

IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL WRIT PETITION NO.37 OF 2019.

Mrs. Nanda Kunkolienkar,
w/o Nonu Kunkolienkar,
40 years, Indian National,
Resident of H. No.147,
Aradi Bandh,
Santa Cruz, Tiswadi, Goa.

.... Petitioner.

Vs.

State of Goa,
Through Public Prosecutor
High Court, Panaji-Goa.

.... Respondent.

Shri Menino Teles, Advocate for the petitioner.

Shri P. Faldessai, Additional Public Prosecutor for the respondent.

Coram:- PRITHVIRAJ K. CHAVAN,J.

Reserved on:-12th July 2019.

Pronounced on :-22nd July 2019.

JUDGMENT:-

Rule. Rule made returnable forthwith.

2. Heard finally with the consent of Mr. M. Teles, learned Counsel for the petitioner and Mr. P. Faldessai, learned Additional

Public Prosecutor. He waives notice on behalf of the respondent.

3. The challenge in this petition is to an order passed by the learned Special Judge on 26.11.2018 by which learned Judge has confirmed the order passed by the learned Judicial Magistrate, First Class, Panaji in case no.IPC/202/2012/C directing a charge to be framed against the petitioner for the offences punishable under Sections 419, 467, 468, 471 and 420 IPC read with Section 34 of IPC.

4. One Mr. Cesar Rego Fernandes filed a complaint before the Police attached to Panaji Police Station against the petitioner and her husband including six others that from 9.8.2009 to 22.8.2009 all the accused in furtherance of their common intention impersonated one deceased Ms. Luiza Maria D'souza after her death by preparing a forged Will dated 9.8.2002 and thereby prepared a Gift Deed dated 5.1.2009 in order to illegally grab and acquire and dispose of the property surveyed under No.244/02 at Village Kalapur which partly belonged to the complainant and his relatives.

5. The Complainant contend that deceased Luiza was the daughter of late Gabriel D'Souza. She expired on 25.7.2002 at Goa Medical College hospital Bambolim. The Will which came to be executed on 9.8.2002 is a forged document. Complaint reveals that accused no.1 i.e. husband of the petitioner is the son of sister of said Luiza who had purportedly bequeathed survey no.242/2 by the aforesaid Will. Luiza had never adopted accused no.1 nor there is any deed of adoption executed by Luiza. Complainant states that accused no.1 who is originally from Taleigao used to sometimes stay in the mundkarial house amongst others which has now been demolished by accused nos.1 and 2 and a big bungalow is coming up on the demolished site by encroaching upon the adjoining land estimated to be around 35 lakhs. Complaint further reveals that Luiza was admitted in the hospital by accused no.1 on 20.7.2002. She was under medical treatment till her death. She died at the age of 75 years as per medical records. On the basis of aforesaid forged Will accused no.1 executed Gift Deed dated 5.1.2009 in favour of accused no.2 (Petitioner) gifting a plot admeasuring 547 sq. mts of the property surveyed under no. 244/2.

6. The complaint further reveals that said Will has been executed 15 days after the death of Luiza. It is therefore, obvious that somebody else had personated Luiza before the Sub-Registrar. The Complainant suspect one Yessu Dias who had impersonated as Luiza. Yessu Dias appears to be closely connected with accused nos.1 and the petitioner. On the basis of complaint, FIR came to be registered. After investigation, chargesheet has been filed in the Court of JMFC Panaji under Sections referred herein above against the petitioner and her husband.

7. The learned Magistrate by an order dated 29.3.2017 directed a charge to be framed against the petitioner and her husband under Sections 419, 467, 468, 471,420 read with Section 34 of IPC. The learned Magistrate has gone through the record, especially Medical records and birth certificate of deceased Luiza indicating two different dates. It is observed that accused no.1 is a relative of deceased Luiza who alleged to have executed Will and bequeathed the property in his name. Prima facie, it is observed by learned Magistrate that there is

involvement of both the accused in committing the offence with which they are charged. The learned Magistrate has also gone through the statement of the witnesses and therefore, directed framing of charge as above.

8. Challenging the said order by way of revision in the Sessions Court, the petitioner and her husband raised the same grounds, however, the learned Session Judge, Panaji, by the impugned order rejected the revision application.

9. At the outset, the learned Counsel for the petitioner contends that Yessu Dias is the main culprit in the case who appears to have impersonated deceased Luiza Maria. According to him, it appears that she has committed forgery by impersonation. The Will is in favour of husband of the petitioner, however, some of the properties were gifted to the petitioner by her husband. The petitioner can, in no way be a consenting party to the alleged act of forgery or impersonation.

