IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.1652 OF 2018

Jainab Sayyed Akhtar Ali,
Age 44 years, Occupation Household,
R/o Bungalow No.12, China Town,
GPO Road, Ahmednagar
Tq. Dist. Ahmednagar. **...Petitioner.**

VERSUS

1) The State of Maharashtra.

2) Shaikh Azir Ahmed Abdul Razzak,
@ Najju Pahelwan,
Age 60 years, Occupation Business,
R/o Zendi Gate, Opp. Deepali
Theater, Ahmednagar Tq. Dist.
Ahmednagar.

3) Shaikh Kasam Hasan,
Age 65 years, Occupation Business,
R/o 16/47, Kamathipura,
Idgah M aidan, 69/A, Kasam Manzil,
Ahmednagar Tq. Dist. Ahmednagar. **...Respondents.**

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Advocate for Petitioner : Mr. A. M. Gaikwad.
APP for Respondent No.1 : Mr. A. R. Kale.
Advocate for Respondent No.3:Mr. Shaikh Mazhar
A. Jahagirdar.

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CORAM : SMT.VIBHA KANKANWADI, J.

DATE : 19-12-2019.

JUDGMENT :

1. Present petition has been filed by the original informant for setting aside the impugned order dated 18-08-2018 by the learned Additional Sessions Judge, Ahmednagar, in Criminal Writ Revision No.116 of 2018, and also order passed below Exhibit 47 in Summary Trial Case No.527 of 2011 by learned Judicial Magistrate, First Class, Ahmednagar, whereby the application filed by the informant for framing additional charge against the accused persons came to be rejected.

2. The factual matrix giving rise to the petition are that, the present informant lodged First Information Report with the police on 01-03-2011. On the basis of which offence vide Crime No.72 of 2011 for the offence punishable under Sections 342, 323, 504, 506 read with 34 of the Indian penal Code was registered. The investigation was undertaken, statements of witnesses were recorded, and after completion of the investigation, charge-sheet has been filed before learned Judicial Magistrate, First Class, Ahmednagar. After the appearance of the accused persons charge has been framed at Exhibit 13 for the offence punishable under Sections 323, 342, 504, 506 read with 34 of the Indian Penal Code against the present respondents – original accused. Thereafter, on 04-12-2017 an application has been

filed under Section 211 of Code of Criminal Procedure by the informant through advocate for addition of charge. It was contended that, there was an attempt by the accused persons to purchase the non-agricultural plot from the husband of the informant forcibly and his signatures have been obtained on false documents. Therefore, it was stated that, it is necessary to keep a charge for the offence under Sections 384, 385, 387 with 465, 466 read with 511 of Indian Penal Code.

3. Say of the accused was called. It was contended that, the informant has no authority to file such an application, it ought to have been presented by the public prosecutor only. It is stated that, the application is very vague and the contents are contrary to the investigation papers. Material on record is not sufficient to frame the charge for the offences stated in the application.

4. After hearing both sides the learned Judicial magistrate, First Class, has rejected the application on 04-04-2018. Thereafter, the present informant filed revision under Section 397 of Code of Criminal Procedure before Sessions Court, Ahmednagar bearing Criminal Revision No.116 of 2018. Said revision was heard by learned Additional Sessions Judge, Ahmednagar and the same came to be dismissed on 18-08-2018. Hence, present petition.

5. Heard learned advocate Mr. A. M. Gaikwad for petitioner and learned advocate Mr. Shaikh Mazhar A. Jahagirdar for respondent No.3, and learned APP Mr. A. R. Kale for respondent No.1 State.

6. It has been vehemently submitted on behalf of the petitioner that, both the Courts below have failed to consider that charge can be altered at any time before the Judgment is pronounced. In fact on the basis of the documents on record when the charge Exhibit 13 was framed, the learned Magistrate ought to have considered as to whether any more offence than the offence for which the case is registered are made out or not. The Magistrate cannot confine to those sections those were stated by the police. For the purpose of framing charge not only the First Information Report but the other documents, mainly the statement of the witnesses under Section 161 of Code of Criminal Procedure are required to be taken into consideration. The informant had specifically stated in her First Information Report that, her husband had left the house at about 02.00 p.m. on 01-03-2011 informing her that he has been called by Najju Pahilwan i.e. accused No.1. Thereafter her husband had given her phone call around 07.00 p.m. and narrated the incident. It was also informed by him that, as he is frightened, he is afraid of people. It was informed to her that, accused No.1 insisted that the open plots belonging to her husband in Mukund Nagar should

