HIGH COURT OF ORISSA : CUTTACK

CRLMC No. 1525 of 2003

In the matter of an application under Section 482 of the Code of Criminal Procedure.

Sarat Chandra Rath
and two others ... ... Petitioners

-Versus-

Malti Tandi ... ... Opposite Party No.1

State of Orissa ... ... Opposite Party No.2

For Petitioners : M/s. B.Routray, A.K.Baral, D.K.Mohapatra, B.N.Satpathy, B.B.Routray,P.K.Dash, D.Mohapatra & D.Routray

For Opposite Parties : None (for O.P.No.1)

Addl. Government Advocate (for O.P.No.2)

PRESENT :

THE HONOURABLE SHRI JUSTICE S.C. PARIJA

Date of Judgment : 16.05.2014

S.C. Parija, J. This application under Section 482 Cr.P.C. has been filed praying for quashing of the criminal proceeding initiated against the petitioners in I.C.C.No.08 of 1991, pending before the learned S.D.J.M., Titilagarh and the order of cognizance dated 06.8.2002

passed therein, taking cognizance of offences under Sections 376/342/506/34 I.P.C and directing issue of N.B.W.(A) against the present petitioners.

2. The brief facts of the case, as detailed in the application is that on 27.11.1990 at about 10 A.M. a written report was lodged at the Tikarpara Police Out-post disclosing the fact that one Gadi Tandi of village Phatamunda was murdered in the preceding night. One Agasti Tandi along with some other persons of the same village were suspected in commission of the said crime. On the said allegation, Saintala P.S. Case No.107 of 1990 was registered on 28.11.1990 for the offence under Section 302 Indian Penal Code and the investigation was taken up. The petitioner no.1, Sarat Chandra Rath, the then O.I.C. of Saintala Police Station coming to know about the report, arrived at Tikarpara Out-post and took charge of the investigation from A.S.I., Muralidhar Mishra. Constable Saranga Gahir, who was watching the dead body at the spot, after inquest over the dead body was done, was asked by the O.I.C. to take the dead body to Patnagarh Hospital for post-mortem. The said constable was accompanied by the Gramrakhi, Gobardhan Nag. After post-mortem was conducted over the dead body, Gobardhan Nag and the Constable S.Gahir returned from Patnagarh on 28.11.1990 night.

3. That on 28.11.1990, the Circle Inspector, S.D.Singh, D.N.Mishra, S.D.P.O., Titlagarh and Himmath Kumar Pradhan,

Scientific Officer, Sambalpur, along with staff arrived at the spot in village Phatamunda for supervision. The petitioners along with aforesaid officers and staff after finishing the work for the day, left for Tikarpara Out-post in the evening. As per the direction of the S.D.P.O., Titlagarh, petitioner no.2 M.P.Karua took over the charge of investigation of Saintala P.S. Case No. 107 of 1990 from O.I.C., S.C.Rath.

4. That on 28.11.1990 all the suspected persons and witnesses of village Phatamunda viz. the opposite party Malti Tandi, who is the wife of accused Agasti Tandi, father and brother of Agasti Tandi, aunt Champa Tandi, village headman Rudramani Meher, Meheswar Bhoi and others were called to the Out-post by police Havildar Manglu Bhoi. The suspects were interrogated and the witnesses were examined by the I.O. M. P. Karua at the Out-post in the night of 28.11.1990. After finishing the enquiry, the S.D.P.O., C.I., Titlagarh, Scientific Officer, Sambalpur and O.I.C., Saintala P.S. in the late night on 28.11.1990 left the Out-post for their respective destinations. Petitioner No.2 and Havildar Manglu Bhoi remained in the Out-post to continue investigation in the next morning of 29.11.1990. During investigation, accused Agasti Tandi admitted to have murdered the deceased Gadi Tandi in the thrashing floor due to previous enmity. The I.O., being satisfied about the complicity of Agasti Tandi in the crime, arrested him and took him to custody.

