

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE M.R.ANITHA

FRIDAY, THE 06TH DAY OF NOVEMBER 2020 / 15TH KARTHIKA, 1942

Cr1.MC.No.4518 OF 2014

AGAINST THE ORDER/JUDGMENT IN CC 851/2014 OF JUDICIAL  
MAGISTRATE OF FIRST CLASS -I, KANNUR

CRIME NO.726/2012 OF Kannur Town , Kannur

PETITIONER/ACCUSED NO.2:

V. P. JYOLSNA  
D/O.P.O.K NAIR, ADVOCATE, CHANDINI  
SADAN, KAKKAD, KANNUR DISTRICT 670 005

BY ADVS.  
SRI.M.RAMESH CHANDER (SR.)  
SRI.ANEESH JOSEPH  
SMT.DENNIS VARGHESE

RESPONDENTS/COMPLAINANT & STATE:

STATE OF KERALA  
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF  
KERALA, KOCHI 682 031

ADDITIONAL R2 IMPLEADED:  
RAJITHA ERAYIL, AGED 43 YEARS, D/O.  
P.V.KARUNAKARAN,  
CHAVANAPPUZHA, PANNIYOOR P.O., 670 142, VIA  
KARIMBAM, TALIPARAMBA, KANNUR DISTRICT

IS IMPLEADED AS ADDITIONAL 2ND RESPONDENT AS PER  
ORDER DATED 11.2.2015 IN CRL.M.A.NO.1037/2015

R1 BY SR. PUBLIC PROSECUTOR SRI. D. CHANDRASENAN  
R2 BY ADV. SRI.M.SASINDRAN

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON  
03-11-2020, THE COURT ON 06-11-2020 PASSED THE FOLLOWING:

**(C.R.)**

**M.R.ANITHA, J.**

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**Crl.M.C.No.4518 of 2014**  
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**Dated this the 6<sup>th</sup> day of November, 2020**

**ORDER**

Petitioner is a lady Advocate practising in various civil and criminal courts in Kannur and Thalassery and also a Notary Public, approaches this Court to quash the Final Report in C.C.No.851/2014 on the files of the Judicial First Class Magistrate Court-I, Kannur.

2. Annexure AI - private complaint preferred by the defacto complainant/additional second respondent herein was forwarded by the Magistrate for investigation under Sections 156(3) Cr.P.C. Prosecution case is that the property described in the complaint was sold by the first accused in favour of the third accused by forging a power of attorney alleged to have been executed by the defacto complainant in the name of her husband/first accused. The defacto complainant has got half right over the property. It is alleged in the complaint that there is some family irking in their marital life. Thereafter, without her knowledge the power of attorney was got executed whereby the power was granted to the first accused to transfer her rights

in the property.

3. The petitioner herein has been arrayed as the second accused. Annexure-A3, FIR was registered against the three accused persons. On completion of the investigation, Annexure-A6 Final Report was filed. It is alleged in the charge that on 27.07.2011 in Room No.53 of Kannur Stadium Complex in the office of the petitioner/second accused, first accused created a power of attorney authorising the sale of a flat owned by the first accused and the defacto complainant in Thane, Mumbai, without the knowledge of the defacto complainant with the aid of the second accused and using the forged power of attorney as original, the first accused sold the flat in Mumbai and thereby cheated the defacto complainant. Hence, accused persons committed offences punishable under Sections 463, 464, 465, 467, 468, 471, 472 & 474 r/w. 34 IPC.

4. According to the learned counsel for the petitioner/second accused (hereinafter called as the petitioner) she started practice on 23.12.1974 and for the last 15 years she had been acting as a Notary Public. In the year 1999, she has been appointed as a Notary Public by the State Government. There had been no complaint against her either in the profession

as an advocate or while in exercising the functions as Notary Public. So according to the learned counsel, this complaint has been falsely foisted in collusion of first accused and defacto complainant after selling the property to a third party, when they found that the value of the property has been subsequently shoot up.

5. The learned Senior Counsel Sri. Ramesh Chander appearing for the petitioner would contend that the crime and final report filed against the petitioner is not sustainable either in law or on facts for reasons more than one: (1) Registration of the crime and taking cognisance by the Judicial First Class Magistrate Court-I, Kannur against the petitioner is hit by Section 13 of the Notaries Act, 1952. (2) There are no prima facie material collected by the investigating agency to sustain the charge against the petitioner. So according to him, the continuance of the proceedings in C.C.No.851/2014 against the petitioner will be an abuse of process of law.