10. It is contended that Luiza Maria died on 25.7.2002 and the Will came to be executed on 9.8.2002 i.e after her expiry and, therefore, it cannot be said that the said Will is a genuine and authentic document. It is contended that the petitioner never visited the office of the registrar nor signed any document. Property was gifted to her by her husband on 5.1.2009.

11. In short, it is the contention of the learned Counsel that the person who executed a Will has committed forgery and therefore, there is absolutely no material on record indicating ingredients of any of the Section with which the petitioner is being prosecuted. It is only the maker of the document who can be held liable for the forgery. Police has not filed any chargesheet against the main culprit. The learned Counsel has therefore placed reliance in the case of ***Sheila Sebastian Vs R. Jawaharaj and anr. in Criminal Appeal No. 359-360 of 2010.***

12. On the other hand, the learned Additional Public Prosecutor contends that facts in the judgment Sheila Sebastian(supra) are quite different wherein there was no issue of common intention of

the accused before the Supreme Court. At the outset, learned Additional Public Prosecutor objected that the petition is not tenable under Section 482 of Cr.P.C. for the reason that this is nothing but continuation of the revision filed before the Sessions Judge. When the two Courts below have concurrently held that there is prima facie material to frame charge against the petitioner, it is needless to interfere in the impugned order. On the aspect of Section 34 of IPC, it is contended by Mr. Phaldessai that for invoking Section 34 of IPC the accused need not require to go to the Registrar's (office) for committing forgery or for the purpose of personation and cheating. However, he drew my attention to the complaint which indicates the name of the petitioner as an accused. He also drew my attention to the said Will dated 9.8.2002 which depicts the name of husband of the petitioner. It is also pointed out that there is a manipulation and interpolation on the death certificate of Luiza which is apparent as name indicates Luis and after erasing "Mr." "MS" has been added. Even the Sex is written as "FeMALE" which indicates that "Fe" is added subsequently to a certificate which appears to have been issued in favour of some male.

13. The learned Additional Public Prosecutor has also drawn my attention to page 3 of the gift deed wherein it appears that name of the deceased Luiza is shown as Luis by stating that death certificate indicates her name as Luis during her life time, only to match it with the death certificate referred herein above. If the deceased died on 25.7.2002 there would be no question of she executing a Will on 9.8.2002 after her death. Nevertheless, it appears from the record that the petitioner is not involved in the act of cheating and personation as she did not visit the office of sub Registrar.

14. From the perusal of the record there is nothing to indicate that a false document or a record has been made by the petitioner thereby attracting the ingredients of Section 464 of IPC. Only because the petitioner's husband had gifted the property in question in her favour would not, ipso facto, mean that she shared common intention with her husband in committing an offence of forgery. The learned Additional Public Prosecutor fairly submits when asked that there is no sufficient grounds for proceedings against the petitioner.

15. The Supreme Court in the case of ***Sheila Sebastian*** cited *supra* observed thus at paragraphs 19, 20, 22, 24, 25, 26 and 27:-

- “19. A close scrutiny of the aforesaid provisions makes it clear that, Section 463 defines the offence of forgery, while Section 464 substantiates the same by providing an answer as to when a false document could be said to have been made for the purpose of committing an offence of forgery under Section 463, IPC. Therefore, we can safely deduce that Section 464 defines one of the ingredients of forgery i.e., making of a false document. Further, Section 465 provides punishment for the commission of the offence of forgery. In order to sustain a conviction under Section 465, first it has to be proved that forgery was committed under Section 463, implying that ingredients under Section 464 should also be satisfied. Therefore unless and untill ingredients under Section 463 are satisfied a person cannot be convicted under Section 465 by solely relying on the ingredients of Section 464, as the offence of forgery would remain incomplete
20. The key to unfold the present dispute lies in understanding Explanation 2 as given in Section 464 of IPC. As Collin J., puts it precisely in *Dickins v. Gill*, (1896) 2 QB 310, a case dealing with the possession and making of fictitious stamp wherein he stated that “to make”, in itself involves conscious act on the part of the maker. Therefore, an offence of forgery cannot lie against a person who has not created it or signed it.
22. In *Md. Ibrahim (supra)*, this Court had the occasion to examine forgery of a document purporting to be a valuable security ([Section 467, IPC](#)) and using of forged document as genuine ([Section 471, IPC](#)). While considering the basic ingredients of both the offences, this Court observed that to attract the offence of forgery as defined under [Section 463, IPC](#) depends

upon creation of a document as defined under [Section 464, IPC](#). It is further observed that mere execution of a sale deed by claiming that property being sold was executant's property, did not amount to commission of offences punishable under [Sections 467 and 471, IPC](#) even if title of property did not vest in the executant.