Accused Agasti Tandi led the I.O. to the spot and gave recovery of an axe, which was the weapon of offence, in presence of witnesses. Accused Agasti Tandi was forwarded on 29.11.1990 to the Court of learned S.D.J.M., Titlagarh, in Saintala P.S. Case No.107 of 1990 and was remanded to jail custody.

5. That on 05.12.1990, A.C. Mallik took charge of the office of Circle Inspector, Titlagarh, from Inspector Sambhu Dayal Singh. On 12.12.1990 C.I., A.C.Mallik went to Saintala P.S. to verify the pending cases on the direction of S.P., Bolangir, along with his reader A.S.I., Gopal Chandra Sahu, in his office jeep driven by assistant driver, Prasanna Kumar Sahu. On the same day in the evening hour C.I., A.C.Mallik left Saintala P.S. for Tikarpara Out-post for a surprise visit along with the petitioners and his said staff. They arrived at Tikarpara Out-post at about 7 P.M. and inspected the records and registers of the Out-post. The C.I. found some omissions and irregularities committed by A.S.I., Muralidhar Mishra and serious lapses in discharge of his official duty as In-charge of Tikarpara Out-post, which was noted in the Station Diary, vide entry no.303, dated 12.12.1990.

6. Malti Tandi-opposite party no.1 lodged a written report before the S.P., Bolangir on 31.12.1990, alleging that on 28.11.1990 the petitioners came to her house in the evening hour and forcibly raped her. It was further alleged that again in the same night, she was called to Tikarpara Out-post where she was raped by the

petitioners for the second time. It was also alleged in the said written report that on 12.12.1990 she was called to Tikarpara Out-post by the C.I., A.C.Mallik and all of them forcibly raped her inside the said police Out-post. Accordingly, Saintala P.S. Case No. 125 of 1990 was registered on 13.12.19990 against the present petitioners and C.I., A.C.Mallik, for the offences under Section 354/376 I.P.C.

7. As serious allegations were made against the police officers, the investigation of the case, i.e. Saintala P.S. Case No. 125 of 1990, was handed over to the C.I.D., Crime Branch of Orissa Police. While investigation was in progress by the C.I.D., C.B., Orissa, the informant-Malti Tandi filed I.C.C.No.08 of 1991 on 08.2.1991, in the Court of the learned S.D.J.M., Titlagarh, against the petitioners and C.I. A.C.Mallik for the offences under Section 376/342 read with Section 34 I.P.C. After receiving the complaint petition, the learned Magistrate called for a report under Section 210 Cr.P.C. from the I.O. of Saintala P.S. Case No. 125 of 1990, corresponding to G.R. Case No.377 of 1990. Inspector C.I.D., C.B., after completion of investigation, on the basis of the materials collected during investigation, came to the conclusion that the allegations made by the Malti Tandi (informant) were false and fabricated and not supported by any evidence. Accordingly, the Inspector, C.I.D., C.B., after obtaining orders from the Inspector General of Police, submitted Final Report in

Saintala P.S. Case No.125 of 1990 before the concerned Magistrate on 18.6.1992, observing that the case is false.

8. Though the complaint case was filed on 08.2.1991, vide 1CC No.08 of 1991, the initial statement of the complainant-opposite party no.1 was recorded after a lapse of more than nine years, only on 27.7.2000. She was examined under Section 202 Cr.P.C. as witness no.1 on 28.7.2000. On the same day, another witness Champa Tandi was examined as witness no.2. Thereafter, on 06.4.2001 the ASI of Police, Muralidhar Mishra was examined under Section 202 Cr.P.C., as witness no.3. The complainant, inspite of several opportunities, declined to examine other witnesses named in the complaint.

9. Learned S.D.J.M., Titlagarh, vide order dated 06.8.2002, took cognizance of offences under Sections 342/506/376/34 I.P.C. against the present petitioners and directed issue of process. On appearance, the petitioners filed an application to recall the order taking cognizance and to drop the proceeding. Learned Magistrate vide order dated 12.5.2003 rejected the application of the petitioners, hence this application.