6. The learned counsel for the additional second respondent/defacto complainant would contend that the complaint filed against the petitioner and the final report filed against her are based upon valid materials. He would also

contend that since the allegation against the petitioner is totally alien to the discharge of her official duties as a notary, the question of sanction under Section 13 of the Notaries Act, 1952 will not have any application. He would contend that the criminal offence of forging a document and aiding the first accused in forging the document will not be an official act.

7. To substantiate the contention of the petitioner that the defacto complainant/additional second respondent executed the power of attorney at her office, she produced Annexure A2 extract of the relevant entries of the register prescribed under Rule 11(2) of the Notaries Rules, 1956 (FormXV). It would show that on 20.07.2011 the additional second respondent had executed power of attorney at her office as serial No.941. So prima facie the copy of the extract of the register would show that the power of attorney has been executed by the defacto complainant/additional second respondent on 20.07.2011.

8. For convenience, I am extracting Section 13 of the Notaries Act, 1952 which reads as follows:

**“13. Cognisance of offence:-**(1) No Court shall take cognisance of any offence committed by a notary in the exercise or purported exercise of his functions under this Act save upon complaint in writing made by an officer authorised by the Central Government or a State Government by general or

special order in this behalf.

(2) No Magistrate other than a Presidency Magistrate or a Magistrate of the First Class try an offence punishable under this Act.”

9. Section 13(1) of the Notaries Act, 1952 (hereinafter be referred as the Act) is an express bar in taking cognisance of any offence committed by a Notary in the exercise or purported exercise of his functions under the Act except upon a complaint in writing made by an officer authorised by the Central Government or a State Government by a general or special order in that regard. The respondents admittedly did not have any case that the complaint has been filed by such an authorised officer.

10. To support the contention the learned counsel placed reliance upon various decisions. Chandmal Motilal Bora v. State of Maharashtra [2004(2)MHLJ 41] was drawn to my attention first. That was a case in which a practising Advocate and Notary approached the High Court of Bombay for discharging him from criminal prosecution involving offences under Sections 395, 344, 347, 365, 387, 324, 506 r/w. S. 120b of IPC. In that case, while dealing with the scope of Section 13(1) of the Act and the application of mind by the court whether the act alleged is an official act or not of a notary public the following discussions has

been made which seems very relevant in this context to be extracted and same reads as follows:

“5. THEREFORE, if any allegation is made against a Notary which touches the official performance as a Notary, the Criminal Court is forbidden from taking cognisance unless the complaint in writing is made by an officer authorised by the Central Government or State Government by general or special order in this behalf. Therefore, whenever an official act of Notary comes in picture, it becomes the duty of the Criminal Court to see, whether the allegations is directly concerned with his official duty or the performance which he has to do as indicated in S.8 of Notaries Act. The Court which has been requested to take cognisance of the complaint has to apply its judicial mind and to see whether the act which is the subject-matter of the complaint is the official act of a notary or it is an act which is beyond his official performance. Suppose if the notary is alleged to have committed an offence by his act directly in his personal capacity, then there is no need of sanction, because, the said act is not connected with his official performance, like an allegation showing that notary committed the murder or Notary assaulted a person for the purposes of causing simple hurt, grievous hurt etc. If the allegations show that by an act which is not in accordance with the provisions of Notaries Act, the Notary has been alleged to have committed an offence, there is no need of having a sanction to the complaint in writing of an officer as contemplated by provisions of S.13 of Notaries Act. But if act alleged is touching his official performance, the Court has to be on guard when it has been requested to take cognisance of the allegations against the Notary.”

From the above, it is clear that whenever a question of official act of Notary comes for determination, it is the duty of the

criminal court to find whether the allegations are directly concerned with his official duty or the performance which he has to do as indicated in Section 8 of the Act. The court has to apply its judicial mind and to see whether the subject matter of the complaint is the official act of a notary or is an act beyond his official performance. The unauthorised acts of a notary is also illustrated by stating commission of murder or assault of a person for causing hurt, grievous hurt etc. So if at all the allegations against the Notary is such unofficial acts or acts not connected with his/her official duties definitely the sanction under Section 13(1) need not be obtained. Paragraph No.6 of the said decision makes the matters more clear which is extracted as follows:

“6. If such protection is not granted to the Notary, he would be involved, implicated and roped in, in number of offences, because number of documents are being notarised before him in his Notarial register. Some documents may be purporting to be for the offence of cheating, blackmailing or offence of commercial transactions. He would be involved in number of offences concerned with the disposing of property, transfer of the property, sale of the property, exchange of property. He would be also coming in picture as an accused in number of offences connected with number of commercial crimes. A Notary is not supposed to know each and every person before him for the purpose of notifying a document in his Notarial register. He is not supposed to know the truth behind the



documents brought before him for entries. He is generally introduced to parties by persons who happen to be persons of his acquaintance. Such person may be an advocates, clerks of the advocates, or some persons who are connected with him by his profession as Notary or by his profession generally as a lawyer. If such protection is not granted to a Notary, it would be very difficult for him to work as notary and members of public at large would be facing number of difficulties at every step and with this object S.13 has been enacted by the Legislature with a foresight.”

