IN THE HIGH COURT OF ORISSA: CUTTACK

CRLMC No. 359 Of 2012

An application under section 482 of the Code of Criminal Procedure, 1973 in connection with I.C.C. Case No. 69 of 2009 pending on the file of S.D.J.M., Athagarh.

Reliance Industries Ltd. …… Petitioner

-Versus-

Shyam Sundar Sharma …… Opposite party

For Petitioner: - Mr. Gautam Mukherji
Mr. Partha Mukherji

For Opposite Party: - Mr. Ashutosh Mishra

P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

Date of Judgment: 30.07.2018

S. K. SAHOO, J. The petitioner Reliance Industries Limited (hereafter 'R.I.L.') represented through its State Head Sri Viren K Joshi has filed this application under section 482 of the Code of Criminal Procedure, 1973 invoking inherent powers of this Court to quash the impugned order dated 01.11.2011 passed by the learned S.D.J.M., Athagarh in I.C.C. Case No.69 of 2009 in taking cognizance of offences under sections 420, 384, 427, 471, 467

read with section 34 of the Indian Penal Code and issuance of process against the R.I.L.

2. The opposite party-complainant Shyam Sundar Sharma filed a complaint petition in the Court of learned S.D.J.M., Athagarh alleging therein that he was fraudulently persuaded by Sangramjeet Mohanty and Sarbeswar Mohanty of the R.I.L. to establish a R.I.L. Petrol Pump at Khuntuni. They assured a guaranteed profit margin as per their commission structure. The complainant was persuaded to purchase a land measuring Ac.1.70 dec. at a huge cost through the land brokers engaged by the R.I.L. All steps were taken before the Collector and Executive Engineer (N.H.) by the R.I.L. and its representatives for obtaining 'No Objection Certificate' for establishment of a retail outlet at Khuntuni under the name and style of 'M/s. Shyam Filling Station'. The R.I.L. fraudulently induced the complainant to execute a lease deed and a dealership agreement and being deceived, the complainant and the R.I.L. entered into dealership agreement as well as lease deed on 22.08.2005. It is the further case of the complainant that he signed and executed both the deeds and delivered the same to the R.I.L. and its representatives. The R.I.L. induced the complainant to pay a sum of Rs.3,00,000/- (rupees three lakhs)

as signing fee and Rs.23.5 lakhs as security deposit. It is stated that the R.I.L. and its authorized representatives extorted the complainant for causing loss of property to the tune of Rs.26.5 lakhs. As per the terms of dealership agreement, the R.I.L. was supposed to continue delivering petrol, diesel and allied products to the filling station of the complainant. The R.I.L. fraudulently convinced the complainant that finances to run the outlet would be arranged by them and the filling station shall run at the rate fixed by the Government earning profit for the complainant.

It is the further case of the complainant that R.I.L. and its officers and agents acted in connivance with the authorities of the State Bank of India and especially the Branch Manager of the State Bank of India, Athagarh Branch in providing finance to the tune of Rs.1.19 crores in favour of the complainant as a term loan and cash credit enabling him to complete the construction of the filling station as per the approved layout and design of R.I.L. and for operation of the filling station. On 29.10.2005 the complainant was compelled to sign a tripartite agreement with R.I.L. and State Bank of India on deceitful and fraudulent terms. The R.I.L. and State Bank of India and their representatives at all relevant time fraudulently made the complainant believe that they would act bona fide as

per the terms of the documents and shall cooperate for appropriate and proper functioning and operation of the filling station. The tripartite agreement ex facie shows that the R.I.L. was interested in setting up and running the retail outlet and the R.I.L. shall not terminate the dealership and shall not stop supplying the products to the complainant and that the R.I.L. had undertaken to act as per the terms and conditions of the agreement. According to the complainant, the tripartite agreement was extorted by fraudulent representations.

It is the further case of the complainant that the complainant operated the outlet for a period of two years as per the instructions and directions of the R.I.L. issued from time to time. The complainant had invested more than Rs.60 lakhs of his own funds for promotion and continuance of the outlet. During that period, there was inter se correspondence between the R.I.L. and the State Bank of India. Suddenly on 19.04.2008 the R.I.L. suspended supply of petrol and diesel with effect from 01.05.2008 to the outlet of the complainant and till the filing of the complaint petition, they did not resume the supply and resorted to flimsy plea of non-support of Government of India. According to the complainant, suspension of supply was a part of criminal conspiracy of the accused to swindle and cheat him of

his valuable assets and properties. Immediately on suspension of the outlet with effect from 01.05.2008, the accused Branch Manager of State Bank of India demanded payment of the outstanding loan by its letter dated 31.05.2008 which according to the complainant was issued at the instance of the R.I.L. A further letter was issued by State Bank of India on 26.06.2008 making an offer to the complainant for 'buy bank' to the R.I.L. for regularizing the loan account. According to the complainant, in the entire process, he incurred loss of about rupees one crore.

It is the further case of the complainant that he initially filed a complaint petition before the learned S.D.J.M., Sadar, Cuttack in I.C.C. Case No.2340 of 2008 as the inducement was done in its Cuttack Office but the said Court was pleased to dispose of the complaint and returned the complaint petition to the complainant for re-presentation before the proper Court as per section 201 of the Code of Criminal Procedure by passing an order on 24.12.2008. The complainant then filed a Criminal Revision No.2 of 2009 before the learned Sessions Judge, Cuttack challenging the order dated 24.12.2008 passed by the learned S.D.J.M., Sadar, Cuttack and the revisional Court after hearing both the sides was also pleased to confirm the order passed by the learned S.D.J.M. vide judgment and order

dated 08.04.2009. Accordingly, the complainant filed the complaint petition i.e. I.C.C. Case No.69 of 2009 before the learned S.D.J.M., Athagarh.

3. After filing of the complaint petition, the learned S.D.J.M. recorded the initial statement of the complainant under section 200 of Cr.P.C. and conducted inquiry under section 202 of Cr.P.C., during course of which the complainant examined three witnesses. After perusing the complaint petition, the initial statement and the statements of witnesses recorded under section 202 of Cr.P.C., the learned Magistrate passed the impugned order.