10. It is the case of the petitioners that the allegations made against them that they committed rape on the informant Malti Tandi on 28.11.1990 and again on 12.12.1990 are false, fabricated and inherently improbable, in view of the fact that on 12.12.1990 the C.I.,

A.C.Mallik went to Tikarpara Out-post along with the petitioners and other police staff. The official tour diary of the C.I. will show that he along with other officers of Saintala P.S. left Tikarpara Out-post and arrived at Saintala P.S. about 11.30 P.M. on 12.12.1990. Soon after that, the C.I. sent a message to the S.P., Bolangir, about the misconduct of A.S.I., M.D.Mishra of Tikarpara Out-post. Therefore, the allegations that the C.I., A.C.Mallik, kept the informant confined inside the inspection room of Tikarpara Out-post and committed rape on her must be held as inherently improbable. Moreover, the informant had stated before the Inspector, Crime Branch, that the C.I., A.C.Mallik along with the present petitioners had committed rape on her on 12.12.1990 night, although the F.I.R. lodged by her does not implicate the petitioners for taking part in commission of the alleged crime on 12.12.1990.

11. It is the further case of the petitioners that there are inherent contradictions in the statements of complainant-opposite party no.1 recorded under Section 200 Cr.P.C. and the statement of the A.S.I., M.D.Mishra, recorded under Section 202 Cr.P.C. in the complaint case. Relevant portions of the statement of the complainant under Section 200 Cr.P.C. is as follows:

> "When I protested accused persons dragged my clothes, the accused persons attempted rape on me one after another.
>
> xxx xxx xxx

> After some day Mallik Babu police officer called me through Gramarakhi, Gobardhan Nag. I went with the Gramarakhi to the Out-post. Mallik Babu was there. He took me to the quarter and committed rape on me. The other three accused persons were present outside."

12. However, the informant in her statement made under Section 161 Cr.P.C. before Inspector, C.I.D., Crime Branch, had stated as follows:

> "Then on dated 12th afternoon the Gramarakhi told me that I was called by Mallik Babu to the Out-post. I went along with my aunt. I was called inside the quarter near the Thana Office where four police persons were present. Mallik Babu committed rape on me. I remained in that quarter for the whole night and those police persons were there in the quarter and then I was raped by four police persons."

13. Relevant portions of statement of Muralidhar Mishra, A.S.I., recorded by the learned Magistrate under Section 202 Cr.P.C. is as follows:-

> "(1)…Saintala O.I.C., S.C.Rath (petitioner no.1), Mohan Pani Karua (petitioner no.2), Giridhari Barik (petitioner no.3) had been to village Phatamunda on 28.11.1990. They asked Malti Tandi about the case. The husband, the brother-in-law and father-in-law of Malti Tandi were arrested and kept at Tikarpara Out-post. Malti Tandi the complainant told me that the above noted police persons dragged her saree and outraged her modesty.
>
> (2)… On 29.1.1990 Malti Tandi was kept in the Inspection room of Tikarpara Out-post in the night. The above noted police personnel also dragged her saree and outraged her modesty in the night, which was told to me by Dhansingh Pradhan, Constable attached to Tikarpara Out-post."

14. Learned counsel for the petitioners submits that when the self-same allegations had been investigated into by the Inspector, C.I.D., C.B. and during investigation, statements of the villagers, relatives of the informant and other police official were recorded and on conclusion of investigation, Final Report was submitted after obtaining approval of the Inspector General of Police, observing that the case is false under Section 354/376 I.P.C., learned Magistrate should have dismissed the complaint, especially when there were no cogent and credible evidence to support the allegations made in the complaint.

15. It is further submitted that as the acts complained of were alleged to have been committed by the present petitioners while investigating a police case as public servant in discharge of their public duties, sanctions under Section 197 Cr.P.C. of the authority concerned was necessary before taking cognizance of the alleged offences.