11. As discussed above, it is quite impossible for a Notary to know the genuineness of the document produced before him for attestation. The Notary is not supposed to know each and every person before him for the purpose of notifying a document in his Notarial Register. He is generally introduced to parties by persons who happen to be persons of his acquaintance. If such protection is not granted to a Notary, it would be very difficult for him to work as notary and members of public at large would be facing number of difficulties at every step. With this object Section 13 has been enacted by the Legislature as a safeguard.

12. The learned counsel further placed reliance on Ayaz Ahamed Khan v. State of Maharashtra [BCR (Cri)-2012-7-198(Crl.Writ petition No.2817/2011 dated 23.07.2012 of High Court of Bombay)]. That was also a case filed by an Advocate and Notary seeking to quash and set aside a criminal proceedings

pending on the file of learned Metropolitan Magistrate's 32<sup>nd</sup> Court at Bandra, Mumbai. In that case also by giving protection under Section 13(1) it was held that petitioner ought not have been prosecuted for the offence under Sections 420, 465, 467, 468, 471 r/w. 34 of IPC and the proceedings are set aside to the extent of the petitioner.

13. The learned counsel further drew my attention to V. Ramakrishnan v. State [Laws (MAD)-2014-9-9]. That was also a case in which the revision petitioner (10<sup>th</sup> accused) preferred a petition under Section 227 of the Code of Criminal Procedure praying for an order of discharge, which was dismissed by the Special Judge for CBI, Madurai and against which criminal revision under Sections 397 r/w. 401 Cr.P.C. has been filed before the High Court. The allegation against the petitioner (10<sup>th</sup> accused) in that case was that he conspired with the other accused persons to forge the documents for the purpose of obtaining passports in the name of fictitious persons and he attested the affidavits in proof of date of birth and supporting applications for getting passports under datkal scheme, without even verifying the identity of the deponents of such affidavits. There also the contention with regard to the bar under Section

13 of the Act has been raised and in paragraph No.10 it has been found that Section 13 provides a bar for taking cognisance of any offence allegedly committed by such acts in exercise or purported exercise of his functions under the Notaries Act without getting the complaint in writing made by an officer authorised by the Central Government or State Government.

14. In that decision *V. Ranga Ramu v. State* [1992(2) ALT Cri 82] was referred wherein criminal proceedings initiated against an advocate/notary public without following the procedure contemplated under Section 13 of the Notaries Act, 1952 was held to be not maintainable and the decision in *Chandmal Motilal Bora v. State of Maharashtra* [2004(2) MhLj 41] cited above has been quoted and ultimately it was found that prosecution has no case that the case against the revision petitioner was instituted on a complaint made by an officer authorised by Central Government or State Government. It is also held that there is a special enactment dealing with the official acts or purported official acts of the notary, the provision of the special enactment will prevail over the general law. Hence for the reason that the case was not instituted on a complaint in writing made by an officer authorised by the Central government

or the State Government and the condition stipulated in Section 13 of the Notaries Act, 1952 for prosecuting a notary public for his acts done in exercise of or purported exercise of his functions under the Act has not been complied with, was held to be a ground to discharge the petitioner.

15. In the same context, the learned counsel next places reliance on *Rajkumar Mishra v. Gurjeet Kaur Bajwa* [CRMP No.294/2017 of the High Court of Chhattisgarh, Bilaspur]. That was also a case filed by an advocate/notary public for quashing a complaint filed against him under Sections 465, 467, 468, 471 and 474 r/w. S.120-B of IPC and the court took cognisance of the offence under Section 420 r/w.120-B IPC. The petitioner challenges the act of the Magistrate in view of Section 13(1) of the Act. In that decision by quoting Section 13(1) of the Act, the Court discussed about the impact of the word no court shall take cognisance of any offence coming under Section 13(1). It has been found that the mode of showing a clear intention that the provision enacted is mandatory, is by clothing the command in a negative form. The relevant paragraphs No.7, 8 and 9 would be useful to be extracted here, which read as follows:

“7. It is settled law that the mode of showing a clear intention that the provision enacted is mandatory, is by clothing the

command in a negative form. Crawford in its Statutory Construction (p.523) has observed as under:-

“Prohibitive or negative words can rarely, if ever be directory. And this is so, even though the statute provides no penalty for disobedience.”

