IN THE GAUHATI HIGH COURT
(THE HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)
ITANAGAR BENCH

CRIMINAL PETITION NO.18 (AP) OF 2013

1. Dr. (Mrs.) Oishy Ering,
   Wife of Shri O. Jamoh, SMO, General Hospital, Pasighat, East Siang District, Arunachal Pradesh.

2. Dr. (Mrs.) Tumbom Riba (Ete),
   Wife of Dr. D. Riba, Veterinary Officer, Basar, C/o: DMO Aalong, West Siang District, Arunachal Pradesh.

3. Dr. S. N. Kundu,
   Medical Officer, Seijosa, East Kameng District, C/o: DMO Seppa, PO: Seppa, Arunachal Pradesh.

.....Petitioners.

Advocates for the Petitioners:
Mr. P. K. Tiwari, Senior Advocate.
Mr. L. Tenzin,
Mr. I. Lollen,
Mr. L. Tsering,
Mr. K. Eshi,

-VERSUS-

1. The State of Arunachal Pradesh, through its Public Prosecutor.
2. Sri. Minto Rollay,
   Kamba Town, PO/PS- Kamba,
   District: West Siang, Arunachal Pradesh.

.....*Respondents.*

Advocates for the Respondents:
Mr. Kholie Tado, learned Public Prosecutor for respondent No. 1.
Mr. D. Boje, for respondent No. 2.

:::BEFORE:::
HON'BLE (MR.) JUSTICE AJIT BORTHAKUR

Date of hearing : **28-02-2017.**
Date of Judgment & Order : **01-05-2017.**

JUDGMENT & ORDER (CAV)

Heard Mr. P. K. Tiwari, learned senior counsel appearing on behalf of the petitioners and Mr. K. Tado, learned Public Prosecutor for the State respondent No. 1. Also heard Mr. D. Boje, learned counsel for the respondent No. 2.

This is an application under Sections 482/483 of the Cr.P.C., for quashing of the criminal case against the petitioners in Sessions Case No.32/2012 (YPA) under Sections 120B/201/218 IPC, arising out of supplementary charge sheet, dated 23.10.2003, in Along P.S. Case No.23/1999 and for re-initiation of the same in accordance of law.

The petitioners' case, in brief, is that they are the Senior Medical Officers (Selection Grade) in the State of Arunachal Pradesh. On receipt of a First Information Report (F.I.R.), dated 01.03.1999, to the effect that one Gotum Rollay committed suicide, Along P.S. U/D (Unnatural Death) Case No.4/1999, under Section 174 Cr.P.C., was registered. On 02.03.1999, the cousin brother of the deceased lodged another complaint alleging that his said cousin was beaten to death by one Ejum Karbak. The post mortem was done by a panel of Doctors comprising of the present petitioners, who gave the opinion that the cause of death was commission of suicide. Accordingly, after preliminary investigation, the investigating officer of the case submitted his report, dated 05.06.1999, stating that the deceased committed suicide by hanging and on his recommendation a case

being Along P.S. Case No.23/1999, under Sections 306/342/323 IPC was registered. Meanwhile, the family and friends of the deceased made complaints disputing the findings recorded in the post mortem report and registration of the case under the aforesaid Sections of the IPC. On completion of investigation, the investigating officer submitted the charge-sheet No.29/2000, dated 29.04.2000, under Sections 306/342/323 IPC against Ejum Karbak, Manoj Dhanuka and R.S. Singh. The aforesaid charge-sheet evoked controversy. Therefore, the Crime Branch re-opened the case and after further investigation, submitted supplementary charge-sheet, dated 23.10.2003, under Sections 342/323/304/34 IPC against the aforementioned accused persons and under Sections 120B/201/218 IPC against the present three petitioners.