16. It is accordingly submitted that the impugned order of cognizance dated 06.8.2002, passed in I.C.C.No.08 of 1991, is not sustainable in law and the same is liable to be quashed.

17. None appears for the complainant-opposite party no.1 inspite of service of notice.

18. The Addl. S.P., C.I.D., C.B., Orissa has filed a counter affidavit stating therein that I.C.C.No.08 of 1991 was instituted by the complainant-opposite party no.1 in the Court of the learned S.D.J.M., Titlagarh, during pendency of the investigation by the C.I.D., C.B., in Saintala P.S. Case No. 125 of 1990, which had been registered on the basis of the written report of the complainant dated 31.12.1990, for the self-same incident. It is stated in the said counter affidavit that during course of investigation in Saintala P.S. Case No. 125 of 1990, the victim lady (informant) did not agree for her medical examination and did not produce her wearing apparels and refused to identify the accused persons. It is further stated that the informant had alleged that the accused persons (petitioners) came to her house when she was gossiping with Kandi Tandi. However, during investigation, the said Kandi Tandi denied about such gossip and arrival of the accused persons. It is further stated that investigation also revealed that the husband of the victim lady, namely, Agasti Tandi had been arrested and forwarded to the Court under Section 302 IPC, in Saintala P.S. Case No.107 of 1990.

19. It is further stated in the said counter affidavit that investigation in Saintala P.S. Case No.107 of 1990 disclosed that on 12.12.1990, C.I. A.C.Mallik paid a surprise visit to Tikarpara Out-Post. On perusals of the records of the Out-post, the C.I. expressed his dissatisfaction regarding the maintenance of the records, non-

execution of warrants, suppression of cognizable cases and doubtful integrity of A.S.I. Muralidhar Mishra and recorded the same in the Station Diary. Resultantly, A.S.I., Muralidhar Mishra, being aggrieved, has engineered the allegation of rape against C.I. A.C.Mallik through Malati Tandi. Other officers who were witnesses to the inspection of the C.I. and were also investigating the murder case against the husband of the informant, were also implicated as accused in the said case.

20. It is further stated in the said counter affidavit that during supervision of the case, the Addl. S.P., C.I.D., C.B., Orissa, opined that the allegation of rape is false and accordingly, on the conclusion of investigation, the Inspector, C.I.D., C.B., submitted Final Report, indicating that the allegations made in the F.I.R. are false. It is further stated that after submission of Final Report, the informant (victim lady) has not filed any protest petition in the Court. As the victim lady (informant) had filed complaint case i.e. I.C.C. No.08 of 1991, during pendency of the investigation by the C.I.D., C.B., learned Magistrate tagged the same with G.R. Case No.377 of 1990, arising out of Saintala P.S. Case No.125 of 1990 and after conducting enquiry under Section 202 Cr.P.C., has taken cognizance of offences under Sections 341/506/376/34 I.P.C. against the present petitioners after a long lapse of time.

21. The legal position is well settled that when a prosecution at the initial stage is asked to be quashed, the tests to be applied by the Court is as to whether the uncontroverted allegations as made prima facie establish the offence. Section 482 does not confer any new powers on the High Court. It only saves the inherent power which the Court possessed before the enactment of the Code. It envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases that may possibly arise. Courts therefore, have inherent powers apart from express provisions of law which are necessary for proper discharge of functions and duties imposed upon them by law. That is the doctrine which finds expression in the section which merely recognizes and preserves inherent powers of the High Courts. All courts, whether civil or criminal possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice on the principle "quando lex aliauid alicui concedit, concedere videtur et id sine guo res ipsae esse non potest" (when the law gives a person anything it gives him that without which

it cannot exist). While exercising powers under the section, the court does not function as a court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It is to be exercised ex debito justitiae to do real and substantial justice for the administration of which alone courts exist. Authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent abuse. It would be an abuse of the process of court, to allow any action which would result in injustice and prevent promotion of justice and in exercise of such powers, court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the report or the complaint, the court may examine the question of fact. When a report or complaint is sought to be quashed, it is permissible to look into the materials to assess what the report has alleged and whether any offence is made out even if the allegations are accepted in toto.