4. Mr. Gautam Mukherji, learned counsel appearing for the petitioner with all the wits at his command contended that the complaint petition is not supported by a duly sworn affidavit or in the form of a verification duly signed by the complainant and therefore, learned Magistrate was not justified in proceeding with such a complaint. He relied upon the decision of the Hon'ble Supreme Court in cases of **Priyanka Srivastava -Vrs.- State of U.P. reported in (2015) 61 Orissa Criminal Reports (SC) 719.** He argued that the learned Magistrate without properly evaluating and appreciating the materials available on record passed the impugned order in a most mechanical manner. It is

contended that after grant of permission for marketing transportation of fuels to Reliance Petroleum Ltd. (hereafter 'R.P.L.') by the Government of India as per its policy decision, the R.P.L. got merged with R.I.L. and the R.I.L. became R.P.L.'s successor in title upon rights and interest including marketing rights of R.P.L. so granted. The petitioner started setting up outlets across the country under various categories and newspaper advertisements were made inviting dealers for the petroleum retail outlets at various places and in response to such advertisement of the petitioner, the complainant-opposite party submitted his application for a dealership for the petroleum pump retail outlet at Khuntuni. The complainant was selected as a dealer and he was issued with a Letter of Intent dated 18.12.2004 on agreeable terms and conditions. After following the due process, the complainant entered into and executed a detailed dealership agreement on 22.08.2005 with the petitioner so also a lease deed dated 22.08.2005. The complainant approached the State Bank of India for financial assistance for the construction of his retail outlet which was granted to him by the bank on certain terms. At the request of the complainant, the petitioner agreed to and joined in executing a tripartite agreement on 29.10.2005 between the bank, the petitioner and

the complainant. Mr. Mukherji further contended that during August 2004, the international prices of crude oil started rising rapidly. The retail prices of the petroleum products which were sold by the public sector oil marketing companies under the Ministry of Petroleum and Natural Gas, Government of India were not correspondingly increased. While the loss of PSU oil companies was compensated by the Government by way of subsidies given to the PSU oil companies, directly by the Government or by way of discount in supply of crude oil by upstream Government Sector oil companies and sharing of the losses by other Public Sector Oil and Gas companies, no such relief was granted to the R.I.L. In spite of that the petitioner did not increase the prices of petroleum products for about two years with a view to assist dealers by keeping retail prices of petroleum products at R.I.L.'s retail outlets at par with the retail selling price of PSU oil companies. In spite of representation to the Government by R.I.L. to extend the fuel subsidies to the R.I.L. at par with subsidies given to the PSUs, there was no response for which in May 2006, the R.I.L. was compelled to increase the retail selling price of petroleum products. The PSU oil companies continued to sell petroleum products at prices lower than the R.I.L. which was possible because of fuel

subsidies offered to them by the Government either by way of discount in product or sharing of subsidy returns. The sales at the retail outlets of the R.I.L. progressively reduced on account of price differential and the R.I.L. decided to suspend supply of petroleum products to all its retail outlets progressively with effect from 1st May 2008 in view of the losses and damages. According to Mr. Mukherji, it was a force majeure situation and beyond the control of the petitioner. By way of an Addl. Affidavit dated 06.11.2016, it is stated by the petitioner that the decision of the Government of India to again make the price of diesel market determined, was communicated through a press release dated 18.10.2014 and also the international crude prices have fallen enabling the petitioner company to resume its retail outlets spread over the country progressively. It is contended that when during hearing of ARBP No.3 of 2009, responding to the suggestion of this Court for an amicable settlement, the petitioner company made offer to resume the supply to the outlet of the opposite party, it was submitted on behalf of the opposite party that the land on which the retail outlet was situated had already been sold in auction, pursuant to proceedings passed in SARFAESI Act. The learned counsel for the petitioner has filed various documents in support of his

contention. It is further contended that the allegations leveled against the petitioner regarding fraudulent inducement to the complainant to open the retail outlet and later on suspending supply of petroleum products intentionally, are completely frivolous and misconceived. It was argued that there was contractual relationship between both the parties and the remedy open to the complainant in case of failure of the petitioner to perform its contractual obligation lies in the civil action and not by way of a criminal proceeding. It is contended that the State Bank of India exercised its rights under the tripartite agreement and called upon the petitioner to terminate the dealership agreement dated 22.08.2005 entered into by the petitioner with the complainant and accordingly, the petitioner by its letter dated 01.07.2010 addressed to the complainant, terminated the dealership agreement. It was argued that the complainant after getting demand notice from the Bank on 03.12.2008 instituted the complaint petition which reflects the oblique motive of the complainant. It is further contended that the allegations made in the complaint petition, even if are taken on its face value do not prima facie constitute the ingredients of the offences under which the impugned order was passed and the allegations are highly absurd and inherently improbable and

on the basis of such allegations, no prudent person can reach a just conclusion that there is sufficient ground for proceeding against the petitioner. It is highlighted by Mr. Mukherji that the complainant has instituted several proceedings before various forums on similar grounds as alleged in the complaint petition. The complainant filed a consumer case before the State Commission which was dismissed on 28.04.2011 and he approached the National Consumer Disputes Redressal Commission, New Delhi against such order which was also dismissed. An Arbitration Petition bearing ARBP No.3 of 2009 was instituted before this Court by the complainant under section 11(6) of the Arbitration and Conciliation Act, 1996 (hereafter '1996 Act') for appointment of an arbitrator which has been disposed of on 21.07.2016 by appointing an arbitrator. Another arbitration application bearing No.22 of 2009 was instituted before the learned District Judge, Cuttack under section 9 of the 1996 Act which is subjudiced. He placed reliance in the cases of **M/s. Thermax Ltd. -Vrs.- K.M. Johny reported in (2011) 50 Orissa Criminal Reports (SC) 616**, **Harshendra Kumar D. -Vrs.- Rebatilata Koley reported in (2011) 48 Orissa Criminal Reports (SC) 861**, **M/s. Indian Oil Corporation -Vrs.- M/s. NEPC India Ltd. reported in (2006) 35 Orissa**

Criminal Reports (SC) 128, **International Advanced Research Centre -Vrs.- Nimra Cerglass reported in (2015) 62 Orissa Criminal Cases (SC) 635**, **Dhananjay -Vrs.- State of Bihar reported in (2007) 36 Orissa Criminal Reports (SC) 697**, **Nagendranath Roy -Vrs.- Dr. Bijoy Kumar reported in (1991) 4 Orissa Criminal Reports 457**, **A. S. Krishnan -Vrs.- State of Kerala reported in (2004) 28 Orissa Criminal Reports (SC) 113**, **Subodh Chandra Shome -Vrs.- Durga Madhab Das reported in 1985 (II) Orissa Law Reviews 115** and **Ashok Kumar Padhy -Vrs.- ICFAI Foundation reported in (2018) 70 Orissa Criminal Reports 133**.