8. In the matter of **M. Pentiah v. M. Muddala Veeramallappa** [AIR 1961 SC 1107] Subbarao speaking for the Supreme Court observed as under:-

“Negative words are clearly prohibitory and are ordinarily used as a legislative device to make a statute imperative.”

9. Similar is the proposition laid down by the Supreme Court in the matter of Nasiruddin v. Sitaram Agarwal [(2003) 2 SCC 577].”

Ultimately it was found that , an authorisation of an officer of Central/State Government is mandatory requirement of law for institution of valid complaint against a notary public for the exercise or purported exercise of functions under the Act in view of the mandatory wording of 'no court' in Section 13(1) of the Act. The functions of a notary public under Section 8 of the Act also has been discussed in the above decision by extracting Section 8(1) which reads as follows:

“12. At this stage, it would be expedient to notice the functions entrusted to the Notary under the Act of 1952. Section 8(1)(a) of the Act provides as under:-

**8. Functions of notaries:-** (1) A notary may do all or any of the following acts by virtue of his office, namely:- (a) verify, authenticate, certify or attest the execution of any instrument.

(b) to (i) xxx xxx xxx xxx”

So attestation of Power of attorney is a statutory duty conferred upon him under the Act. So the bar under S.13(1) would squarely apply. In that decision also V. Ranga Ramu's case (cited supra) has been quoted and held that absence of any complaint by the officer authorised by Central Government or State Government regarding the duty of notary, the order taking cognisance is not proper and accused is entitled for discharge. Accordingly, 482 petition filed by the notary public in that case was also allowed.

16. So in view of the settled position of law discussed above, there would not be any room for doubt to conclude that bar provided under Section 13(1) is mandatory and no court shall take cognisance of any offence committed by a notary public in exercise or purported exercise of his functions under the Act except upon a complaint in writing made by an officer authorised by the Central Government or a State Government by a general or special order in that behalf. That is a protection given to the notary public by the rule making authority visualising the functions which a notary public has to exercise. Section 8 authorises a notary public to verify, authenticate, certify or attest the execution of any instrument. At that stage,

he may not be knowing the genuineness of the document or the consequences which may come after the execution of the document. If no such protection is granted to a notary it will be difficult for them to perform their acts as contemplated to be done as a notary. So whenever a criminal prosecution is launched against a notary public a court should not be oblivious of the protections given to them under the Act and straight away take cognizance without verifying the nature of the complaint and formality to be complied.

17. The learned counsel for the petitioner also drew my attention to D. Devaraja v. Owais Sabeer Hussain [(2020) 7 SCC 695]. In that case while dealing with Section 197 Cr.P.C., object of sanction for prosecution, it has been held that Section 197 Cr.P.C. or under Section 170 of the Karnataka Police Act, 1963, is to protect a public officer/public servant from discharging official duties and functions from harassment by initiation of frivolous retaliatory criminal proceedings.

18. The learned counsel for the additional second respondent/defacto complainant in this context took my attention to Punjab State Warehousing Corp. v. Bhushan Chander and Anr. [2016 KHC 6426] wherein while dealing with Section 197 Cr.P.C.

and sanction to prosecute it has been held that if the acts omission or commission is totally alien to the discharge of the official duty, question of invoking S.197 Cr.P.C. does not arise. It is also held that prosecution of public servant for offence under S.409 IPC sanction of Government is not necessary. But that was a case in which accused who has been working as a Godown Assistant in the Corporation had misappropriated 11 gunny bales, value of which was Rs.38,841/- and tampered with the record of the department and accordingly charge sheet was filed by the police against him before a competent judicial magistrate. The learned Magistrate after trial found him guilty and sentenced him under Sections 409 and 467 IPC. In appeal, the learned Additional Sessions Judge modified the sentence confirming the conviction and the matter was taken up in revision. There only question of sanction under Section 197 Cr.P.C. was urged and the learned Single Judge found that since requisite sanction was not obtained the trial was vitiated. When the matter went up before the Apex Court it was found that the protection by way of sanction under Section 197 Cr.P.C. is not applicable to the officers of Government Companies or the public sector undertakings even when such public undertakings are



'State' within the meaning of Art.12 of the Constitution. So it has no relevance in this case.

