

DISTRICT: KOLKATA

**IN THE HIGH COURT OF CALCUTTA  
CRIMINAL REVISIONAL JURISDICTION**

C.R.R. NO. 2755 of 2011

**In the matter of:**

An application under the Article 227 of the Constitution of India read with Section 401 and 482 of the Code of Criminal Procedure (CrPC).

**And**

**In the matter of:**

Order dated 10-8-2011 and 16-8-2011 passed by the Learned 8<sup>th</sup> Judicial Magistrate at the Bankshall Court, Kolkata in Complaint Case No. C/19938/11, under Section 500 of the Indian Penal Code (IPC).

**And**

**In the matter of:**

Kunal Saha (Dr.) of 3937 Kul Circle S., Hilliard, OH 43026, USA and also of, Subol Apartment (Flat - E1), 7 Nilgunge Road, Kolkata 700056

.....**Complainant/Petitioner**

*Versus*

1. Mr. Gora Chand Dey, Justice (Retired) of CK-260, Sech Bhawan, Kolkata 700091

.....**Accused/Opposite Party No. 1**

2. State of West Bengal

.....**Opposite Party No. 2**

**TO:**

The Hon'ble Chief Justice Mr. J. N. Patel and His Companion Justices of the Hon'ble Court.

The humble petition of the petitioner above named -

**Most Respectfully Sheweth:**

1. Your petitioner is a bona fide "overseas citizen of India" (OCI) having a permanent residence at 3937 Kul Circle S., Hilliard, OH 43026, USA and a local residence at Subol Apartment (Flat- E1), 7 Nilgunge Road, P.O.

Belghoria, Kolkata - 700056. Originally a medical graduate from the NRS Medical College in Kolkata, the petitioner migrated to the USA and have been settled there for the past more than two decades as a renowned researcher in the field of HIV and AIDS. The petitioner is also deeply involved with humanitarian work in India. He is well-known for his work fighting corruption in the healthcare system to promote a better healthcare delivery system in India. In fact, your petitioner is the founding-president of "People for Better Treatment" (PBT), a premier charitable organization that has already brought important changes in the medical regulatory system and helped numerous victims of medical negligence in West Bengal and across India. As a reputed humanitarian worker and specialist in HIV/AIDS, your petitioner is well known in India and has featured in numerous news, articles and TV shows in India.

2. That your petitioner's wife and a USA-based child psychologist, Anuradha Saha, died from gross medical negligence by several Kolkata doctors during a social visit to India in 1998. The Petitioner filed criminal as well as civil cases against the said doctors and hospital (AMRI) in Kolkata in 1998 and 1999, respectively. The trial court (Chief Judicial

Magistrate) at Alipore held *inter alia*, vide its judgment dated.29<sup>th</sup> May, 2001 two senior doctors (Dr. Sukumar Mukherjee and Dr. Baidyanath Halder) guilty for criminal negligence on May 29, 2001, convicted them under Section 304A of the Indian Penal Code and sentenced them each for three months imprisonment and also fine of Rs. 3000/-. However, one of the three accused, Dr. Abani Roy Chowdhury, was acquitted by the trial court.

3. That while Dr. Mukherjee and Dr. Halder filed separate appeals against their conviction, your petitioner also filed an appeal in the Hon'ble High Court against the acquittal of Dr. Roychowdhury. The three appeals were heard together at length by the Hon'ble Justice G. C. De (opposite party no. 1 herein) and *vide* an Order dated. 19<sup>th</sup> March, 2004, the Hon'ble Court allowed the said two appeals against conviction of Dr. Mukherjee and dismissed the appeal by the petitioner against acquittal of Dr. Roychowdhury. Apart from acquitting the three accused doctors from all charges of medical negligence, Hon'ble Justice G.C. De made numerous overtly derogatory and inflammatory comments directed against the petitioner that had absolutely no reasonable connection with the case at

hand or borne out from the record. These defamatory comments included allegation that the petitioner himself was responsible for the death of his wife and that the petitioner actually filed these lawsuits to make financial profit by introducing American insurance companies in India. The slanderous observations made by Hon'ble Justice G.C. De were widely reported by news media that degraded petitioner's image before the public and brought endless pain and anguish for him.