5. Mr. Ashutosh Mishra, learned counsel appearing for the opposite party on the other hand while supporting the impugned order, raised preliminary objection regarding maintainability of the application under section 482 of Cr.P.C. to challenge the order of taking cognizance. He placed reliance in the case of **Ramesh Samal -Vrs.- Chabi Mandal reported in 1987 (I) Orissa Law Reviews 1**. He argued that when the learned Magistrate has found prima facie case against the petitioner and the ingredients of the offences are clearly made out, invoking of jurisdiction under section 482 of Cr.P.C. is not

warranted. It is further contended that the documents relied upon by the learned counsel for the petitioner are virtually the defence plea of the accused which cannot be considered at this stage and at the appropriate stage of trial, the petitioner has to prove those documents in accordance with law and the relevancy of such documents can be looked into by the trial Court and not by this Court while invoking its inherent powers under section 482 of Cr.P.C. which is to be used very sparingly. He relied upon the decisions of the Hon'ble Supreme Court in cases of **Sonu Gupta -Vrs.- Deepak Gupta reported in (2015) 60 Orissa Criminal Reports (SC) 993**, **Fiona Shrikhande -Vrs.- State of Maharashtra reported in (2014) 57 Orissa Criminal Reports (SC) 285**, **R. Kalyani -Vrs.- Janak C. Mehta reported in (2009) 42 Orissa Criminal Reports (SC) 162**, **Amanullah -Vrs.- State of Bihar reported in (2016) 64 Orissa Criminal Reports (SC) 304**, **Sampelly -Vrs.- Indian Renewable Energy reported in (2016) 65 Orissa Criminal Reports (SC) 583**, **HMT Watches -Vrs.- M.A. Abida reported in 2015 (I) Orissa Law Reviews (SC) 1012** and **Kamala Devi Agarwal -Vrs.- State of W.B. reported in 2002 (I) Orissa Law Reviews (SC) 173**.

6. Adverting to the contentions raised by the learned counsels for the respective parties carefully and minutely and after going through the petitions, documents filed, written notes of submission and the citations placed during course of argument, it would be proper to deal with each of them point wise.

(i) **Maintainability of the application under section 482 of Cr.P.C. in the prayer for quashing cognizance**:

Preliminary objection was raised by the learned counsel for the opposite party relating to the maintainability of this application under section 482 of Cr.P.C. in challenging the order taking cognizance. He placed reliance in case of **Ramesh Samal -Vrs.- Chabi Mandal reported in 1987 (I) Orissa Law Reviews 1** in which the Sessions Judge had dismissed the revision petition preferred by the petitioners on the ground that an order taking cognizance is an interlocutory one and a revision is barred under section 397(2) of the Code. When the matter was challenged, a Division Bench of this Court held that an order taking cognizance is not an interlocutory order and can be revised by the High Court or the Court of Session. There is nothing in the decision cited that an application under section

482 of Cr.P.C. challenging the order taking cognizance is not maintainable.

The Code of Criminal Procedure, 1973 has provisions at each stage to correct errors, failures of justice and abuse of process under the supervision and superintendence of the High Court. The High Court has inherent powers under section 482 of the Code to correct errors of the Courts below and pass such orders as may be necessary to do justice to the parties and/or to prevent the abuse of process of Court.

In the case of **State through Special Cell, New Delhi -Vrs.- Navjot Sandhu reported in (2003) 6 Supreme Court Cases 641**, it was held that section 482 of the Criminal Procedure Code starts with the words "nothing in this Code". Thus the inherent jurisdiction of the High Court under section 482 can be exercised even when there is a bar under section 397 or some other provisions of the Criminal Procedure Code. The most common case where *inherent jurisdiction is generally exercised is where criminal proceedings are required to be quashed because they are initiated illegally, vexatiously or without jurisdiction*. It must be remembered that the inherent power is not to be resorted to if there is a specific provision in

the Code or any other enactment for redress of the grievance of the aggrieved party.

The Hon'ble Supreme Court in case of **State of Bihar -Vrs.- Murad Ali Khan reported in A.I.R. 1989 S.C. 1** held as follows:-

> "6. It is trite that jurisdiction under Section 482 Cr.P.C., which saves the inherent power of the High Court, to make such orders as may be necessary to prevent abuse of the process of any Court or otherwise to secure the ends of justice, has to be exercised sparingly and with circumspection. In exercising that jurisdiction, the High Court should not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not. That is the function of the trial Magistrate when the evidence comes before him. Though it is neither possible nor advisable to lay down any inflexible rules to regulate that jurisdiction, one thing, however, appears clear and it is that when the High Court is called upon to exercise this jurisdiction to *quash a proceeding at the stage of the Magistrate taking cognizance of an offence*, the High Court is guided by the allegations, whether those allegations, set out in the complaint or the charge-sheet, do not in law constitute or spell out any offence and that resort to criminal proceedings would, in the

> circumstances, amount to an abuse of the process of the Court or not."