Thereafter, the case came up before the Court of the learned Additional Sessions Judge (F.T.C.), Basar for consideration of charges against the petitioners. The petitioners filed an application for closure of the proceeding for want of prosecution Sanction, required under Section 197 Cr.P.C. whereupon the learned Court by order, dated 23.02.2004, passed in BSR/SESS Case No.183/2002, held that the prosecution sanction was necessary and since no prosecution sanction was obtained against the petitioners, the proceeding was dropped against the present petitioners.

Thereafter, by three separate orders, dated 24.03.2006, the Government of Arunachal Pradesh accorded sanction under Section 197 of the Cr.P.C., for prosecution of the present three petitioners. As per records, the learned Sessions Judge, Yupia registered the aforesaid criminal case as Sessions Case No.32/2012 (YPA) and vide order, dated 10.04.2013, issued summons to all the accused petitioners herein, for appearance before the said Court on 24.05.2013. All the accused petitioners represented by their learned counsel appeared before the

said trial Court and the next date was fixed on 15.07.2013, for framing of charges against the petitioners. On 15.07.2013, the learned Public Prosecutor prayed for adjournment to file an application for review of the order, dated 23.02.2004. It was contended by the learned Public prosecutor that unless the order, dated 23.02.2004, by which the petitioners were discharged for want of prosecution sanction is recalled/reviewed, further proceeding cannot be initiated against the petitioners in this case. Consequently, the learned trial Court by order, dated 15.07.2013, took note of the aforementioned submissions and fixed the case on 19.08.2013, for hearing on the question of framing of charges against the three petitioners. However, on 19.08.2013, on the prayer of the learned Public prosecutor, the case was again adjourned and fixed on 17.09.2013, followed by 08.11.2013.

Mr. P. K. Tiwari, learned senior counsel for the petitioners has contended that the petitioners are not raising the issue of illegality in the order, dated 23.02.2004, because effect of such illegality is inconsequential so far as the petitioners are concerned. Whether it is discharge of the petitioners or merely closing of the case for want of sanction, the consequence would be the same, namely, closure of the criminal proceeding against the petitioners for want of sanction till its re-initiation after obtaining sanction for petitioners' prosecution.

Mr. Tiwari, learned senior counsel has further submitted that instead of closing the case and returning the record, the learned trial Court by order, dated 23.02.2004, discharged the petitioners, which it was not competent to do as it was not even competent to frame these charges for want of sanction. Mr. Tiwari has submitted that from the stage of the order, dated 19.05.2006, onwards, the illegalities in the criminal proceeding against the petitioners are palpable and manifest, which have incurably vitiated the proceeding. The order, dated 19.05.2006, which is purportedly an order of taking cognizance against

the petitioners for commission of the offences under Sections 120B/201/218 IPC, does not even *prima facie* indicate taking of any cognizance at all of the aforementioned offences. The order in question does not indicate if the supplementary charge-sheet, dated 23.10.2003, was placed before the learned trial Court and the same was taken note of.

Mr. P. K. Tiwari, the learned Senior counsel for the petitioners, has submitted that the materials available on record suggest that the prosecution sanction was placed before the learned trial Court sometime in March 2006, however, the period of limitation for taking cognizance of the offence under Section 218 IPC is 3(three) years either from the date of offence or when commission of such offence came to the knowledge either of the investigating agency or the complainant. The sequence of events and the materials available on record *prima facie* indicate, Mr. Tiwari has submitted, as on 19.05.2006, taking of cognizance of commission of offence under Section 218 IPC was barred by limitation. Hence, the learned trial Court could not have taken cognizance of the same without condoning the delay by taking recourse to the relevant provisions of the Cr.P.C.

