

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1426 OF 2003

Rajiv S Modi]
Indian Inhabitant presently]
Residing at Pushpak, 17th Floor,]
Altamount Road,]
Mumbai 400 007]..... Petitioner.

Versus

1] The State of Maharashtra]
]]
2] Divyesh K Kothari]
residing at 4/2, Walkeshwar Road]
Malchand Bhavan, 2nd floor,]
Near Band Stand Garden,]
Mumbai – 400 006]
]]
3] Pankaj S. Modi]
]]
4] Ketki Pankaj Modi,]
]]
Both Indian Inhabitants, presently]
residing at Padam building No.2]..... Respondents
Pedder Road, 4th Floor, Flat No.7,] (Resp.No.2 Orig.Comp. &
Opp. Jaslok Hospital,] Resp. Nos.3 & 4 Orig
Mumbai 400 026] Accused.)

Mr. Prafulla Shah a/w Mrs. Mallika Ingale I/by Kayval P Shah for the
Petitioner.

Mr. A R Patil, APP for Respondent No.1/State.

Mr. Vikram Sutria for Respondent No.2.

CORAM : S. S. SHINDE, J

DATE : 06th June 2019

JUDGMENT :-

1 Present writ petition is preferred under Articles 226 and 227 of the Constitution of India as well as under Section 482 of the Code of Criminal Procedure, 1973, for quashing the proceedings being Case No.25/S of 2001 filed in the Court of Metropolitan Magistrate, 18th Court, Girgaum Mumbai.

2 Respondent No.2 herein is the original Complainant who had filed a complaint against the Petitioner and Respondent Nos.3 and 4 before the Metropolitan Magistrate 18th Court, Girgaum, Mumbai., It was alleged in the said complaint that he is doing the business of sub-broker in the stock exchange. As Accused No.1 Pankaj S Modi, who is Respondent No.3 herein, gave him the forged transfer deeds along with 2000 shares of Tata Power Co. Ltd. and cheated him, accordingly police lodged a case against accused No.1 vide CR No.128 of 1998 for the offences punishable under Sections 467, 468, 471, 420, 182 and 211 of the Indian Penal Code. Thereafter accused No.1 was arrested by D B Marg Police and was produced before the Court on 28/01/1999 when a police custody was granted to accused Pankaj S Modi. Thereafter accused No.1 applied for bail and he was released on bail by order dated 06/02/1999. Thereafter a charge sheet against accused No.1 was filed which is numbered as 154/P/2000. It is alleged that the complainant came to know that accused No.1 was never suffering from any serious ailments and it is only the mother of accused No.1 who was hospitalized at Jaslok Hospital and she was undergoing the treatment. It is alleged that the medical certificates

submitted on behalf of accused No.1 before the Court while obtaining bail are forged certificates. Thereafter the Complainant through his advocate's letter called the concerned authorities of Jaslok Hospital to give clarification as to whether the said certificates are pertaining to the accused No.1 Pankaj Modi or otherwise. The Complainant also through his advocate addressed a letter to Sr. Inspector of Police to investigate the matter. It is alleged that the authorities of Jaslok Hospital informed that the name of patient is Mrs.Kusumben Modi and not Mr.Pankaj Modi and the certificate is pertaining to Mrs. Kusumben Modi. It is alleged that when the bail was granted to accused No.1, the Petitioner, who was accused No.3 was present in Court and was instructing the advocate. It is further alleged that the advocate for accused No.1 has in fact produced the medical certificates and argued the bail application in the presence of accused No.1. It is also alleged that Accused No.3 i.e. the Petitioner herein, is the brother of Accused No. 1 and, accused No.2 i.e. the Respondent No.4 herein is the wife of accused No.1, who have aided and abetted to prepare and produce the forged certificates before the court and instructed the advocate to produce the said forged medical certificates. It is alleged that the accused have committed serious offence and misled the court while obtaining the bail for accused No.1. The Complainant sent a letter dated 22/06/2000 written by Dr. G R. Jhankharia to the police station, but so far the police have not taken any cognizance of the offence committed by the accused. The Complainant therefore prayed that the

complaint be forwarded to Inspector of Police, D B Marg Police Station under Section 156(3) of the Criminal Procedure Code for investigation and further action.