In case of **State of West Bengal and Ors. -Vrs.- Mohammed Khalid reported in A.I.R. 1995 S.C. 785**, it is held as follows:-

> "63. It is, therefore, manifestly clear that proceedings against an accused in the initial stages can be quashed only if on the face of the complaint or the papers accompanying the same, no offence is constituted. In other words, the test is that taking the allegations and the complaint as they are, without adding or subtracting anything, if no offence is made out then the High Court will be justified in quashing the proceedings *in exercise of its powers under Section 482 of the present Code*."

Therefore, in my humble view, there is no bar for the High Court in entertaining an application under section 482 of Cr.P.C. when a prayer is made to quash the criminal proceeding or an order taking cognizance of offence and issuance of process is under challenge. The contention of the learned counsel for the opposite party in raising preliminary objection relating to the maintainability of this application, stands rejected.

(ii) **Complaint petition not supported by a duly sworn affidavit or a verification**:

It is contended by the learned counsel for the petitioner that the complaint petition is not supported by a duly sworn affidavit or in the form of a verification duly signed by the complainant and therefore, learned Magistrate was not justified in proceeding with such a complaint. He placed reliance in the case of **Priyanka Srivastava -Vrs.- State of U.P. reported in (2015) 61 Orissa Criminal Reports (SC) 719**, wherein Hon'ble Supreme Court held as follows:-

> "27. In our considered opinion, a stage has come in this country where Section 156(3) Cr.P.C. applications are to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate. That apart, in an appropriate case, the learned Magistrate would be well advised to verify the truth and also can verify the veracity of the allegations. This affidavit can make the applicant more responsible. We are compelled to say so as such kind of applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain persons. That apart, it becomes more disturbing and alarming when one tries to pick up people who are passing orders under a statutory provision which can be challenged under the framework of the said Act or under Article 226 of the Constitution of India. But it cannot be done

> to take undue advantage in a Criminal Court as if somebody is determined to settle the scores..."

Section 156(3) of Cr.P.C. provides that any Magistrate empowered under section 190 of Cr.P.C. may order an investigation of a cognizable case to be made by the police officer. Forwarding of the complaint petition to the police for investigation under section 156(3) of Cr.P.C. when it discloses a cognizable offence, before taking cognizance of offence can be done suo motu after proper application of mind or on an application filed by the complainant supported by duly sworn affidavit seeking for such a direction. It is open to the Magistrate to use his judicious discretion and direct the police to register an F.I.R. on the basis of the complaint petition forwarded and to conduct an investigation.

First of all, in the case in hand, there is neither any prayer made by the complainant before the Magistrate for exercising the power under section 156(3) of Cr.P.C. nor the Magistrate has exercised any such power. The learned Magistrate has recorded the initial statement of the complainant under section 200 of Cr.P.C., conducted inquiry under section 202 of Cr.P.C., during course of which three witnesses were examined by the complainant and after perusing the complaint petition,

initial statement of the complainant and statements recorded under section 202 of Cr.P.C., the impugned order was passed. Therefore, the ratio laid down in the case of **Priyanka Srivastava** (supra) is not applicable in this case.

Section 2(d) of the Code of Criminal Procedure states that 'complaint' means any allegation made orally or in writing to a Magistrate, with a view to his taking action under the Code that some person, whether known or unknown, has committed an offence, but does not include a police report. Out of the three modes provided to the Magistrate to take cognizance of offences under section 190 of Cr.P.C., one of the modes is upon receiving a complaint of facts which constitutes such offence. Chapter-XV of the Code deals with the procedure to be followed by the Magistrate upon receiving a complaint. Rule 14 of Chapter-II of the G.R.C.O. (Criminal) of High Court of Judicature states that all petitions should be in the language of the Code and as far as practicable typewritten. Every page of the petition and every interlineation, alteration or erasure therein shall be authenticated by initial of the petitioner or of his pleader by whom it is presented. Rule 15 states that every petition shall state concisely and clearly the facts, matters and circumstances upon which the petitioner relies and the matter of complaint, if any, and the

relief sought or prayer made. Rule 20 states that if it is a written complaint, the complaint petition should contain the name, age and other description of the complainant as well as the accused, the date, time and place of occurrence, the list of witnesses with addresses, the nature of offence with section of statute, the information about prior lodging of F.I.R. and action taken thereon, the information about any previous complaint regarding the same occurrence and the name of the Court, date and manner of disposal of such complaint, facts of the case and details of documents relied upon by the complainant. Information sought for in each of these columns has its significance and it is the duty of the complainant to comply the requirement with correct facts. There is nothing either in the Code or in the G.R.C.O. (Criminal) that a private complaint petition cannot be entertained by a Magistrate unless it is supported either by affidavit or verification by the complainant. Like all procedural laws, Code of Criminal Procedure is also designed to subserve the ends of justice and not to frustrate them by mere technicalities. Averments made in the complaint petition are not substantive piece of evidence. Even if it is supported by an affidavit or verification, the position will not change. It would be travesty of justice to throw out a complaint

petition merely because it is not supported by an affidavit or verification or not to act upon it, even though the initial statement of the complainant and the statements of the witnesses recorded under section 202 of Cr.P.C. prima facie make out the ingredients of the offences alleged.

In the case in hand, the complaint petition filed by the complainant-opposite party fulfills the requirements laid down in Rules 14, 15 and 20 of Chapter-II of the G.R.C.O. (Criminal).

Therefore, the contentions raised by the learned counsel for the petitioner that learned Magistrate was not justified in proceeding with the complaint petition as it was not supported by a duly sworn affidavit or in the form of a verification by the complainant, is totally misconceived and liable to be rejected.

(iii) **Requirement for the Magistrate at the stage of taking cognizance and issuance of process**:

In case of **Fiona Shrikhande -Vrs.- State of Maharashtra reported in (2014) 57 Orissa Criminal Reports (SC) 285**, it is held that at the complaint stage, the Magistrate is merely concerned with the allegations made out in the complaint and has only to prima facie satisfy whether there

are sufficient grounds to proceed against the accused and it is not the province of the Magistrate to enquire into a detailed discussion on the merits and demerits of the case. The scope of inquiry under section 202 is extremely limited in the sense that the Magistrate, at this stage, is expected to examine prima facie the truth or falsehood of the allegations made in the complaint.