According to Mr. Tiwari, the learned senior counsel, law is well settled that when taking of cognizance of offence is barred by limitation, then the delay can be condoned only by issuing notice to show cause to the accused against the proposed condonation. In the present case, however, Mr. Tiwari has submitted, the learned trial Court by order, dated 19.05.2006, purportedly took cognizance of the offences against the petitioners without examining as to whether cognizance of offence under Section 218 IPC was barred by limitation. In view of the fact that the petitioners were denied opportunity on the question as to whether taking of cognizance of offence under Section 218 IPC was barred by limitation and if the same could be condoned,

the continuation of the criminal proceeding against the petitioners from 19.05.2006 is illegal and all the orders passed with effect from 19.05.2006, onwards are liable to be quashed and set aside. Mr. P. K. Tiwari, learned senior counsel for the petitioners has drawn attention to the decision rendered by a single judge of this Court in ***Arambam Thomchou Singh Vs. Union of India & Ors.,*** reported in ***2010 (1) GLT 510.***

The respondent No. 2-the informant in his affidavit-in-opposition and Mr. D. Boje, learned counsel appearing on his behalf, has stated that the penal of Doctors which included a close relative (niece) Dr. (Mrs.) Tumbom Riba (Ete) of the accused person petitioner No. 2 and due to influence of the other members by doctor (Mrs.) Tumbom Riba (Ete), the Post Mortem report was so designed to fit the false suicide theory and accordingly, the Civil Surgeon, the then DMO, Dr. Ligu Tacha, without cross checking the original papers and the inquest report which were not annexed to the report had approved and counter signed on the aforesaid report prepared by the board of Doctors. It has been further submitted that the learned Additional Sessions Judge, FTC, Basar during the time of hearing on consideration of charges and also on the point of prosecution sanction, no reasonable opportunity of being heard was given to the investigating officer and as such, order dated 23.02.2004, dropping the proceeding against the petitioners and thereby discharging them of the offences was illegal. It has been further submitted by Mr. D. Boje learned counsel that the prosecution sanction order dated 24.03.2006, was, in fact, issued prior to the order, dated 19.05.2006, after proper application of mind of the competent authority to the facts of the case. According to Mr. Boje, learned counsel, the learned trial Court rightly did not take cognizance of the offences since prosecution sanction was not obtained for want of sanction. However, taking no cognizance does

not mean that the learned Additional Sessions Judge has no jurisdiction to take cognizance of the offences as the prosecution sanction was obtained before taking cognizance and as such, question of closing the case and returning the case record and further re-initiation of the process with effect from 23.02.2004, does not arise. Mr. Boje has further submitted that the petitioners' contention that the order, dated 23.02.2004, has not been disputed is self contradictory as in paragraph 23 of the petition, it is stated that the said order is illegal and the order, dated 19.05.2006, does not vitiate any proceeding. It has been further submitted that the petitioners did not raise any question of limitation, although the order, dated 19.05.2006, was passed about 6(six) years ago and therefore, the case is barred by limitation is not sustainable in law. Further, since supplementary charge-sheet is filed and the prosecution sanction has already been obtained from the competent authority, therefore, Mr. Boje has submitted that *prima facie* case is established against the petitioner-doctors. Mr. Boje, learned counsel for the respondent No. 2 has expressed displeasure over pendency of the case without trial for more than 15(fifteen) years due to lashes on the part of the investigating agency and the alleged accused persons including the present petitioners.

Mr. K. Tado, the learned Public Prosecutor for the State-respondent No. 1 has submitted that the instant petition filed, under Sections 482/483 Cr.P.C. is not maintainable for setting aside and quashing of the impugned orders as there is no legal bar against continuance of the proceedings, for the question of limitation is curable under Section 473 Cr.P.C. and the other irregularities highlighted by the petitioners also being insignificant irregularities, the matter may be remanded to the learned trial Court to remove the irregularities in accordance with the procedural laws, on those counts, so that no injustice is done to either of the parties.