3 Taking into consideration the complaint and hearing the complainant, the learned Metropolitan Magistrate, 18th Court by order dated 30/11/2000 transferred the complaint of Complainant to Sr. Inspector of Police, Dr. D B Marg Police Station for the purpose of investigation and submitting report under section 202(i) of the Criminal Procedure Code and also directed the Sr. Police Inspector to depute a sub ordinate police officer to investigate the offence, if any, as alleged by the complainant and committed by the accused and to submit a report to that Court. It appears that the police had made inquiry and investigation in the matter, and submitted a report stating therein that, accused No.1 was arrested by Dr. D B Marg P Station in Crime No.128/98 and he was released on bail on the basis of the medical certificate produced on record in the said bail application. Accused No.1 was released on bail on medical ground, and on the inquiry being done by the complainant it was revealed that the medical treatment was given to a female patient and medical certificate was issued in favour of a male. However, the said certificate has been forged showing the name of Accused No.1 Pankaj as patient. After perusal of the material placed on record including the report submitted by the investigating officer, the learned Metropolitan Magistrate,

18th Court Girgaon, Mumbai came to a conclusion that accused No.1 has committed alleged offences under Section 467, 468, 471, 182 r/w sections 192 and 198 of the Indian Penal Code and, the complainant has made out a prima facie case against accused Nos.1 to 3. The Metropolitan Magistrate therefore passed an order dated 11/10/2001 thereby issuing process of summons against accused Nos.1 to 3 for the offences punishable under Section 192, 198, 464, 468, 470, 471, 474 r/w 114 of the Indian Penal Code after depositing necessary process fee, and the summons was made returnable on 06/12/2001.

4 In the said complaint, the complainant Divyesh Kothari examined himself as PW No.1 before the Trial Court. He stated that the application for bail made by accused was argued in presence of accused No.1. He further stated in his examination in chief that he obtained a true copy of medical certificate filed by the accused in support of the said bail application. He further stated that he has obtained photocopy of the above referred medical certificate from the court record. He further stated that he has shown the certificate to one doctor who told him that the disease mentioned in the certificate can only be suffered by a female and not to any male.

5 It appears that Mr. Chetan Yeshwant Bane, Advocate, who prepared bail application for Accused No.1, was examined as PW No.2. PW No.2 Advocate Chetan Bane stated in his examination in chief that accused

No.3 Raju approached him. He prepared bail application for accused No.1 Pankaj on the 1st day of remand. Accused No.3 Rajiv told him that he want to engage Sr.Advocate in the matter therefore witness had contacted Advocate Shri Rajendra Shirodkar and introduced accused No.3 to Shri Shirodkar. PW No.2 further stated that after introduction of Shri Shirodkar he has withdrawn the application for bail filed by him and thereafter he has filed fresh application for bail for accused No.1 Pankaj. He has filed certain documents along with the said bail application. PW No.2 further stated that the photo copy of the documents were filed on record and original were returned to the party. The witness (PW 2) further stated that the accused No.3 Rajiv handed over the original documents and certificate to the witness (PW 2) for filing it before the court. The original certificates were returned to the accused No.3 Rajiv. The medical certificates were shown to the witness (PW 2) and he admitted that, these are the same certificate which were filed by him before the court. During the cross examination PW No.2 admitted that, a lady who approached him along with accused No.3 Rajiv was an old lady and introduced herself to be the mother of accused No.1 Pankaj.

6 It further appears that Dr. G R Zankaria was examined as PW No.4. In the examination in chief, PW No.4 Dr. G R Zankaria, who is a radiologist, stated that he does not remember whether he has taken out X-ray of person viz. Pankaj Modi. During his evidence he has shown a certificate

dated 27/10/1998. He stated that the certificate shown to him is never issued by him. He further stated that the certificate refers to mastectomy which is usually used carried out in female patient, however, the certificate now shown to me (PW 4) pertains to one Pankaj Modi who is a male. In the cross examination he specifically stated that the certificate at Exhibit 6 collectively are medically incorrect. The witness volunteer that on the basis of language used, it say that it is a false report.

7 On the basis of the aforesaid material, the learned Metropolitan Magistrate was pleased to issue process. Hence this Petition.