In case of **Amanullah -Vrs.- State of Bihar reported in (2016) 64 Orissa Criminal Reports (SC) 304**, it is held that at the stage of taking cognizance, the Court should not get into the merits of the case and its duty is limited to the extent of finding out whether from the material placed before it, offence alleged therein against the accused is made out or not with a view to proceed further with the case.

(iv) **Scope of interference in an application under section 482 of Cr.P.C.**:

In case of **Popular Muthiah -Vrs.- State of Tamil Nadu reported in (2006) 34 Orissa Criminal Reports (SC) 749**, it is held that inherent powers of the High Court can be exercised, it is trite, both in relation to substantive as also procedural matters. In respect of the incidental or supplemental power, evidently, the High Court can exercise its inherent jurisdiction irrespective of the nature of the proceedings. It is not

trammeled by procedural restrictions in that. Power can be exercised suo motu in the interest of justice. If such a power is not conceded, it may even lead to injustice to an accused. Such a power can be exercised concurrently with the appellate or revisional jurisdiction and no formal application is required to be filed therefor. It is, however, beyond any doubt that the power under section 482 of the Code of Criminal Procedure is not unlimited. It can, inter alia, be exercised where the Code is silent where the power of the Court is not treated as exhaustive, or there is a specific provision in the Code; or the statute does not fall within the purview of the Code because it involves application of a special law. It acts ex debito justitiae. It can, thus, do real and substantial justice for which alone it exists.

In case of **Sonu Gupta -Vrs.- Deepak Gupta reported in (2015) 60 Orissa Criminal Reports (SC) 993**, it is held that cognizance is taken of the offence and not the offender. Summoning of an accused can be made on the basis of prima facie case. It is further held that an error has been committed by the High Court in evaluating the merits of the defence case and other submissions advanced on behalf of the accused which were not appropriate for consideration at the stage of taking cognizance and issuing summons.

(v) **Materials to be perused when order taking cognizance and issuance of process is under challenge:**

In case of **Sampelly -Vrs.- Indian Renewable Energy reported in (2016) 65 Orissa Criminal Reports (SC) 583**, it is held that it is well settled that while dealing with a quashing petition, the Court has ordinarily to proceed on the basis of averments in the complaint. The defence of the accused cannot be considered at the stage. The Court considering the prayer for quashing does not adjudicate upon a disputed question of fact.

In case of **R. Kalyani -Vrs.- Janak C. Mehta reported in (2009) 42 Orissa Criminal Reports (SC) 162**, it is held that while exercising its inherent jurisdiction to quash a criminal proceeding, save and except in very exceptional circumstances, the Court should not look into any documents relied upon by the defence.

In case of **HMT Watches -Vrs.- M.A. Abida reported in 2015 (I) Orissa Law Reviews (SC) 1012**, it was held that the High Court committed grave error of law in quashing the criminal complaints filed by the appellant in respect of offence punishable under section 138 of the N.I. Act in exercise of powers under section 482 of the Code of Criminal

Procedure by accepting factual defences of the accused which were disputed ones. Such defences, if taken before trial Court, after recording of the evidence, can be better appreciated.

In case of **Harshendra Kumar D. -Vrs.- Rebatilata Koley reported in (2011) 48 Orissa Criminal Reports (SC) 861**, it is held as follows:-

> "21. In our judgment, the above observations cannot be read to mean that in a criminal case where trial is yet to take place and the matter is at the stage of issuance of summons or taking cognizance, materials relied upon by the accused which are in the nature of public documents or the materials which are beyond suspicion or doubt, in no circumstance, can be looked into by the High Court in exercise of its jurisdiction under Section 482 or for that matter in exercise of revisional jurisdiction under Section 397 of the Code. It is fairly settled now that while exercising inherent jurisdiction under Section 482 or revisional jurisdiction under Section 397 of the Code in a case where complaint is sought to be quashed, it is not proper for the High Court to consider the defence of the accused or embark upon an enquiry in respect of merits of the accusations. However, in an appropriate case, if on the face of the documents - which are beyond suspicion or doubt - placed by accused, the accusations

> against him cannot stand, it would be travesty of justice if accused is relegated to trial and he is asked to prove his defence before the trial court. In such a matter, for promotion of justice or to prevent injustice or abuse of process, the High Court may look into the materials which have significant bearing on the matter at prima facie stage.
>
> 22. Criminal prosecution is a serious matter; it affects the liberty of a person. No greater damage can be done to the reputation of a person than dragging him in a criminal case....”

7. Keeping in view the requirement for the Magistrate at the stage of taking cognizance and issuance of process, scope of interference by this Court in an application under section 482 of Cr.P.C. and materials to be perused when order taking cognizance and issuance of process is under challenge, it is to be seen whether the impugned order of taking cognizance of offences under sections 420, 384, 427, 471, 467 read with section 34 of the Indian Penal Code and issuance of process is justified or not.

(i) **Offence under section 420 of the Indian Penal Code:**

Section 420 of the Indian Penal Code deals with punishment for cheating and dishonestly inducing delivery of

property. ‘Cheating’ has been defined in section 415 of the Indian Penal Code. The essential ingredients of the offence of 'cheating' are: (i) deception of a person either by making a false or misleading representation or by other action or omission (ii) fraudulent or dishonest inducement of that person to either deliver any property or to consent to the retention thereof by any person or to intentionally induce that person to do or omit to do anything which he would not do or omit if he were not so deceived and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property. (Ref:- **Ashok Kumar Padhy -Vrs.- ICFAI Foundation reported in (2018) 70 Orissa Criminal Reports 133**).

In case of **Subodh Chandra Shome -Vrs.- Durga Madhab Das reported in 1985 (II) Orissa Law Reviews 115**, it is held that the necessary ingredients of the offence of cheating are a deception by the accused that deception must emanate from the accused, there must be dishonest inducement from the accused to the complainant, and believing on such inducement, the complainant parted with some property or valuable security and there must be a criminal intention of the accused when the transaction took place. If these ingredients are

not satisfied then the offence of cheating cannot be said to have been committed.