4. That your petitioner moved an appeal before the Hon'ble Supreme Court against the said decision rendered by the opposite party no. 1. Simultaneously, the petitioner also moved a separate appeal against the dismissal of his complaint by the Hon'ble National Consumer Forum (NCDRC) seeking compensation for the wrongful death of his wife. The Hon'ble Apex Court disposed of both the criminal and civil appeals together with a common judgment on August 7, 2009 holding four Kolkata doctors (including Dr. Mukherjee, Dr. Halder and Dr. Roychowdhury) guilty for medical negligence and responsible for the death of petitioner's wife. While the Hon'ble Supreme Court also dismissed the criminal charges against the three doctors on the ground of "cumulative

negligence”, the Apex Court made scathing criticism of the High Court’s observation. Specifically, the Hon’ble Supreme Court severely condemned the judge (opposite party no. 1) for his “*irresponsible accusations*” and baseless allegations against the petitioner. The said judgment by the Supreme Court was reported in **2009 SCC (9) 221**. In the said judgment, the Hon’ble Apex Court has extensively discussed and criticized the comments made by the opposite party no. 1 which spans over paragraph nos. 190-194 in the said judgment [**2009 SCC (9) 221**].

5. While your petitioner’s reputation was badly dented by the wide-spread and defamatory news published based on the false assertions made in the High Court judgment, the categorical observations made by the Hon’ble Apex Court left no doubt that the slanderous comments made by the opposite party no. 1 against your petitioner were untrue, baseless, unrelated to the case and made with reckless disregard to the fundamental rights of an ordinary citizen. The Hon’ble Apex Court has expressed “*agony*” as they found the comments made by the opposite party no. 1 were “*irresponsible*” and “*highly undesirable*”. In fact, in order to underscore the gravity of the baseless assertions made by the opposite party no. 1, the

Hon'ble Supreme Court has directly quoted some of the most outrageous assertions made in the High Court judgment. For example, in para 193 of the Supreme Court judgment [2009 SCC (9) 221], the Hon'ble Apex Court has expressed "*great dissatisfaction*" to the irrelevant and derisory assertion made by Hon'ble Justice G.C. De that the petitioner filed the criminal and civil cases against the accused doctors with a sinister motive to bring American insurance system to the Indian soil in order to make personal financial gain. Again, under para 194, the Hon'ble Apex Court has scathingly reprimanded the assertion made by the opposite party no. 1 that your petitioner committed "forgery" as the Supreme Court has observed, "*In a case of this nature, Kunal (Petitioner) would have expected sympathy and not a spate of irresponsible accusations from the High Court*" (emphasis added).

6. That based on the categorical and scornful observations made by the Hon'ble Supreme Court and evidence of highly defamatory reports widely published in the news media, your petitioner filed a complainant for criminal defamation U/S 500 IPC against the opposite party no. 1 before the Hon'ble Chief Metropolitan Magistrate (CMM) at Bankshall Court on

3<sup>rd</sup> August, 2011 praying to take cognizance of the offence alleged and issue process under Section 500 IPC and try, convict and sentence the respondent no. 1 for criminal defamation of your petitioner. A copy of the said petition filed before the Hon'ble CMM is annexed herewith and marked as **Annexure- P1**. The Hon'ble CMM admitted the matter and assigned it to the Learned 8<sup>th</sup> Judicial Magistrate who examined your petitioner (who argued personally) as well as two witnesses (Mr. Mihir Banerjee and Ms. Ratna Ghosh) on 10-8-2011 and was pleased to dismiss the said petition vide orders dated 10-8-2011 and 16-8-2011 on three grounds:

- A) The opposite party no. 1 is protected by "sanction" U/S 197 CrPC.**
- B) Complaint is barred by limitation U/S 468 (2-c).**
- C) A judge has "privileges" for passing remarks.**

7. It is submitted most respectfully that the Learned 8<sup>th</sup> Judicial Magistrate has failed to apply his mind and to comprehend that the three legal grounds based on which he was pleased to dismiss the case have absolutely no application under the facts and substances present in the instant case as discussed below:

- **Protection U/S 197 CrPC:** Although “sanction” may be ordinarily necessary U/S 197 CrPC for criminal prosecution of judges and other public servants, Hon’ble Supreme Court has categorically held in *Matajog Dubey v. H.C. Bhari* (AIR 1956 SC 44) that in order to invoke protection U/S 197 CrPC, “*There must be a reasonable connection between the act and the discharge of official duty; the act must bear such relation to the duty that the accused could lay a reasonable, but not a pretended or fanciful claim, that he did it in the course of the performance of his duty*”. The same theme has been echoed in numerous decisions by the Apex Court in the later years that in order to attract protection through “sanction” U/S 197 CrPC, it is essential that there is a reasonable connection between the act and discharge of official duty [AIR 1983 SC 64; 2008 SCC (5) 248].