22. The scope of exercise of power under Article 226 of the Constitution and Section 482 of the Code and the categories of cases where the High Court may exercise its power under it relating to

cognizable offences to prevent abuse of the process of any Court or otherwise to secure the ends of justice were set out in some detail by the Supreme Court in ***State of Harayana and others v. Ch. Bhajan Lal and others,*** AIR 1992 SC 604. The Hon'ble Court made it clear that 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 to 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 F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under S. 156(1) of the Code except under an order of a Magistrate within the purview of S. 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.
>
> (4) Where, the allegations in the F.I.R. 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 S. 155(2) of the Code.
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> (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."

23. In a earlier decision of this Court, in the case of ***Tribikram Misra v. State of Orissa & another,*** *67 (1989) CLT 729,* a Division Bench of this Court, while dealing with the sustainability of the order of cognizance in absence of prima-facie satisfaction, has held as follows :

> "At the stage of cognizance, however, the court is not required to enter into a detailed discussion of the merits or demerits of the case so as to find out if the allegations and the charges are true or not. It is nevertheless desirable for the court to see that innocent persons are not roped in so as to suffer the rigour of a trial with the sword of Damocles hanging on his head, merely because some of the witnesses make bald statements implicating him in criminal offences. It is also settled law that the Magistrate taking cognizance of offences should not act as an automation and believe and swallow what a few witnesses state about a person having been involved in a criminal offence, but has to apply his judicial mind and test the materials on record with eagle eyes so as to discern the complicity or otherwise of the person concerned. For this purpose, he is bound to give free play to his sense of criticism. Unless this course is adopted at the initial stage of a criminal case, it is very likely that innocent persons would be involved in criminal cases, maybe falsely and without any basis. It is also to be borne in mind that unless this salutary caution is exercised, crafty litigants will be encouraged to implicate innocent persons or their rivals in criminal

> cases by setting up a few band followers to speak against such persons."

24. In the case of ***Punjab National Bank v. Surendra Prasad Sinha,*** AIR 1992 SC 1815, the Supreme Court has observed that judicial process should not be an instrument of oppression or needless harassment. There lies the responsibility and duty on the Magistrate to find out whether the concerned accused should be legally responsible for the offence charged for. Only on satisfying that the law casts liability or creates offence against the accused persons impleaded then only process would be issued. At that stage the Court would be circumspect and judicious in exercising discretion and should take all the relevant facts and circumstances into consideration before issuing process lest it would be an instrument in the hands of the private complaint as vendetta to harass the persons needlessly. Vindication of majesty of justice and maintenance of law and order in the society are the prime objects of criminal justice but it would not be the means to wreak personal vengeance.

25. From the facts aforestated, it is seen that the husband of the complainant-opposite party no.1 was arrested in connection with Saintala P.S. Case No.107 dated 28.11.1990 for commission of offence under Section 302 IPC. During pendency of the investigation in the said case, the complainant lodged a written report before the Supdt. of Police, Balangir, on 31.12.1990, which was registered as Saintala P.S.

Case No.125 of 1990, alleging therein that the petitioners, who are police officers of Saintala Police Station, came to her house in the evening hours on 28.11.1990 and forcibly raped her. It was further alleged that on the same night she was called to the Tikarpara Police Out-post and was again raped by the petitioners. She also alleged in her said written report that on 12.12.1990, she was called to the Tikarpara Police Out-post by the Circle Inspector, A.C.Mallik, who raped her inside the said Police Out-post in the presence of the petitioners.

26. As serious allegations of rape was made against the police officers of Saintala Police Station, the investigation of the case was handed over to the CID, Crime Branch. Without waiting for the completion of the investigation by the Crime Branch, the complainant filed a written complaint before the learned S.D.J.M., Titlagarh, on 08.2.1991, for the self-same alleged incidence of rape against the petitioners and Circle Inspector, A.C.Mallik, which was registered as 1.C.C.No.08 of 1991.