Upon consideration of the above rival contentions, this Court finds that the relevant question that falls for judicial scrutiny is whether after discharge of the petitioners for want of prosecution sanction vide order, dated 23.02.2004, by the learned Additional Sessions Judge, F.T.C., Basar, in BSR/Sessions Case No.183/2002 (Corresponding to Aalong P.S. Case No.23/1999) and thereby dropping the case against them, the learned Additional Sessions Judge, F.T.C, Yupia to whom the case was subsequently transferred, was correct in law to take cognizance of the offences against the petitioners in Sessions Case No.445/2005 (FTC), after receipt of the prosecution sanction orders, by the impugned order, dated 19.05.2006.

To avoid the probable confusion, it is pertinent to mention that the case underwent a number of litigations for transfer from one Court to another Court, in this Court and finally trial commenced in the said Court of learned Additional Sessions Judge, F.T.C., Yupia, Arunachal Pradesh, where the case was re-registered as Sessions Case No.445/2005 (FTC).

The impugned order, dated 23.02.2004, passed by the learned Additional Sessions judge, F.T.C., Basar in BSR/Sessions vase No.183/2002, is quoted herein below

> ***"23/02/04***
>
> ***All accused Ejum Karbak, Monuj Dhanuka, Dr. S. N. Kund, Dr. Mrs T. Riba and Dr. Mrs. O. Ering are present. Both the counsels are also present.***
>
> ***An application filed by the defence counsel praying for dropping of accused Drs. from proceeding against them for want of prosecution sanction has been perused. And both the learned counsels being heard on the point in issue. After having heard the counsels of the either party in the long and short on the above aspect and also after having careful***

consideration of the evidence on record before me I have arrived at a conclusion that the previous prosecution sanction is necessary to proceed against the accused doctors in the charges made against them in the instant case and the same being not obtained by the prosecuting agency, they are entitled to benefit of under section 197 of Cr.P.C. Accordingly, the accused doctors from amongst all the accused of the instant case have been dropped from proceeding against them in the charges made against them. And accordingly, they are discharged from all the charges made against them. A separate order has been pronounced in the open Court today in the presence and hearing of all the parties. Copy of the order be furnished to all concerned free of cost with immediate effect. However the hearing on the point of consideration of charge will be taken on the next date of the case against the remaining accused namely Sri Ejum Karbak, Monuj Dhanuka and R. Singh.

The next date of the case is fixed on 16th of March 2004 and the same being informed in persons to the said accused for appearance on the next date.

Till the next date the case is adjourned."

The aforementioned order clearly indicates that the charges under Sections 120B/201/218 IPC brought against the petitioners-doctors by way of filing the supplementary charge-sheet, dated 23.10.2003, in Along P.S. Case No.23/1999, were dropped for want of prosecution sanction, required under Section 197 Cr.P.C. and accordingly, they stood discharged. However, the matter of prosecution of the petitioners in the case came up for reconsideration before the Court of learned Additional Sessions Judge, F.T.C., Yupia in

Sessions case No.445/2005, on 19.05.2006, when the competent authority of the Government of Arunachal Pradesh accorded sanctions, under Section 197 Cr.P.C., dated 24.03.2006, were laid by the officer-in-charge, Crime Branch P.S. (S.I.T.), PHQ, Itanagar vide his forwarding letter, dated 30.03.2006 and upon hearing the learned counsel for both the sides, took cognizance of the offences against the petitioners.

Vide the impugned order, dated 19.05.2006, reads as follows-

> ***"19.05.06.***
>
> ***Case record return from Hon'ble High Court, Gauhati. Meanwhile I.O. has submitted the Prosecution sanction against three medical officers, which are placed before the Court today.***
>
> ***Call for statement of three PWs recorded u/s 164 Cr.P.C. from Basar (FTC). The materials are not available in the case record. Issue summons to all the accd persons including three medical officers.***
>
> ***Fixed on 16.06.06".***