8 I have heard the learned counsel for the parties.

9 The learned counsel for the Petitioner Mr. Prafulla Shah submitted that the complaint as filed before the Metropolitan Magistrate by Respondent No.2 – complainant could not be entertained and tried by the learned Metropolitan Magistrate without conducting the preliminary enquiry as there is a bar under Section 195 of the Criminal Procedure Code wherein the Magistrate in such a complaint has to conduct a preliminary inquiry and, on arriving at the satisfaction that there is a substance in the complaint has to proceed further against the accused. It is also contended that as per the provisions of Criminal Procedure Code a private complaint filed in the Court

under Sections 192, 198, 468, 470, 471, 474 r/w 34 and/or 114 of the Indian Penal Code pertaining to a pending case, cannot be tried by the Metropolitan Magistrate as he has no jurisdiction to do so as it attracts a bar under Section 195 of the Criminal Procedure Code. In support of the contentions, the learned counsel for the Petitioner sought to place reliance on the judgments of the Apex Court in the matter of Saloni Arora v/s. State (NCT of Delhi) reported in (2017) 3 SCC 286, in the matter of Central Bureau of Investigation v/s. M Sivamani reported in (2017) 14 SCC 855; in the matter of Kailash Mangal v/s. Ramesh Chand (Dead) Through Jail reported in (2015) 15 SCC 729; in the matter of State of Kerala and others v/s. S Unnikrishnan Nair and others, reported in (2015) 9 SCC 639; and Mahesh Chand Sharma v/s. State of Uttar Pradesh and ors reported in (2009) 15 SCC 519. The learned counsel for the Petitioner further contended that the allegations made in the complaint do not disclose any offence. It is the contention of the learned counsel for the Petitioner that the police submitted the report without any investigation on the alleged role of the Petitioner i.e. accused No.3. It is contended that in the evidence of the complainant, the complainant did not utter even single word against the Petitioner. The learned counsel further argued that the doctors examined by the trial Court did not give any evidence against the Petitioner. He therefore prays for quashing the proceedings being Case No.25/S of 2001 pending before the Metropolitan Magistrate, 18th Court, Girgaum, Mumbai.

10 Per contra, the learned counsel appearing on behalf of the Respondent No.2 Complainant Mr. Vikram Suria submits that the medical certificate produced by accused No.1 while obtaining bail from the trial court is a forged document and, the present Petitioner and accused No.2 aided and abetted to prepare the said certificate. He also submitted that the Petitioner himself approached the advocate and handed over the medical certificate for preparation of bail application of accused No.1 Pankaj. He further submitted that by obtaining order for bail from the trial court on the basis of such a forged medical certificate itself is a serious offence. In so far as the contention of the learned counsel for the Petitioner that the trial court has no jurisdiction to entertain the complaint as it attracts a bar under Section 195 of the Criminal Procedure Code is concerned, the learned counsel for Respondent No.2 submits that it is only when document is tampered with after filing in court, that the bar provided in Section 195 of the Criminal Procedure Code would be attracted. In support of the said contention, the learned counsel for Respondent No.2 sought to place reliance on the judgments of the Apex Court in the matter of Iqbal Singh Marwah and another v/s. Meenakshi Marwah and another reported in (2005) 4 SCC 370 and in the matter of Kishorbhai Gandubhai Pethani v/s. State of Gujarat and another reported in (2014) 13 SCC 539. He lastly submitted that the offence committed by the Petitioner is serious in nature and therefore the trial court was right in directing the police

to investigate the matter and sought a report, and thereafter was rightly issued process against accused Nos.1 to 3.

11 Having heard the learned counsel for the parties, I have bestowed my anxious consideration to the rival contentions. It is not in dispute that accused No.1 Pankaj Modi granted a bail by the Trial Court on the medical ground. It is also not in dispute that along with the said bail application, a medical certificate was produced before the Trial Court. It is after the complainant came to know that the certificate produced by the accused while obtaining bail order appears to have been forged document and not pertaining to real ailment of accused No.1 Pankaj, that the complainant approached the police to investigate the matter. The complainant through his advocate also sent letters to the concerned medical authorities making inquiries about the authenticity of the medical certificate produced by accused No.1. The complainant also sent the letter written by Dr. G R Jhankharia to the police station, but the police has refused to take cognizance of the offence committed by the accused. The complainant therefore filed the present complaint. Initially, the trial court directed the police to investigate the matter and submit a report. Accordingly the police has investigated the matter and submitted the report to the court. Upon perusal of the report submitted by the police after investigation, the Trial Court has come to a conclusion that the complainant has made out a prima facie case against the accused Nos. 1 to 3 and therefore

issued process of summons against the accused No.1 to 3.