27. During the course of investigation by the Crime Branch into the allegations of rape made against the present petitioners, the Investigating Officer recorded the statement of the victim lady, her relatives and other witnesses under Sections 161/164 Cr.P.C. As no materials were forthcoming in support the allegations made in the

F.I.R. and the victim lady did not agree for her medical examination and did not also produce her wearing apparels for chemical examination and even declined to identify the accused persons, the Investigating Officer submitted Final Report dated 18.6.1992 in the Court of the learned S.D.J.M., Titlagarh, as the allegations made in the F.I.R. were found to be false, after obtaining necessary orders from the Inspector General of Police, Crime Branch.

28. It is further seen that though the complainant had filed the complaint case, i.e. 1.C.C.No.08 of 1991, before the learned S.D.J.M., Titlagarh on 08.2.1991, her initial statement under Section 200 Cr.P.C. was recorded by the learned Magistrate only on 27.7.2000. Subsequently, the evidence of the complainant and two of her witnesses were recorded by the learned Magistrate under Section 202 Cr.P.C. Considering the materials available on record, learned magistrate vide order dated 06.8.2002 has proceeded to take cognizance of the offences under Sections 376/342/506/34 IPC against the present petitioners. Relevant findings of the learned Magistrate recorded in the order of cognizance is extracted below:

> "xx xx xx
> Perused the materials on record. It appears that the accused persons named in the complaint petition has committed rape on the complainant on three occasions. The statement of the complainant and her witness Muralidhar Mishra shows that besides the named accused persons, rape was also committed by Giridhari Barik A.S.I. of police on the complainant

> although his full name has not been mentioned in the complaint petition. The material presented by the complainant clearly show his complicity with the rape of the complainant. Besides the offence U/s.376/34 I.P.C., the material presented by the complainant also makes out prima facie case for the offence punishable U/s.342/34, 506/34 I.P.C. against the accused persons.
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> Taking into consideration the material available in the record, I am of the opinion that there are sufficient ground to proceed against the accused persons, Sarat Rath, M.Karuan, G.Barik for the offence U/s.376/34, 342/34 and 506/34 I.P.C. Similarly, I am of the opinion that there are sufficient ground to proceed against the accused A.C.Mallik for the offence U/s.376/342/506 I.P.C. As such cognizance is taken against the Sl.no.2 to 4, accused persons U/Ss.376/34, 342/34 and 506/34 I.P.C. and U/S.376/342/506 I.P.C. against Sl.no.1 accused A.C.Mallik."

29. On a perusal of the impugned order of cognizance, it is seen that the same is based solely on the statements of the complainant and two of her witnesses, recorded under Section 202 Cr.P.C. almost 10 years after the alleged occurrence. Moreover, learned Magistrate has not taken into consideration the Final Report submitted by the Crime Branch and the statement of witnesses recorded by it during investigation. Merely relying upon the bald statements of the complainant and her two witnesses, learned Magistrate has proceeded to take cognizance of the offences under Sections 376/342/506/34 IPC against the present petitioners. Moreover, all the witnesses named in the complaint have not been examined before taking cognizance and directing issue of process against the accused persons, as has been prescribed under Section

202(2) Cr.P.C., especially when the offence alleged is under Section 376 IPC, which is exclusively triable by the Court of Sessions.

30. All these goes to show that the learned Magistrate has acted in a most casual and mechanical manner and has failed to apply his judicial mind to the very nature and extent of the allegations made in the complaint and exercise due caution and circumspection in examining the genuineness of the same, before taking cognizance and issuing process against the present petitioners.

