the trial court has completely overlooked this vital provision of law and has in the process acted illegally in framing the charge against the petitioner under Section 500 IPC. Mr. N.D. Chullai, the learned Public Prosecutor, defends the impugned order and submits that once a non-cognizable offence like Section 500 IPC has been investigated by the police together with a cognizable offence, which is permissible under Section 155(4) CrPC, the prosecution of the petitioner on the basis of the charge sheet filed by the police cannot be faulted with and cannot be hit by Section 199(1) CrPC. He, therefore, contends that the criminal petition has no merit and is, rather, an abuse of process of Court. Mr. M.F. Qureshi, the learned counsel for the private respondents supports the submission of the learned Public Prosecutor and submits that no interference is called for in the impugned order.

4. I have given my thoughtful consideration to the rival submissions advanced by the learned counsel appearing for the parties. As noticed earlier, initially, the two FIRs filed by the respondents were jointly registered by the Shillong Sadar Police Station as Case No. 176(11)05 U/s 505(2)/500 IPC. As one of the offences alleged against the petitioner was a cognizable offence, namely, Section 505(2) IPC, by virtue of the

legal fiction introduced in Section 155(4) CrPC, the case was deemed to be a cognizable offence. Once the case was deemed to be a cognizable offence, there was no legal impediment in investigating the case by the police. After the case was investigated by the police, the charge-sheet was submitted by them to the learned Magistrate under Section 173 CrPC for trying the petitioner under Section 505(2)/500 IPC. However, the charge made against the petitioner under Section 505(2) IPC was quashed by this Court on the ground that no prosecution sanction U/s 196(1A) CrPC was obtained by the police. The net result is that the trial court had to proceed with consideration of the charge under Section 500 IPC and, after hearing the parties, framed the charge accordingly by rejecting the prayer of the petitioner for dropping the charge against him. Section 155(2) CrPC prohibits a police officer from investigating a non-cognizable offence without the order of a Magistrate having the power to try such case or commit the case for trial. However, an exception is carved out from Section 155(4) CrPC for enabling the police to investigate even a non-cognizable offence if the case relates to both a cognizable offence and a non-cognizable offence. Section 155(4) CrPC is in the following terms:

"155.(1) *** *** ***

(2) *** *** ***

(3) *** *** ***

(4) Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable."

5. The aforesaid sub-section was introduced in CrPC in 1973 to overcome the controversy about investigation of non-cognizable offences by the police without the leave of the Magistrate. Under this sub-section, if the facts reported to the police disclose both cognizable and non-cognizable offences, the police would be acting within the scope of its authority in investigating both the offences as the legal fiction enacted in sub-section (4) provides that even a non-cognizable case shall, in that situation, be treated as cognizable. The law is now well-settled that in interpreting a provision creating a legal fiction, the Court is to ascertain for what purpose the fiction is created, and after ascertaining this, the Court is to assume all those facts and consequences which are incidental or inevitable corollaries to the giving effect of the fiction. But in so construing the fiction it is not to be extended beyond the purpose for which it is created, or beyond the language of the section by which it is created. In an oft-quoted passage, LORD ASQUITH stated: "If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequence and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs. "Thus", JUSTICE G.P. SINGH vividly explains, "if A is deemed to be B, compliance with A is in law compliance with B and then contravention of A is in law contravention of B". In my opinion, with the help of this legal fiction, it can be said that once a non-cognizable offence like Section 500 IPC is deemed to be a cognizable offence, the logical and inevitable

conclusion flowing therefrom is that the learned Magistrate is to treat the offence of Section 500 IPC as a cognizable offence and frame the charge against the petitioner under Section 500 IPC on the basis of the charge sheet submitted by the police. This is, however, subject to condition that a prima facie case for prosecuting him is made out notwithstanding that under Section 199(1) CrPC a complaint to that effect by an aggrieved person is required. The controversy is now resolved by the Apex Court in ***State of Orissa v. Sharat Chandra Sahu and another, (1996) 6 SCC 435*** wherein it was held that:

> *"11. Sub-section (4) creates a legal fiction and provides that although a case may comprise of several offences on which some are cognizable and others are not, it would not be open to the police to investigate the cognizable offences only and omit the non-cognizable offences. Since the whole case (comprising of cognizable and non-cognizable offences) is to be treated as cognizable, the police had no option but to investigate the whole of the case and to submit a charge sheet in respect of all the offences, cognizable and non-cognizable both, provided it is found by the police during investigation that the offences appear, prima facie, to have been committed.*
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> *12. Sub-section (4) of Section 155 is a new provision introduced for the first time in the Code of 1973. This was done to overcome the controversy about investigation of non-cognizable offences by the police without the leave of the Magistrate. The statutory provision is specific, precise and clear and there is no ambiguity in*

the language employed in sub-section (4). It is apparent that if the facts reported to the police disclose both cognizable and non-cognizable offences, the police would be acting within the scope of its authority in investigating both the offences as the legal fiction enacted in sub-section (4) provides that even a non-cognizable case shall, in that situation, be treated as cognizable."

5. From the aforesaid observations made by the Apex Court, it becomes clear that once you imagine, by legal fiction under Section 155(4) CrPC, a non-cognizable offence like Section 500 IPC when tagged with a cognizable offence like Section 505(2) IPC to be a cognizable offence, you must give full effect to the statutory fiction and carry it to its logical conclusion i.e. you should also treat the non-cognizable case as a cognizable offence till the end of the trial provided that there is prima facie case for the trial even though there is no complaint from the aggrieved person under Section 199(1) CrPC: the fact that the cognizable offence of Section 505(2) IPC has been quashed by this Court earlier is immaterial, and is no ground to stop treating the case as a cognizable case and drop the proceeding on the ground of absence of complaint by an aggrieved person. Any other construction will be doing violence to the legal fiction introduced by the legislature. If the contention of the petitioner is accepted, then it will amount to saying that after investigation of the case, if the facts disclose only a non-cognizable offence, the case must be dropped for want of complaint from an aggrieved person: this could not have been the intention of the Legislature in introducing the legal fiction in Section 155(4) CrPC. In other words, even after the cognizable offence of Section 505(2) IPC

against the petitioner was quashed by this Court, the offence under Section 500 IPC is still deemed to be a cognizable offence by virtue of legal fiction introduced in Section 155(4) CrPC.

6. An analogy can be drawn from the recent decision of the Apex Court in ***Ushaben v. Kishorbhai Chunilal Talpada, (2012) 6 SCC 353,*** which was a case of Section 494 IPC and Section 498-A IPC. Section 198(1) CrPC says that no Court shall take cognizance of the offence under Section 494 IPC except on a complaint filed by "aggrieved person", while cognizance of the offence under Section 498-A IPC can be taken by a Court even on police report. It was held by the Apex Court that where a complaint contains allegations of commission of offences both under Section 498-A IPC (a cognizable offence) as well as Section 494 IPC (non-cognizable offence), Court can take cognizance thereof even on a police report: a complaint by an aggrieved person under Section 198-A CrPC is thus not necessary for taking cognizance of the offence under Section 494 IPC. Though the decision in ***Ushaben case*** *(supra)* was rendered in the context of Sections 494/498-A IPC and Section 198-A CrPC, the underlying principles therein, *ex proprie vigour*, will apply in this case also. In the view that I have taken, the learned Chief Judicial Magistrate/Shillong has rightly held that the case against the petitioner could not be dropped. No interference is thus called for.

7. The off-shoot of the foregoing discussion is that there is no merit in this criminal petition, which is hereby dismissed. The trial court shall now proceed with the trial of the case expeditiously. The interim order

stands vacated. The parties are directed to appear before the trial court on 12-11-2012.

JUDGE

V.Lyndem