In the case in hand, it is the case of the complainant that the petitioner-company has dishonestly induced him into the business of selling petroleum products manufactured by the company with some alluring proposals that it would yield huge profit and basing on such inducement, the complainant invested huge amount to do business in petroleum products with the company and in course of such business, the company suddenly suspended supply of petrol and diesel with effect from 01.05.2008 to the complainant on flimsy plea of non-support of Govt. of India and thereby dishonestly caused huge loss to the complainant.

On a plain reading of the complaint petition, it appears that the complainant was a successful businessman in lime business and in order to establish a R.I.L. petrol pump at Khuntuni, he purchased land and with the help of the representatives of the R.I.L., he obtained 'No Objection Certificate' for establishment of retail outlet at Khuntuni under the name and style 'M/s. Shyam Filling Station'. A lease deed and a dealership agreement were executed between the complainant and the R.I.L. It is the case of the complainant that

he paid Rs.3,00,000/- as signing fees and Rs.23,50,000/- as security deposits to the company. The complainant also obtained finance from State Bank of India, Athagarh Branch to the tune of Rs.1.19 crores for completion of construction of the filling station as per the approved layout and design of R.I.L. It is also the case of the complainant that he operated the outlet for a period of two years as per the instructions and directions of the R.I.L. issued from time to time. There is no dispute that the R.I.L. suspended the supply of petrol and diesel to the outlet of the complainant with effect from 01.05.2008. The documents which are annexed to the 482 Cr.P.C. petition are the notification dated 15.03.2002 of the Govt. of India (Annexture-3) and notification dated 28.03.2002 issued by the Govt. of India (Annexture-4). In view of the policy decision of the Govt. of India, R.P.L. submitted application to the Central Govt. seeking marketing rights and permission for marketing transportation of fuels was granted to the R.P.L. by the Govt. of India. The petitioner-company after setting up outlets across the country under various categories carried on business. When the complainant submitted his application for a dealership for the petroleum pump retail outlet on the basis of newspaper advertisement and he was selected by the company as a dealer for the proposed retail outlet at

Khuntuni and accordingly, dealership agreement was executed between the parties on 22.08.2005 and a tripartite agreement was executed on 29.10.2005 between the State Bank of India, the petitioner and the complainant and after availing the loan amount and setting up the retail outlet, the company supplied petroleum products to the retail outlet of the complainant for a period of two years, it cannot be said that the company had fraudulent or dishonest intention at the time of making the promise of supplying petroleum products to the retail outlet of the complainant. There is nothing on record to show that representation which was made by the company to the complainant to supply petroleum products in the retail outlet at Khuntuni was false to the knowledge of the company and was made in order to deceive the complainant. It also prima facie appears on the basis of the materials/documents as to what was the reason for suspension of supply of petroleum products to all the retail outlets by the company progressively with effect from 1st May 2008. Since it was a force majeure situation for which the supply was suspended, it is difficult to hold that there was any element of cheating in it. It may be a mere breach of contract by the company for which civil remedies are available and in fact the complainant has already resorted to such

remedies and by filing the complaint petition, the complainant has given the dispute a cloak of criminal offence.

Learned counsel for the opposite party placed reliance in case of **Kamaladevi Agarwal -Vrs.- State of West Bengal reported in 2002 (I) Orissa Law Reviews (SC) 173** wherein it is held that merely because civil suit is pending in the High Court, the Magistrate is not unjustified to proceed with the criminal case either in law or on the basis propriety. Criminal cases have to be proceeded with in accordance with the procedure as prescribed under the Code of Criminal Procedure and the pendency of a civil action in a different Court even though higher in status and authority, cannot be made a basis for quashing of the proceedings.

Coming to the citations placed by the learned counsel for the petitioner, in case of **M/s. Thermax Ltd. -Vrs.- K.M. Johny reported in (2011) 50 Orissa Criminal Reports (SC) 616**, it is held that for proceeding under section 156(3) of the Code, the complaint must disclose relevant material ingredients of sections 405, 406, 420 read with section 34 of the Indian Penal Code. If there is a flavour of civil nature, the same cannot be agitated in the form of criminal proceeding. If there is huge

delay and in order to avoid the period of limitation, it cannot be resorted to a criminal proceeding.

In case of **Hridaya Ranjan Pd. Verma -Vrs.- State of Bihar reported in A.I.R. 2000 S.C. 2341**, it is held as follows:

> "16.In determining the question, it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time to inducement which may be judged by his subsequent conduct *but for this subsequent conduct is not the sole test*. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore, it is the intention which is the gist of the offence. To hold a person guilty of cheating, it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently, such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed."

In case of **S.W. Palanitkar and others -Vrs.- State of Bihar reported in A.I.R. 2001 S.C. 2960**, it is held as follows:-

> "24. Many a times, complaints are filed under section 200 Cr.P.C. by the parties with an oblique motive or for collateral purposes to harass, to wreak vengeance, to pressurize the accused to bring them to their own terms or to enforce the obligations arising out of breach of contract touching commercial transactions instead of approaching Civil Courts with a view to realize money at the earliest. It is also to be kept in mind that when parties commit a wrongful act constituting a criminal offence satisfying necessary ingredients of an offence, they cannot be allowed to walk away with an impression that no action could be taken against them on criminal side. A wrongful or illegal act such as criminal breach of trust, misappropriation, cheating or defamation may give rise to action both on civil as well as on criminal side, when it is clear from the complaint and sworn statements that necessary ingredients of constituting an offence are made out. May be parties are entitled to proceed on civil side only in a given situation in the absence of an act constituting an offence but not to proceed against the accused in a criminal prosecution. Hence before issuing a process, a

> Magistrate has to essentially keep in mind the scheme contained in the provisions of sections 200-203 of Cr.P.C. keeping in mind the position of law stated above and pass an order judiciously and not mechanically or in routine manner."