24. *[In Mir Nagvi Askari vs. Central Bureau of Investigation](#), (2009) 15 SCC 643, this Court, after analysing the facts of that case, came to observe as follows:*

“A person is said to make a false document or record if he satisfies one of the three conditions as noticed hereinbefore and provided for under the said section. The first condition being that the document has been falsified with the intention of causing it to be believed that such document has been made by a person, by whom the person falsifying the document knows that it was not made. Clearly the documents in question in the present case, even if it be assumed to have been made dishonestly or fraudulently, had not been made with the intention of causing it to be believed that they were made by or under the authority of someone else.

The second criteria of the section deals with a case where a person without lawful authority alters a document after it has been made. There has been no allegation of alteration of the voucher in question after they have been made. Therefore, in our opinion the second criteria of the said section is also not applicable to the present case.

The third and final condition of [Section 464](#) deals with a document, signed by a person who due to his mental capacity does not know the contents of the documents which were made i.e. because of intoxication or unsoundness of mind, etc. Such is also not the case before us. Indisputably therefore the accused before us could not have been convicted with the making of a

false document.

25. *Keeping in view the strict interpretation of penal statute i.e., referring to rule of interpretation wherein natural inferences are preferred, we observe that a charge of forgery cannot be imposed on a person who is not the maker of the same. As held in plethora of cases, making of a document is different than causing it to be made. As Explanation 2 to [Section 464](#) further clarifies that, for constituting an offence under [Section 464](#) it is imperative that a false document is made and the accused person is the maker of the same, otherwise the accused person is not liable for the offence of forgery.*
26. *The definition of “false document” is a part of the definition of “forgery”. Both must be read together. ‘Forgery’ and ‘Fraud’ are essentially matters of evidence which could be proved as a fact by direct evidence or by inferences drawn from proved facts. In the case in hand, there is no finding recorded by the trial Court that the respondents have made any false document or part of the document/record to execute mortgage deed under the guise of that ‘false document’. Hence, neither respondent no.1 nor respondent no.2 can be held as makers of the forged documents. It is the imposter who can be said to have made the false document by committing forgery. In such an event the trial court as well as appellate court misguided themselves by convicting the accused. Therefore, the High Court has rightly acquitted the accused based on the settled legal position and we find no reason to interfere with the same.*
27. *A reasonable doubt has already been thoroughly explained in the case of Latesh @ Dadu Baburao Karlekar Versus The State of Maharashtra, (2018) 3 SCC 66 wherein ‘reasonable doubt’ has been enunciated by this Court as “a mean between excessive caution and excessive indifference to a doubt, further it*

has been elaborated that reasonable doubt must be a practical one and not an abstract theoretical hypothesis.” In this case at hand, the imposter has not been found or investigated into by the concerned officer. Nothing has been spilled on the relationship between the imposter and respondent no.1. Law is well settled with regard to the fact that however strong the suspicion may be, it cannot take the place of proof. Strong suspicion, coincidence, grave doubt cannot take the place of proof. Always a duty is cast upon the Courts to ensure that suspicion does not take place of the legal proof. In this case, the trial Court as well as the appellate Court carried away by the fact that accused is the beneficiary or the executant of the mortgage deed, where the prosecution miserably failed to prove the first transaction i.e PoA as a fraudulent and forged transaction. The standard of proof in a criminal trial is proof beyond reasonable doubt because the right to personal liberty of a citizen can never be taken away by the standard of preponderance of probability.”

16. The law is well settled on the point of scope of Sections 227 and 228 of Cr.P.C. It is not necessary for a Judge, at the time of framing charge, to consider in detail all the material on record. It is also not necessary to see whether there is sufficient ground for conviction of the accused or whether trial will certainly end into conviction. A strong suspicion at the initial stage is sufficient to frame the charge. From perusal of the material on record it appears that there is no strong suspicion in so far as the petitioner is concerned. Powers

under Section 482 of Cr.P.C are inherent in nature. As such, such powers are of wide plentitude with no statutory limitation but which are required to be exercised to achieve twin object namely to prevent abuse of process of any court or to do real and substantial justice.

17. Having carefully considered the facts and circumstances of the case, vis-a-vis the impugned order, I am of the view that the proceedings against the petitioner would tantamount to abuse of process of Court. Though it is contended by Mr. Phaldessai that this would be in continuation of the revision, yet it is made clear that while exercising power under Section 482 of Cr.P.C. Court does not function as a Court of appeal or revision. Inherent jurisdiction under this section has to be exercised sparingly, carefully and with caution. Jurisdiction can be exercised only if these three tests are justified.

18. In the light of the aforesaid discussions, the impugned order dated 26.11.2018, to the extent of present petitioner, needs to be quashed and set aside. Accordingly, it is set aside. The petitioner is discharged. Her bail bond stands cancelled.

19. The learned Magistrate shall proceed further with the matter as per law.

20. Rule is made absolute in the aforesaid terms with no order as to costs.

PRITHVIRAJ K. CHAVAN, J.

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