- **Bar by limitation U/S 468-2c:** While Section 468-2c CrPC has stipulated a three-year time limit for proceedings of offence punishable with imprisonment between 1 and 3 years, in the instant case, a case for criminal defamation U/S 500 IPC was clearly made out only after the categorical observations made against the opposite party no. 1 by the

Hon'ble Supreme Court in 2009 [2009 SCC (9) 221]. Therefore, the instant complaint was filed well within the limitations set U/S 468-2(c).

- **Judges' privileges:** Although Section 77 IPC provides general immunity to a judge when acting judicially, the law has unequivocally stated that the immunity is valid only when the judge has acted in "*good faith*". In the instant case, opposite party no. 1 has accused the petitioner for causing death of his wife and charged him with absolutely baseless accusations such as that the petitioner filed the case to bring American insurance companies to India. Even the Hon'ble Apex Court has deemed the High Court's observations as "*a spate of irresponsible accusations*" (para 194). Section 52 IPC has clearly stated that nothing is said to be in "*good faith*" if the act is done "*without due care and attention*". Obviously, the irresponsible and baseless accusations made against the petitioner by the opposite party no. 1 cannot be said to have been done in "*good faith*". While dealing with similar complaint U/S 499/500 IPC, the Hon'ble Supreme Court has expressed same views while dealing with similar complaints U/S 499/500 IPC [1999 SCR (1) 580]; [2001 SCC (2) 171]. These points and said Apex Court judgments were also raised by the petitioner

during argument before the Learned Magistrate. Unfortunately, the Learned Magistrate has failed to appreciate these indisputable legal positions while concluding that a judge has unfettered “privileges” to say or accuse anything and everything during his official duty. In fact, the Hon’ble Supreme Court has previously denied immunity to a Learned Magistrate who was charged with criminal defamation for making baseless accusations during his official duty [AIR 1983 SC 64].

8. That as discussed above, the Learned Magistrate was clearly unable to comprehend the basic facts and legal issues raised by your petitioner and failed to apply his mind for proper consideration of the judgments of the Hon’ble Supreme Court, which were cited by the petitioner in his application as well as during the oral argument, as the Learned Magistrate wrongly dismissed the petition without proper appreciation of the legal points and issues involved in the said application.

9. Being aggrieved by and dissatisfied with the impugned order of the Learned 8<sup>th</sup> Judicial Magistrate of the Bankshall Court in Case no.

C/19938/2011, your petitioner begs to move this application on the following grounds amongst other:

### GROUNDS

- I. For that the order of the Learned Magistrate is incurably bad in law.
- II. For that the impugned judgment and order is a glaring example of abuse of process of law which unless is set aside, will be a gross violation of principle of justice.
- III. For that the Learned Magistrate has erred in law by not considering the materials on record and relevant judgments of the Hon'ble Supreme Court.
- IV. For that the Learned Magistrate has dismissed the application on the erroneous assumption that the opposite party no. 1 was protected by "sanction" U/S 197 CrPC by failing to appreciate that the Hon'ble Supreme Court in numerous decisions, as enumerated

under paragraph 7 above, have clearly affirmed that a public servant including a judge cannot invoke Section 197 CrPC unless there is a reasonable connection between the act and discharge of his official duty.

V. For that the Learned Magistrate has failed to realize that the Learned Chief Metropolitan Magistrate (CMM) had already admitted the petition filed by the petitioner when referring the application to the court of the 8<sup>th</sup> Judicial Magistrate and thus, after examining the complainant and two witnesses under Section 200 CrPC, he had no option to re-consider the issue of Section 197 CrPC.