In case of **International Advanced Research Centre -Vrs.- Nimra Cerglass reported in (2015) 62 Orissa Criminal Reports (SC) 635**, it is held as follows:-

> "13.....In order to bring a case for the offence of cheating, it is not merely sufficient to prove that a false representation had been made, but, it is further necessary to prove that the representation was false to the knowledge of the accused and was made in order to deceive the complainant.
>
> 14. Distinction between mere breach of contract and the cheating would depend upon the intention of the accused at the time of alleged inducement. If it is established that the intention of the accused was dishonest at the very time when he made a promise and entered into a transaction with the complainant to part with his property or money, then the liability is criminal and the accused is guilty of the offence of cheating. On the other hand, if all that is established that a representation made by the accused has subsequently not been kept, criminal liability cannot be foisted on the

> accused and the only right which the complainant acquires is the remedy for breach of contract in a Civil Court. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown at the beginning of the transaction."

In case of **M/s. Indian Oil Corporation -Vrs.- M/s. NEPC India Ltd. reported in (2006) 35 Orissa Criminal Reports (SC) 128**, it is held that there is a growing tendency in business circles to convert purely civil disputes into criminal cases. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. There is an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure through criminal prosecution should be deprecated and discouraged. It is further held that while no one with a legitimate cause or grievance should be prevented from seeking remedies available in criminal law, a complainant who initiates or persists with a prosecution, being fully aware that the criminal proceedings are unwarranted and his remedy lies only in civil

law, should himself be made accountable, at the end of such misconceived criminal proceedings, in accordance with law.

In view of the foregoing discussions, I am of the humble view that there is absence of any prima facie material to show that representation which was made to the complainant by the company was false to the knowledge of the company and it was made in order to deceive the complainant. There is also nothing on record to show that the intention of the company was dishonest at the very time when it made a promise and entered into a transaction with the complainant to part with his money. Discontinuance of supply of petroleum products to the retail outlet of the complainant under force majeure situation may be a mere breach of contract but the conduct of the petitioner in supplying the petroleum products for two years to the retail outlet of the complainant negatives any fraudulent or dishonest intention on the part of the company at the beginning of the transaction. Subsequent conduct of the company relating to discontinuance of supply of petroleum products cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction i.e. the time when the offence is alleged to have been committed. When the Govt. of India took the decision to

make the price of diesel market determined and a press release was made on 18.10.2014 (Annexure-11), the petitioner-company resumed its retail outlets all over the country progressively and the complainant was offered by the company to resume the supplies to the outlet at Khuntuni but the land on which the retail outlet of the complainant was situated had already been sold in auction pursuant to proceedings under SARFAESI Act. The documents which are relied upon by the petitioner appear to be beyond suspicion or doubt and in fact, during course of hearing, the learned counsel for the opposite party did not dispute the same but submitted that such documents are in the nature of defence plea which cannot be considered at this stage. In view of the decision of the Hon'ble Supreme Court in case of **Harshendra Kumar D.** (supra), it would be travesty of justice, if this Court ignores those documents which have got a significant bearing on the matter at prima facie stage.

Therefore, I am of the humble view that in the factual scenario, the ingredients of offence under section 420 of the Indian Penal Code are not attracted.

(ii) **Offence under section 384 of the Indian Penal Code:**

Section 384 of the Indian Penal Code provides punishment for 'extortion' which is defined under section 383 of the Indian Penal Code and the ingredients of extortion are as follows:-

(i) The accused must put any person in fear of injury to that person or any other person;

(ii) The putting of a person in such fear must be intentional;

(iii) The accused must thereby induce the person so put in fear to deliver to any person any property, valuable security or anything signed or sealed which may be converted into a valuable security;

(iv) Such inducement must be done dishonestly.

A distinction between theft and extortion is that the offence of extortion is carried out by overpowering the will of a person by putting him intentionally with fear whereas in commission of an offence of theft, the offender's intention is always to take the property without the owner's consent. (Ref:-

Dhananjay -Vrs.- State of Bihar reported in (2007) 36 Orissa Criminal Reports (SC) 697).

Though it is mentioned in the complaint petition that being intentionally put to fear by R.I.L. of loss of his property, a valuable sum of Rs.2.65 lakhs were extorted from the complainant by R.I.L. and its authorised representatives but the complaint petition does not disclose any kind of fear which was put to the complainant so as to take away from him the element of volition or to cause any form of injury to reputation/property or bodily harm or a mental alarm. There is nothing in the complaint petition or in the statement of the complainant or his witnesses that the petitioner induced the complainant by putting him in fear to deliver to him any property. Except a mere averment in the complaint petition, the complainant has failed to make out prima facie case satisfying the ingredients of the offence under section 384 of the Indian Penal Code.

Therefore, I am of the humble view that the ingredients of offence under section 384 of the Indian Penal Code are not attracted.

(iii) **Offence under section 427 of the Indian Penal Code:**

In order to attract the ingredients of the offence under section 427 of the Indian Penal Code, at first the requirements of the definition of 'mischief' as envisaged under section 425 of the Indian Penal Code has to be proved. Mischief involves mental act with a destructive animus. Destruction with object of creating wrongful loss or damage is obligatory to be established. Negligence does not unnecessarily amount to mischief. Negligence coupled with intention to cause wrongful loss or damage may amount to mischief in certain circumstances. The elements of section 425 of the Indian Penal Code relating to intention or knowledge have to be proved otherwise section 427 of the Indian Penal Code will have no application. (Ref:- **Nagendranath Roy -Vrs.- Dr. Bijoy Kumar reported in (1991) 4 Orissa Criminal Reports 457**).

In the complaint petition, it is mentioned that the accused persons have caused mischief and thereby putting the complainant in loss and harassment. There is nothing in the complaint petition as to in what way the petitioner had got any intention or knowledge to cause wrongful loss or damage to the opposite party. The decision taken for suspension of supplies of petroleum products to the retail outlets of the company in the force majeure situation might have caused loss or damage to the

complainant but in absence of necessary mens rea, it is difficult to arrive at the conclusion that the prima facie ingredients of offence under section 427 of the Indian Penal Code are attracted.

