

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.4875 OF 2019

Deepak Jeevach Mandal	]	Petitioner
Vs.		
The State of Maharashtra	]	Respondent

.....
Mr. Ajay Rai a/w Krishnanand Mishra i/b Akhilesh Singh, for the
Petitioner.
Mr. A.R. Patil, A.P.P, for the Respondent-State.
.....

CORAM : REVATI MOHITE DERE, J.

DATE : 13TH NOVEMBER, 2019.

P.C. :

Heard.

2. Rule.

3. Rule is made returnable forthwith with the consent of the parties and the Petition is taken up for final disposal. Learned A.P.P waives notice on behalf of the respondent-State.

4. By this Petition, the petitioner has impugned the order dated 29th August, 2019 passed by the learned Special Judge (under Protection of Children from Sexual Offences Act, 2002) below Exhibit 75 in POSCO Special Case No.866 of 2013.

5. The principal and only grievance of the petitioner is that the application filed by the learned Special Public Prosecutor for framing additional charge as against the petitioner under section 376 (2) of the Indian Penal Code and under section 6 of the POCSO Act, was not maintainable under section 216 of the Code of Criminal Procedure. Learned Counsel for the petitioner relied on the judgment of the Apex Court in the case of **P. Kartikalakshmi Vs. Sri Ganesh, (2017) 3 Supreme Court Cases 347** in support of his submission. He submitted that in paragraph 6 of the said judgment, the Apex Court has clearly observed that the power under section 216 of the Cr. P.C vests in the Court and that no party has any right to seek any addition/alteration of charge, by filing an application as a matter of right.

6. Learned A.P.P does not dispute the fact that no party i.e neither the *de facto* complainant nor the accused nor the prosecution, has any vested right to seek addition/alteration of charge.

7. Perused the papers. The petitioner-accused was arrested in connection with C.R. No.350 of 2013 registered with the Khar Police Station, Mumbai for the alleged offences punishable under section 376 of the Indian Penal Code and sections 4,8 and 12 of the POCSO Act. After investigation, charge-sheet was filed against the petitioner-accused and the trial of the petitioner-accused commenced. After 15 witnesses were examined and after the petition-accused's statement under section

313 was recorded, at the stage of final arguments, the prosecution preferred an application (Exhibit 75) under section 216 of the Cr. P.C. before the learned Special Judge and sought alteration/addition of the charge i.e to add charge, under section 376 (2) of the I.P.C and section 6 of POCSO. The said application was opposed by the petitioner's Advocate. It was urged that no evidence has come on record for addition/altering the charge. The learned Special Judge after hearing the parties, passed the impugned order dated 29th August, 2019.

8. The Apex Court in **P. Kartikalakshmi** (supra), considered whether an application was maintainable before the trial Court under section 216 of the Cr. P.C at the behest of any party. The Apex Court in paragraphs 6 and 7 has observed as under:

“Having heard the learned counsel for the respective parties, we find force in the submission of the learned Senior Counsel for Respondent No.1. Section 216 Cr.PC empowers the Court to alter or add any charge at any time before the judgment is pronounced. It is now well settled that the power vested in the Court is exclusive to the Court and there is no right in any party to seek for such addition or alteration by filing any application as a matter of right. It may be that if there was an omission in the framing of the charge and if it comes to the knowledge of the Court trying the offence, the power is always vested in the Court, as provided under Section 216 Cr PC to either alter or add the charge and that such power is available with the Court at any time before the judgment is pronounced. It is an enabling provision for the Court to exercise its power under certain contingencies which comes to its notice or brought to its notice. In such a situation, if it comes to the knowledge of the Court that a necessity has arisen for the charge to be altered or added, it may do so on its own and no order need to be passed for that purpose. After such alteration or addition when the final decision is rendered, it will be

open for the parties to work out their remedies in accordance with law.

7. We were taken through Sections 221 and 222 CrPC in this context. In the light of the facts involved in this case, we are only concerned with Section 216 CrPC. We, therefore, do not propose to examine the implications of the other provisions to the case on hand. **We wish to confine ourselves to the invocation of Section 216 and rest with that. In the light of our conclusion that the power of invocation of Section 216 CrP.C is exclusively confined with the Court as an enabling provision for the purpose of alteration or addition of any charge at at any time before pronouncement of the judgment, we make it clear that no party, neither de facto complainant nor the accused or for that matter the prosecution has any vested right to seek any addition or alteration of charge, because it is not provided under section 216 CrPC. If such a course to be adopted by the parties is allowed, then it will be well-nigh impossible for the criminal court to conclude its proceedings and the concept of speedy trial will get jeopardised”.**

(emphasis supplied)

9. Having regard to what is stated aforesaid, the application (Exhibit 75) preferred by the prosecution before the trial Court was not maintainable. It is clear from the aforesaid judgment that neither the de facto complainant nor the accused nor the prosecution, has any vested right to seek any addition or alteration of charge under section 216 of the Cr.P.C.

10. Considering the aforesaid position, the application is allowed and the impugned order dated 29th August, 2019 is quashed and set aside. Needless to state that it is open for the Court to invoke section 216 of the Cr.P.C if the same is found necessary, in accordance with law.

11. In view of the aforesaid discussion, the Writ Petition is allowed and rule is made absolute in the aforesaid terms. The Petition is accordingly disposed of.

12. All concerned to act upon the authenticated copy of this order.

[REVATI MOHITE DERE, J.]