31. This appears to be a clear case of malafide and malicious criminal proceeding initiated by the complainant against the present petitioners, who are police officers of Saintala Police Station, with an ulterior motive to wreak vengeance and vendetta on the accused persons, with a view to spite them due to the arrest of her husband Agasti Tandi on the allegation of murder in Saintala P.S. Case No.107 of 1990. Moreover, the wild allegations made in the complaint are absurd, inherently improbable and entirely unbelievable and in absence of any clear, cogent and credible prima facie evidence in support of such allegations, I feel, the action of the learned Magistrate in taking cognizance almost 12 years after the alleged occurrence and directing issue of process has become an instrument of oppression in the hands of the complainant as a vendetta to harass the present

petitioners needlessly. Therefore, allowing continuance of such a criminal proceeding would be an abuse of the process of Court.

32. Coming to the question regarding requirement of sanction for prosecution under Section 197(1) Cr.P.C., it is now well settled that the protection given under Section 197 of the Code is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if they choose to exercise it, complete control of the prosecution. This protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant from the protection. The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon the offender being a public servant, but whether it was committed by a public servant acting or

purporting to act as such in the discharge of his official capacity. Before Section 197 can be invoked, it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. It is not the duty which requires examination so much as the act, because the official act can be performed both in the discharge of the official duty as well as in dereliction of it. The act must fall within the scope and range of the official duties of the public servant concerned. It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty.

33. Section 197(1) of the Code reads as under:

> "197.(1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction–
>
> (a) in the case of person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government:
>
> (b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government."
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34. The section falls in the chapter dealing with conditions requisite for initiation of proceedings. That is if the conditions mentioned are not made out or are absent then no prosecution can be set in motion. For instance no prosecution can be initiated in a Court of sessions under Section 193, as it cannot take cognizance, as a court of original jurisdiction, of any offence unless the case has been committed to it by a Magistrate or the Code expressly provides for it. And the jurisdiction of a Magistrate to take cognizance of any offence is provided by Section 190 of the Code, either on receipt of a complaint, or upon a police report or upon information received from any person other than police officer, or upon his knowledge that such offence has been committed. So far public servants are concerned the cognizance of any offence, by any court, is barred by Section 197 of the Code unless sanction is obtained from the appropriate authority, if the offence, alleged to have been committed, was in discharge of the official duty. The section not only specifies the persons to whom the protection is afforded but it also specifies the conditions and circumstances in which it shall be available and the effect in law if the conditions are satisfied. The mandatory character of the protection afforded to a public servant is brought out by the expression, 'no court shall take cognizance of such offence except with the previous sanction. Use of the words, 'no' and 'shall' make it abundantly clear that the bar on the exercise of power by the court to take cognizance

of any offence is absolute and complete. Very cognizance is barred. That is the complaint, cannot be taken notice of. According to Black's Law Dictionary the word 'cognizance means 'jurisdiction' or 'the exercise of jurisdiction or 'power to try and determine causes.' In common parlance it means 'taking notice of. A court, therefore, is precluded from entertaining a complaint or taking notice of it or exercising jurisdiction if it is in respect of a public servant who is accused of an offence alleged to have committed during discharge of his official duty.

35. In ***P. K. Pradhan v. State of Sikkim,*** AIR 2001 SC 2547, the Supreme Court has, inter alia, held as follows:

> "The legislative mandate engrafted in sub-section (1) of Section 197 debarring a court from taking cognizance of concerned in a case where the acts complained of are alleged to have been committed by a public servant in discharge of his official duty or purported to be in the discharge of his official duty and such public servant is not removable from office save by or with the sanction of the Government, touches the jurisdiction of the court itself. It is prohibition imposed by the Statute from taking cognizance. Different tests have been laid down in decided cases to ascertain the scope and meaning of the relevant words occurring in Section 197 of the Code: "any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty". The offence alleged to have been committed must have something to do, or must be related in some manner, with the discharge of official duty. No question of sanction can arise under Section 197, unless the act complained of is an offence: the only point for determination is whether it was committed

> in the discharge of official duty. There must be a reasonable connection between the act and the official duty. It does not matter even if the act exceeds what is strictly necessary for the discharge of the duty, as this question will arise only at a later stage when the trial proceeds on the merits. What a court has to find out is whether the act and the official duty are so interrelated that one can postulate reasonably that it was done by the accused in the performance of official duty, though, possibly in excess of the needs and requirements of the situation."