(iv) **Offence under section 471 of the Indian Penal Code:**

The essential ingredients of section 471 of the Indian Penal Code are (i) fraudulent or dishonest use of a forged document as genuine (ii) knowledge or reasonable belief on the part of person using the document that it is a forged one. Therefore, there must be material to show that a particular document is a forged one. Section 470 of the Indian Penal Code states that a *false document* made wholly or in part by forgery is designated "a forged document". The person using the document must have specific knowledge or reasonable belief that it is a forged one. Making a *false document* is enumerated under section 464 of Cr.P.C.

In case of **Md. Ibrahim -Vrs.- State of Bihar reported in (2009) 8 Supreme Court Cases 751**, it is held as follows:-

> "10. An analysis of Section 464 of Penal Code shows that it divides false documents into three categories:

10.1) The first is where a person dishonestly or fraudulently makes or executes a document with the intention of causing it to be believed that such document was made or executed by some other person, or by the authority of some other person, by whom or by whose authority he knows it was not made or executed.

10.2) The second is where a person dishonestly or fraudulently, by cancellation or otherwise, alters a document in any material part, without lawful authority, after it has been made or executed by either himself or any other person.

10.3) The third is where a person dishonestly or fraudulently causes any person to sign, execute or alter a document knowing that such person could not by reason of (a) unsoundness of mind; or (b) intoxication; or (c) deception practised upon him, know the contents of the document or the nature of the alteration.

11. In short, a person is said to have made a `false document', if (i) he made or executed a document claiming to be someone else or authorised by someone else; or (ii) he altered or tampered a document; or (iii) he obtained a document by practicing deception, or from a person not in control of his senses.

In case of **A.S. Krishnan -Vrs.- State of Kerala reported in (2004) 28 Orissa Criminal Reports (SC) 113**, it is held as follows:-

> "8. Section 471 is intended to apply to persons other than forger himself, but the forger himself is not excluded from the operation of the Section. To attract Section 471, it is not necessary that the person held guilty under the provision must have forged the document himself or that the person independently charged for forgery of the document must of necessity be convicted, before the person using the forged document, knowing it to be a forged one can be convicted, as long as the fact that the document used stood established or proved to be a forged one. The act or acts which constitute the commission of the offence of forgery are quite different from the act of making use of a forged document. The expression 'fraudulently and dishonestly' are defined in Sections 25 and 24 IPC respectively. For an offence under Section 471, one of the necessary ingredients is fraudulent and dishonest use of the document as genuine. The act need not be both dishonest and fraudulent. The use of document as contemplated by Section 471 must be voluntary one. For sustaining conviction under Section 471, it is necessary for the prosecution to prove that

> accused knew or had reason to believe that the document to be a forged one. Whether the accused knew or had reason to believe the document in question to be a forged has to be adjudicated on the basis of materials and the finding recorded in that regard is essentially factual."

In the complaint petition, it is mentioned that the R.I.L. and its representatives dishonestly and fraudulently made, signed, sealed and executed the documents with the intention of causing the complainant to believe that such documents would be acted upon bonafide and R.I.L. shall continue to deliver, diesel and allied products to the said filling station as per terms under the dealership agreement. The documents referred to are lease deed and dealership agreement. Both these documents were executed on 22.08.2005 in the non-judicial stamp papers which are annexed to the CRLMC application as Annexure-7 series. The complainant has signed the documents so also from the side of the R.I.L., the authorized signatory has signed the same. These documents have been executed in the prescribed formats of R.I.L. which are meant for the lessors/dealers. There is nothing to show that these documents are forged documents and created dishonestly or fraudulently. Section 24 of the Indian Penal Code defines 'dishonestly' as doing anything with the

intention of causing wrongful gain to one person or wrongful loss to another person. Similarly section 25 of the Indian Penal Code defines 'fraudulently' which means doing the thing with intent to defraud but not otherwise. It cannot be lost sight of the fact that on the basis of these documents, the tripartite agreement was executed between the bank, the petitioner and the complainant on 29.10.2005 and the complainant availed the loan from the bank and established the retail outlet at Khuntuni and carried on business of petroleum products for two years which were supplied by the petitioner on the basis of the dealership agreement.

Therefore, in my humble opinion, the ingredients of offence under section 471 of the Indian Penal Code are also not attracted.

(v) **Offence under section 467 of the Indian Penal Code:**

Section 467 of the Indian Penal Code prescribes punishment for forgery of valuable security, will etc. In case of **Inder Mohan Goswami -Vrs.- State of Uttaranchal reported in (2008) 39 Orissa Criminal Reports (SC) 188**, it is held as follows:-

> "42. The following ingredients are essential for commission of the offence under Section 467 IPC:
> 1. the document in question is forged;
> 2. the accused who forged it;
> 3. the document is one of the kinds enumerated in the aforementioned section."

In view of the discussions which have been made relating to offence under section 471 of the Indian Penal Code, since there is no material on record to show that the documents i.e. lease deed and dealership agreement are forged documents, the basic ingredients of offence under section 467 of the Indian Penal Code are altogether missing even in the allegations leveled in the complaint petition against the petitioner. Therefore, by no stretch of the imagination, the petitioner can be legally prosecuted for an offence under section 467 of the Indian Penal Code.

Conclusion

8. To sum up, in the light of discussions made, it seems that the criminal prosecution instituted against the petitioner is nothing but used as an instrument of harassment and with an ulterior motive to pressurize the petitioner to compensate the loss or damage which has been caused to the complainant. The averments made in the complaint petition, the initial statement

of the complainant and the statements of the witnesses recorded under section 202 of Cr.P.C. do not make out any of the offences under sections 420, 384, 427, 471, 467 read with section 34 of the Indian Penal Code against the petitioner and therefore, to prevent abuse of the process and to secure the ends of justice, it becomes imperative to quash the impugned order invoking the inherent powers under section 482 of Cr.P.C.

9. For the reasons stated above, the CRLMC application is allowed. The impugned order dated 01.11.2011 passed by the learned S.D.J.M., Athagarh in I.C.C. Case No.69 of 2009 so far as the petitioner is concerned, stands quashed.

.....

S. K. Sahoo, J.

Orissa High Court, Cuttack
The 30th July 2018/Pravakar/Sukanta