be sold to him. When he refused, he was insisted that he should sign on the bond papers brought from Shaikh Razzak bond writer. He was not allowed to move, but at around 06.30 p.m. under the pretext of natures call, he got himself rescued. Ultimately the informant who is the wife of the victim in this case, lodged the report. Police had recorded statement of the husband of the informant on the next day i.e. 02-03-2011, wherein he has specifically stated that, accused No.1 after confining him had called stamp vendor Shaikh Razzak and he was made to sign on the register of the stamp vendor, and also on stamp paper of Rs.100/-. One advocate was also called by accused No.1 and the stamp paper was given to said advocate. It is stated that, under pretext of natures call then he left that place. His statement was further supported by the statement under Section 161 of Code of Criminal Procedure by Shaikh Hafiz Noor Mohammod Jahagirdar who is advocate. Therefore, there was material before the learned Magistrate to frame charge for the sections mentioned in Exhibit 47. The learned Additional Sessions Judge is also failed to consider that, the ingredients of those sections have been made out.

7. Learned advocate appearing for respondent No.3 supported the reasons given by the learned Magistrate as well as by the learned Additional Sessions Judge. He submitted that, the record was not

supporting the ingredients of Section 384, 385, 387 of Indian Penal Code as there was no question of extortion. No documents were prepared falsely. It was specifically observed that, there is no involvement of any document as such referred in the charge-sheet which could have created legal right in favour of the accused and it cannot be termed as valuable security. Therefore, the application Exhibit 47 as well as the revision has been rightly dismissed.

8. At the outset it can be said that, at the time of framing charge, the concerned Judge should go through the entire record i.e. the charge-sheet which comprises of First Information Report, statements recorded under Section 161 of Code of Criminal Procedure, and the documents those have been seized or annexed. In her First Information Report the present petitioner has clearly stated that, the source of her information to lodge the report is her husband. It is well settled principle of law that a criminal law can be set in motion by anybody. It is not necessary that the person who has suffered or / injured or/ victim / prosecutrix should file the First Information Report. It is only the report / information of an offence to the police. Accordingly when she was not present at the time of alleged incident and whatever is conveyed to her was stated by her which may not be a complete set of facts. However, when offence was registered and

investigation was undertaken, statements of the witnesses have been recorded under Section 161 of Code of Criminal Procedure, learned Magistrate was bound to consider those documents as well as the documents those were seized by police.

9. The record shows that, statement of the husband of the informant was recorded on 02-03-2011. He clearly says that, on the call of accused No.1 on 01-03-2011, he left his house around 02.15 p.m. He reached the house of accused No.1 around 02.30 p.m. They had lunch and then accused No.1 told that he desires to have the plots of the witness (husband of the informant) situated at Mukund Nagar. He disclosed that, he is one of the co-owner of the plot and original owner is not ready to sell the land to them. The history was given by him that, on the day of incident there was only agreement to sell in favour of him as well as his partner, but still they had started the construction on the plot. When he refused, accused No.1 started dispute. It is stated that, some other persons were also present there. One Kasambhai who was present took both of them to his house under the pretext that the dispute would be resolved there. But again in the house of said Kasambhai the dispute started between accused No.1 and this witness. Accused No.1 had given him threat to kill. He was manhandled and then threat was given to kill his family members also.

He was confined at the said place and then accused No.1 called stamp vendor Razzak Gazi. It is stated that, this witness was made force to sign on the register of stamp vendor. Due to fear he signed on the register as well as stamp paper of Rs.100/-. Thereafter, advocate Shaikh Hafiz was called by accused No.1 and the stamp paper was handed over to him. Under the pretext of natures call, the witness came out of the house of said Kasam and ran away.

10. The statement of advocate Shaikh Hafiz would also show that, he was called by accused No.1 where the other persons were present including Sayyad Akhtar (informant's husband). Advocate has also stated that, accused No.1 told Sayyad Akhtar that, he should give the plots at Mukund Nagar in his name but Sayyad Akhtar refused. Then by forcing Sayyad akhtar, accused No.1 got the documents signed. Advocate Shaikh Hafiz says that, on the say of accused No.1, he had prepared agreement to sell and took note of the same in the register. He asked accused No.1 and Sayyad Akhtar to give their photos to him, stamp paper of Rs.100/-, and accordingly those photos were given. He has also stated that, accused No.1 had manhandled Sayyad Akhtar. When accused No.1 asked Sayyad Akhtar to sign on the stamp paper, at that time under the pretext of answering natures call Sayyad Akhtar left. Further in support of these two statements there is statement of

other witness namely Shaikh Kasam Hasan. Documents have been seized from Notary Register, however the said register mentions that after the document was prepared and when it is being registered at that time under the pretext he would come after Namaz, he did not return, and therefore waiting for a while, the document has been cancelled. The 100/- rupees stamp paper with two more documents on which there is no signature by anybody, appears to have been seized.