Section 190 Cr.P.C., deals with 'taking cognizance of offence' by Magistrate and not of the offenders. A magistrate takes 'cognizance', when he applies his mind or has taken judicial notice of an offence with a view to initiate proceedings in respect of offence, which is said to have been committed. Cognizance of offence and prosecution of an offender, it needs to be borne in mind, are two aspects of a case as the language of Section 190 Cr.P.C, clearly indicates taking of cognizance is not a mere formality as before taking cognizance, the Magistrate needs to apply his judicial mind to the materials placed before him to see if on the facts alleged, there is *prima facie* case to issue process against the suspected offender. The aforesaid rule of

cognizance provided in Section 190 Cr.P.C. can well be applied to taking cognizance of offence by the Sessions judge as a Court of original jurisdiction, as provided in Section 193 Cr.P.C. Further, the Section says that except as otherwise expressly provided, no Sessions Court can take cognizance of any offence without any commitment by a Magistrate, meaning thereby that when an offence is exclusively triable by a Court of Session, the Magistrate is to commit the case under Section 209 Cr.P.C. to the Court of Session. It indicates that Sessions Court has no jurisdiction to take cognizance of an offence directly unless it is expressly provided vesting it power to take cognizance of an offence.

In the case of ***Arambam Thomchou Singh vs. Union of India & Ors., (supra),*** this Court held that whenever a Court finds that no cognizance can be taken by it of an offence, because of want of requisite sanction, required under Section 197 Cr.P.C., the Court must stop the proceeding forthwith making it clear that it had no jurisdiction to take cognizance and then return the police report, which it had received under Section 173 (2) Cr.P.C. This Court had made it clear that if the appropriate authority grants sanction, and with the appropriate sanction, so granted, the investigating agency resubmits the report, there would be no impediment in taking cognizance of the offence (s) unless the period of limitation, if any, bars taking of such cognizance and when the period of limitation sets in, the delay, if any, can be condoned by taking recourse to the provisions of Cr.P.C. This Court further held that discharging the petitioner is *prima facie* against the law and that order of discharge can be passed only when the Court is competent to frame charge.

In the backdrop of the instant case, it needs to be kept in mind that submission of a report under Section 173 (2) Cr.P.C. does not preclude further investigation and the investigating agency can submit

supplementary reports, after such further investigation to the Court. On the other hand, taking cognizance without considering the police report is certainly an abuse of the process of the Court and as such, the magistrate or judge is required to record, in substance, the materials, on consideration of which the cognizance was so taken. Section 227 Cr.P.C. envisages that if the judge after considering the record of the case including the relevant documents submitted therewith comes to a conclusion that there is no sufficient ground for proceeding against the accused, then he may discharge the accused.

On scrutiny of the above impugned orders, it appears that the learned Court below while passing the impugned improper order, dated 23.02.2004 apparently committed irregularity for non-application of mind by way of **discharging the petitioners** of the offences for want of prosecution sanction as this Court prescribed the course of action in such a fact situation in the case of Arambam Thomchou Singh (supra) and likewise, passing the subsequent improper impugned order, dated 19.05.2006, issuing summons to the petitioners, after receipt of prosecution sanction orders, without specifying the penal provisions and without consideration of the point of limitation in respect of the charge-sheeted offence under Section 218 IPC. It is needless to say that Section 465 Cr.P.C., which is a residuary Section, is intended to cure any error, omission or irregularity committed by a Court through accident or inadvertence or even an illegality consisting in the infraction of any mandatory provision of law, unless such irregularity or illegality has, in fact, occasioned a failure of justice.

Therefore, the petition is partly allowed.

The impugned orders, dated 23.02.2004, passed in BSR/Sessions Case No.183/2002 and dated 19.05.2006, passed in Session Case No.445/2005 (FTC), Yupia are set aside and quashed.

The case is remanded back to the learned Court below with direction to pass fresh orders in accordance with law.

The case being a very old pending one, the learned Court below shall make endeavour for expeditious disposal at the earliest time possible.

Accordingly, the petition stands disposed of.

Send back the LCRs along with a copy of this judgment and order.

JUDGE