36. In ***S. K. Zutshi and another v. Bimal Debnath and another***, AIR 2004 SC 4174, while considering to what extent an act or omission performed by a public servant in discharge of his official duty can be deemed to be official, the Supreme Court observed:

> "Use of the expression, 'official duty' implies that the act or omission must have been done by the public servant in the course of his service and that it should have been in discharge of his duty. The Section does not extend its protective cover to every act or omission done by a public servant in service but restricts its scope of operation to only those acts or omission which are done by a public servant in discharge of official duty.
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> It has been widened further by extending protection to even those acts or omissions which are done in purported exercise of official duty. That is under the colour of office. Official duty therefore implies that the act or omission must have been done by the public servant in course of his service and such act or omission must have been performed as part of duty which further must have been official in nature. The Section has, thus, to be construed strictly, while determining its applicability to any act or omission in course of service. Its operation has to be limited to those duties which are discharged in course of duty. But once any act or omission has been found to have been committed by a public servant in discharge of his duty then it must be

> given liberal and wide construction so far its official nature is concerned. For instance a public servant is not entitled to indulge in criminal activities. To that extent the Section has to be construed narrowly and in a restricted manner. But once it is established that act or omission was done by the public servant while discharging his duty then the scope of its being official should be construed so as to advance the objective of the Section in favour of the public servant. Otherwise the entire purpose of affording protection to a public servant without sanction shall stand frustrated."

37. In ***Rakesh Kumar Mishra v. State of Bihar & Others,*** AIR 2006 SC 820, Supreme Court while reiterating the object behind enacting Section 197 of the Code and also the prerequisites for application thereof, held as follows:

> "The protection given under Section 197 is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if it chooses to exercise it, complete control of the prosecution. This protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant from the protection. The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon

> the offender being a public servant, but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official capacity. Before Section 197 can be invoked, it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. It is not the duty which requires examination so much as the act, because the official act can be performed both in the discharge of the official duty as well as in dereliction of it. The act must fall within the scope and range of the official duties of the public servant concerned. It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty. There cannot be any universal rule to determine whether there is a reasonable connection between the act done and the official duty, nor is it possible to lay down any such rule. One safe and sure test in this regard would be to consider if the omission or neglect on the part of the public servant to commit the act complained of could have made him answerable for a charge of dereliction of his official duty : if the answer to this question is in the affirmative, it may be said that such act was committed by the public servant while acting in the discharge of his official duty and there was every connection with the act complained of and the official duty of the public servant This aspect makes it clear that the concept of Section 197 does not get immediately attracted on institution of the complaint case."

38. In the present case, learned Magistrate while dealing with the question regarding requirement of prior sanction for prosecuting the present petitioners, as required under Section 197(1) Cr.P.C., has come to the following findings:

> "As because the alleged offences committed by the accused persons do not come under the performance

> of their official duty, so no sanction is necessary U/S.197 Cr.P.C. Since the alleged offences are warrant cases, issue N.B.W.(A) against the accused persons for their production fixing the case to 5.9.2002."

39. In the case at hand, as the acts complained of are alleged to have been committed by the present petitioners as public servants in discharge of their official duty, while investigating into Saintala P.S. Case No.107 of 1990 or in dereliction of the same, the protection envisaged under Section 197(1) Cr.P.C. is attracted. I am therefore of the considered view that the petitioners, who are police officers of the State and are not removable from their office save by or with the sanction of the Government, cannot be prosecuted without previous sanction of the State Government.

40. For the reasons as aforestated, the criminal proceeding initiated against the present petitioners in 1CC No.08 of 1991, pending in the Court of Learned S.D.J.M., Titilagarh, and the order of cognizance passed therein are hereby quashed.

CRLMC is accordingly allowed.

(S.C.PARIJA, J.)

ORISSA HIGH COURT : CUTTACK.
Dated the 16th May, 2014/MPanda