11. When all these material was available, it was for the learned Magistrate to appreciate Exhibit 47 application for addition of charge. Charge can be altered or added at any point of time. Though charge Exhibit 13 appears to have been framed on 13-04-2012, yet it appears that the present application Exhibit 47 came to be tendered on 04-12-2017. Though exact stage of the matter is not before this Court yet both the parties agree that the application Exhibit 47 was given before the pronouncement of Judgment. Therefore, it was for the learned Magistrate to consider under Section 216 of the Code of Criminal Procedure (though the section has been wrongly quoted on Exhibit 47), whether the evidence on record is sufficient to attract the ingredients of the section suggested. It was not necessary that the offence might have been completed but even when there was an attempt and that attempt itself being an offence, it ought to have also be considered by

the learned concerned Magistrate.

12. Section 384 of Indian penal Code prescribes punishment for extortion. *Section 383 of Indian Penal Code* provides ;

> "Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security, or anything signed or sealed which may be converted into a valuable security, commits 'extortion' " .

if we considered this definition with the above said above referred evidence, then naturally the attempt was made by putting the husband of the informant in fear to deliver to the accused the property i.e. the plots and even that preparation of the document on stamp of Rs.100/-, attempt was made to get his signature on the said document.

Illustration (d) of Section 383 of Indian Penal Code may help us more, which states ;

> "*A*, by putting *Z* in fear of grievous hurt, dishonestly induces *Z* to sign or affix his seal to a blank paper and deliver it to *A*. Z signs and delivers the paper to *A*. Here, as the paper so signed may be converted into a valuable security. *A* has committed extortion."

Here in this case it is only an attempt, though the husband of the informant had not actually signed it, but if it would have been signed, it could have been used to convert it in valuable security.

13. *Section 385* of Indian Penal Code provides for punishment in case of putting person in fear of injury in order to commit extortion. As aforesaid, even if we considered that Section 384 of Indian Penal Code is not made out then Section 385 of Indian Penal Code covers attempts made. It prescribes ;

> *"Whoever, in order to the committing of extortion, puts any person in fear, or attempts to put any person in fear, of any injury, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."*

14. *Section 387* of Indian penal Code prescribes for punishment for putting a person in fear of death or of grievous hurt, in order to commit extortion. Therefore, both the Courts ought to have held on the basis of the material referred above that, case is made out to frame additional charge for the offence punishable under Sections 384, 385, 387 read with 511 of Indian Penal Code.

15. Same is the case as regards Section 465 of Indian Penal Code is concerned, which prescribes punishment of forgery. We must consider Section 464 of Indian Penal Code which is in respect of making of false

documents for this purpose. Section 464 of Indian Penal Code prescribes ;

> "The person who dishonestly or fraudulently--
>
> (a) makes, signs, seals or executes a document or part of a document ;" etc.
>
> "with an intention of causing it to be believed that such document or part of document was made, signed, sealed executed, transmitted or affixed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, etc."

Attempt to prepare false document for which husband of the informant was not ready amounts to preparation of false document, and therefore, case was made out to frame charge for the attempt in this case.

16. When the ingredients of the offence as suggested in Exhibit 47 were not considered, both the Courts have failed to consider alteration in the charge. The observation by the learned Additional Sessions Judge that the documents referred in the charge-sheet could not have created legal right in favour of accused and at that moment there was no movement wherein there was an attempt to execute sale deed which could have been converted or termed as valuable security are not appealing. In fact when the document which was prepared was styled

as “Kharedi Pavti” and if the contents are considered then it was contents of a sale deed. Whether it could have been executed on Rs.100/- stamp paper is a different question, but there was an attempt and it was tried to be registered with a notary public. What kind of right it would have given to the accused can be read between the lines but then whether that document was capable of being converted into a valuable document or not, ought to have been considered by the learned Additional Sessions Judge. Therefore, though both the Courts below were consistent enough in saying that, documents on record do not show *prima facie* material to frame additional charge yet on the scrutiny above said, it can be seen that such material was in fact available. A casual approach without going into the statements of the witnesses and the cryptic order by both the Courts has given rights to this petition, and when there is non application of mind the powers of this Court under Article 227 of the Constitution of India are required to be invoked. Both the Courts have failed to consider that, it was the right stage and an opportunity could have been made available to the accused persons to defend the said charge also when there was material on record. Hence, petition stands allowed in terms of prayer Clause ‘B’. Application Exhibit 47 stands allowed. The learned Magistrate to frame appropriate additional charge against the accused persons.

17. It is clarified that, if the evidence has began then learned Magistrate may have recourse to Section 217 of the Code of Criminal Procedure. Further it is clarified that, the observations in this order shall not influence the Magistrate at the time of final disposal of the case.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.