19. In merit also, the learned counsel for the petitioner would vehemently contend that apart from the complaint filed by the additional second respondent, there is no material to prove the act of alleged forgery committed by the petitioner. He would contend that in this crime the first accused who is none other than the husband of the defacto complainant has moved this Court seeking anticipatory bail as B.A.No.5892/2012. Though notice was issued to the defacto complainant/additional second respondent herein in that bail application and she was served, she did not enter appearance. The copy of the bail order has been produced as Annexure-A4. That, according to the learned counsel, would indicate that the present complaint filed by the defacto complainant against the petitioner herein and her husband is only a collusive act otherwise she would have entered appearance and objected the bail application filed by her husband. Though non appearance of the defacto complainant in Annexure A4 bail application by itself will not leads to an inference of collusion between the first accused and the defacto complainant it would throw some light to show that the defacto

complainant and her husband are not at loggerheads as has been alleged by her.

20. The learned counsel would further contend that no documents including alleged power of attorney has been produced before the court and without any material the final report has been filed. In this context, the learned counsel took my attention to Annexure A5, which is a copy of the application for certified copy of the documents filed by the advocate of the petitioner herein before the Judicial First Class Magistrate Court-I, Kannur. In that application, petitioner herein sought for photocopies of the power of attorney, sale agreements and another copy application and the endorsement on that application would show that document Nos.1 to 3 i.e. photocopy of the power of attorney and two sale deeds were not produced before the court till that date. That endorsement is on 21.05.2014. The learned counsel for the petitioner would contend that, that would show show that even the copy of the alleged power of attorney has not been produced before the court. But as rightly pointed by the learned counsel for the defacto complainant the copy of the final report enclosed with the file would show that final report has been received before

the Judicial First Class Magistrate Court-I, Kannur on 22.05.2014. So obviously it is after the dismissal of that copy application. So probably along with the final report the photocopy of the power of attorney and sale deeds might have been produced.

21. Yet another argument advanced by the learned counsel is that no steps was taken by the investigating officer to prove the signature in the power of attorney of the defacto complainant as a forged one by sending the same to FSL. At the time of argument, the learned Public Prosecutor conceded that the power of attorney has not been send for expert opinion for comparison. So, in effect, apart from the allegation in the complaint filed by the defacto complainant, no attempt is seen made by the investigating agency to collect some evidence with regard to the authenticity of the signature in the power of attorney. Since it is a serious offence alleging forgery involving a Notary Public also, investigating officer ought to have been more cautious. However the copy of the entire final report was not produced. So I am not in a position to enter into a finding as to whether in merit there is any prima facie material or not.

22. As found earlier cognisance taken against the

petitioner/2<sup>nd</sup> accused in non compliance of Section 13(1) of the Notaries Act, 1952 is bad in law. So the continuance of all the proceedings in C.C.No.851/ 2014 on the files of the Judicial First Class Magistrate Court-I, Kannur against the petitioner as second accused would be an abuse of process of law. Hence, I am of the considered view that this is a fit case to invoke the inherent powers vested with this Court to quash the proceedings against the petitioner.

In the result, Crl.M.C. allowed. The charge sheet in C.C.No.851/2014 on the files of the Judicial First Class Magistrate Court-I, Kannur as against the petitioner/second accused is quashed. It will not be a bar to continue the proceedings in C.C.No.851/2014 against other accused.

Sd/-

**M. R. ANITHA**

**JUDGE**

shg

**APPENDIX**

**PETITIONER'S/S EXHIBITS:**

- ANNEXURE A1                    TRUE COPY OF THE COMPLAINT PREFERRED BY  
THE DEFACTO COMPLAINANT BEFORE THE LEARNED  
JUDICIAL FIRST CLASS MAGISTRATE-1 KANNUR  
DATED 11-4-2012
- ANNEXURE A2                    TRUE COPY OF THE REGISTER PRESCRIBED UNDER  
RULE 11(2) OF THE ACT
- ANNEXURE A3                    TRUE COPY OF THE FIRST INFORMATION REPORT  
IN CRIME NO 726/2012 OF KANNUR TOWN POLICE  
STATION
- ANNEXURE A4                    TRUE COPY OF THE ORDER IN BA 5892/12 DATED  
20-12-2012
- ANNEXURE A5                    PHOTOSTAT COPY OF THE APPLICATION BEFORE  
THE JFCM I KANNUR AND THE ORDER ISSUED  
THEREON
- ANNEXURE A6                    TRUE COPY OF THE CHARGE SHEET IN CRIME NO  
726/12 OF KANNUR TOWN POLICE STATION WHICH  
WAS NUMBERED AS CC 851/14 ON THE FILE OF  
THE JUDICIAL FIRST CLASS MAGISTRATE-1  
KANNUR