12 Now coming to the contention of the learned counsel for the Petitioner that the complaint as filed could not have been entertained and tried by the learned Metropolitan Magistrate without conducting the preliminary inquiry, as there is a bar under Section 195 of the Criminal Procedure Code wherein the Magistrate in such a complaint has to conduct preliminary inquiry and on arriving at the satisfaction that there is substance in the complaint has to proceed further against the accused, it would be gainful to make reference to Section 195 of the Criminal Procedure Code. Sub-section (1) of Section 195 Cr.P.C., which according to the Petitioner, creates a bar in taking cognizance on the complaint filed by Respondent No.2, reads as under :

“195. Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence. - (1) No Court shall take cognizance

(a) (i) of any offence punishable under Sections 172 to 188 (both inclusive) of the Indian Penal Code (45 of 1860), or

(ii) of any abetment of, or attempt to commit, such offence, or

(iii) of any criminal conspiracy to commit such offence, except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate ;

(b) (i) of any offence punishable under any of the following sections [of the Indian Penal Code](#) (45 of

1860), namely, [Sections 193 to 196](#) (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, or

(ii) of any offence described in [Section 463](#), or punishable under [Section 471](#), [Section 475](#) or [Section 476](#), of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court, or

(iii) of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in sub-clause (i) or sub-clause (ii), except on the complaint in writing of that Court, or of some other Court to which that Court is subordinate.

13 The Hon'ble Supreme Court had an occasion to interpret and explain the scope of Section 195 of the Criminal Procedure Code in the said case of *Iqbal Singh Marwah's* case (supra). Paragraphs 25 and 33 of the said Judgment are relevant and are reproduced herein under for ready reference :-

“25 An enlarged interpretation to Section 195(1)(b) (ii), whereby the bar created by the said provision would also operate where after commission of an act of forgery the document is subsequently produced in court, is capable of great misuse. As pointed in *Schida Nand Singh* after preparing a forged document or committing an act of forgery, a person may manage to get a proceeding instituted in any civil, criminal or revenue court, either by himself or through someone set up by him and simply file the document in the said proceeding. He would thus be protected from prosecution, either at the instance of a private party or the police until the court, where the document has been filed, itself chooses to file a complaint. The litigation may be a prolonged one due to which the actual trial of

such a person may be delayed indefinitely. Such an interpretation would be highly detrimental to the interest of the society at large.

33 In view of the discussion made above, we are of the opinion that Sachida Nand Singh has been correctly decided and the view taken therein is the correct view. Section 195(1)(b)(ii) CrPC would be attracted only when the offences enumerated in the said provision have been committed with respect to a document after it has been produced or given in evidence in a proceeding in any court i.e. during the time when the document was in custodia legis.”

The said bar would be attracted only when the offences enumerated in Section 195(1)(b)(ii) have been committed with respect to a document after it has been produced or give in evidence in a proceeding in any court.

14 Therefore the learned counsel for Respondent No.2 Complainant is right in contending that, if an offence enumerated in Section 195(1)(b)(ii) is alleged to have committed prior to production of a document or giving in evidence in court, no complaint by court would be necessary and a private complaint would be maintainable.

15 The learned counsel for the Respondent No.2 also relied upon the judgment of Apex Court in *Kishorbhai Gandubhai Pethani's* case wherein the Apex Court held that, if the fabrication of false evidence takes place or document is tampered with, before filing in Court, the provisions of Section 195 of the Criminal Procedure Code would not be attracted. It is only when

the document is tampered with after filing in Court, that the bar provided in Section 195 of the Criminal Procedure Code would be attracted.

16 In the present case, the accused No.1 Pankaj Modi applied for bail on the medical ground. He produced a medical certificate, which according to the complainant, is a forged one. The medical certificate was produced by the accused No.1 while obtaining the bail and not during the course of evidence, hence in the facts of the present case, question of attracting section 195 would not arise. In the present case as it is evident from the material on record that the alleged preparation of forged and fabricated medical certificate showing that accused No.1 Pankaj was ailing has occurred before filing the bail application in the court.

17 Considering material on record, the police investigation report, the statements made by the PW No.2 Advocate Chetan Bane and PW No.4 Dr. G R Zankaria, the order passed by the learned Metropolitan Magistrate prima facie indicate an involvement of the Petitioner herein in the alleged offence. The ratio laid down by the Apex Court in *Iqbal Singh Marwa's* case (supra) and *Kishorbhai Gandubhai Pethani's* case squarely applies to the facts of the present case. There is no merit in the present Writ Petition. No case is made out to entertain the complaint filed by Respondent No.2 at the hands of this Court in its writ jurisdiction under Article 226 and 227 of the Constitution of

India r/w Section 482 of the Criminal Procedure Code. The above Writ Petition stands rejected. Rule stands discharged. Ad-interim/interim relief, if any, was in force during the pendency of this Petition, shall continue for eight weeks from today.

18 The observations made herein above are prima facie in nature and confined to the adjudication of the present Writ Petition.

[S. S. SHINDE , J]