VI. For that the Learned Magistrate has made a serious error in law in dismissing the specific observations made by the Hon'ble Supreme Court in *B.S. Shambhu v. T.S. Krishnaswamy* [AIR 1983 SC 64] by merely saying that since it was a "transfer petition", it is not applicable in the instant case. The said case mentioned was NOT a "transfer petition". Instead, it was a criminal appeal before the

Apex Court filed by a Learned Magistrate seeking protection U/S 197 CrPC from a criminal defamation complaint filed against him for making unrelated and derogatory comments during his official duty as a judge. Therefore, the said Apex Court judgment has direct application in the instant case which has been filed against opposite party no. 1, a retired judge, for making derogatory comments against the petitioner that have no connection with the relevant case.

VII. For that the Learned Magistrate has remained totally oblivious of the important fact that in the instant case, the Hon'ble Supreme Court has made scathing criticism of the judgment passed by the accused no. 1 with specific observations that accused no. 1 made "*irresponsible accusations*" against the petitioner. "*Irresponsible accusations*" against the petitioner cannot be said to have been made after due care and in "*good faith*".

VIII. For that despite admitting that your petitioner was indeed defamed by the impugned judgment delivered by the opposite

party no. 1 after consideration of the documents filed and examination of the complainant and his witnesses, the Learned Magistrate has made a grave error in judgment by deciding that the opposite party no. 1 had a “privilege” to make any comments that are defamatory and are in no way connected with the case or borne out from the record. As discussed above under paragraph 7, a judge cannot be given immunity for making defamatory comments that have no connection with the act.

- IX. For that the Learned Magistrate has failed to consider the Supreme Court decision in its proper perspective in the relevant case in *Malay Ganguly v. Dr. Sukumar Mukherjee & Ors.* [2009 SCC (9) 221] which was the primary impetus for the development of the instant case for criminal defamation U/S 500 IPC against the opposite party no. 1. A simple reading of the said Apex Court judgment in its true letter and spirit would leave no doubt that the opposite party no. 1 exceeded his jurisdiction by making baseless and irresponsible accusations against the petitioner while passing a judgment as a High Court judge. The said High Court judgment

played a central role in wide-spread circulation of groundless and extremely slanderous news undermining the reputation of the petitioner.

- X. For that the Learned Magistrate has erroneously concluded that the application filed U/S 500 IPC by the petitioner was barred by limitations U/S 468-2c CrPC by failing to appreciate that the instant case stems from the categorical and scathing observation made against the opposite party no. 1 by the Hon'ble Apex Court in its judgment dated August 7, 2009 [2009 SCC (9) 221] and as such, was filed well within the limitation set U/S 468 CrPC. Although the High Court judgment containing derogatory assertions against the petitioner was delivered in 2004, the petitioner had no other option but to move the Apex Court against the said judgment by the High Court. Needless to say that until the said judgment was delivered by the Apex Court in 2009, the petitioner was in no position to start a criminal defamation case against the retired judge, opposite party no. 1.

10. This application is made bona fide and for the ends of justice.

Under the above circumstances, it is humbly prayed that Your Lordships may be graciously pleased to:

a) Issue Rule directing the Opposite Parties to show cause why the order dated 10-8-2011 and 16-8-2011 passed by the Learned 8<sup>th</sup> Judicial Magistrate at the Bankshall Court, Kolkata, in complaint Case No. C/19938/11, under Section 500 IPC should not be set aside and proceeding against the accused/opposite party no. 1 should not be started;

b) Pass an order to call for the records by special messenger at the cost of the petitioner (since the petitioner is from USA and wants personally to

argue the case) and after hearing the parties on causes if shown, the rule may be made absolute;

- c) Pass any other order or orders as Your Lordships may deem fit and proper for the ends of justice.

And for this act of your kindness, your petitioner as in duty bound shall ever pray.

## AFFIDAVIT

I, Dr. Kunal Saha, son of late Dr. Jaladhar Saha, a resident of 3937 Kul Circle S., Hilliard, OH 43026, USA and also of Subol Apartment (Flat- E1), 7 Nilgunge Road, Kolkata 700056, do hereby solemnly affirm and declare as follows:

- a. That I am the complainant/petitioner of the instant case and as such, I am well aware and acquainted with the facts and circumstances of the case. I am competent to verify the foregoing application and to affirm this affidavit.
- b. That the statements made under paragraphs 1-6 are matter of records and paragraphs 7-10 are my humble submissions before this Hon'ble Court.

**DEPONENT**

Prepared by the petitioner

Dr. Kunal Saha  
Petitioner

Solemnly affirmed before me on this     day

Of August, 2011.