

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO. 1013 OF 2021

1. Deepak Baldev Khatri
2. Jyoti @ Anita Deepak Khatri ...Petitioners

Versus

1. The State Of Maharashtra
2. Bhushan Baldev Khatri ...Respondents

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Mr. Rushikesh Kale i/by Mr. A.S. Rao, Advocate for the Petitioners.

Mr. Ganesh Gole a/w Mr. R. Jain i/by Mr. Ritesh Ratnam, Advocate for Respondent No.2.

Mr. A.R. Agarkar, APP for the Respondent No.1 – State.

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CORAM : PRAKASH D. NAIK, J.
DATE : 11th AUGUST, 2022.

PER COURT :

1. The petitioners challenge order dated 12th February, 2021 below Exhibit-141, Charge dated 12th February, 2021 and order dated 15th February, 2021 below Exhibit-157 passed by learned J.M.F.C., Court No.2, Ulhasnagar in R.C.C. No.73 of 2008.

2. The petitioners are accused in C.C. No.887 of 2007 pending before the Court of learned J.M.F.C. Court No.2, Ulhasnagar. The respondent No.2 is the complainant. The complaint was filed for offences under Sections 406, 420, 504 & 506 r/w Section 34 of Indian Penal Code (for short “IPC”).

3. The complainant had alleged that, the petitioner No.1 and complainant are brothers. Their father Baldev Khatri died on 23.03.1993 and mother Smt. Lata Khatri died on 21.3.2003. According to complainant their father had acquired properties bearing Barrack No.319/A, Room No.12 and Barrack No.319/B, Room No.12 situated at Netaji Road, Ulhasnagar. Mr. Baldev Khatri had constructed a building in the name of Padam Market in the year 1987-88 consisting of basement, ground floor and 3 upper floors, which consisted of shop, galas and office premises. There are 7 shops plus bar and restaurant and on the ground floor 16 shops and each of the three upper floors has a hall and also terrace above third floor. The first floor is occupied by accused No.1 and second floor is occupied by complainant. The third floor is occupied by the elder brother of complainant and accused No.1. It is alleged that the property is in the name of Baldev Khatri in the Municipal and S.D.O. record. The accused No.1 was helping his father in the construction of the building and after his death he was acting as care taker of building and tried to create third party interest in some of the shop premises. The shops were allowed to be occupied by third person. Accused No.1 is running the General Stores in shop Nos.15 & 16. The shop Nos. 1 & 2 in the basement were converted into the beer bar and restaurant by accused Nos.1

& 2. The complainant, accused No.1 and his elder brother Jagdish are the only legal heirs of Baldev Khatri and Smt. Lata Khatri. The accused No.1 had never disclosed to the complainant and his brother as to the basis on which the accused No.1 in collusion with accused No.2 had allowed strangers to use the property and occupy the ground floor or the basement area. The license for running the beer bar and restaurant in the shop Nos.1 & 2 in the basement of the building has been obtained by accused No.1 by making forgery of documents and submitting the same before State Prohibition & Excise Department by showing that the premises belongs to accused No.1. The accused No.1 had never given the accounts to complainant or elder brother about the profits derived from the business or rent. The accused No.1 fraudulently running shop Nos.15 & 16 on the ground floor in the name of accused No.1. The accused No.1 has conspired with his wife to convert the property to his own name by false representation to the Public Authorities. The accused No.1 has been trying to get mutation of the properties only in his name or in the name of accused No.2. Complaints were made to Police. No action was initiated by Police. Notice was issued to accused No.1. False reply was given by the accused No.1. The accused No.1 prepared Agreement for sale dated 26.12.2002 and the accused No.1 has sold the property at Padam Market,

Room No.12, Barrack No.319, Netaji Road, Ulhasnagar-2 for consideration of Rs.3,00,000/- to accused No.2. Both the accused have acted in connivance with each other.

4. Learned J.M.F.C. vide order dated 26.09.2007 passed orders for investigation under Section 156(3) of Cr.P.C. On completing investigation, charge sheet was filed and the case is numbered as R.C.C. No.73 of 2008.

5. Charge was framed vide Exhibit-53 against the accused under Section 406, 420, 504 & 506 r/w Section 34 of IPC. The prosecution made an application below Exhibit-141 reframing the charge against the accused. In the application it was stated that, Sections 211 to 214 of Code of Criminal Procedure (for short "Cr.P.C.") specifies the manner in which charge needs to be framed and Section 215 of Cr.P.C. states the effect of error while framing charge. The charge framed at Exhibit 53 does not specify the details/particular of the offence and the manner in which the accused No.1 had committed the offence. It can be gathered from charge sheet, Police reports, statements and supplementary charge sheet that, Barrack No.319/B, Room No.12 was purchased from the funds provided by the informant since it was a joint family and Barrack No.319/A, Room No.12 was in the name of informant's

father namely Shri. Baldev Motiram Khatri. Their exists building namely Padam Market having 16 shops on the ground floor, 8 shops in the basement with 3 upper floors and also that the building was constructed by informant's father on plots of Barrack No.319/A, Room No.12 and Barrack No.319/B, Room No.12 jointly as a family property. The accused No.1 has misappropriated the property by selling shops. He prepared false and fabricated documents. The accused No.1 dishonestly cheated the Excise Department hence, the charge needs to be modified. This application was signed by complainant as well as learned A.P.P.

6. The petitioners opposed the said application by filing say. Apart from the merits, it was urged that the application was not maintainable.

7. The petitioners had preferred Criminal Writ Petition No.1240 of 2016 challenging order dated 1st March, 2016 to the extent of directions of the trial Court by which the accused were directed to produce documents. Vide order dated 14th March, 2017, this Court had observed that, keeping in view the scope of Section 242 of Cr.PC. the petition was partly allowed only to the extent of direction of the trial Court at clause (3) of the operative part of order and setting aside the said direction. It was also observed that

the prosecution would be at liberty to follow the procedure under Section 91 of Cr.PC.

8. Learned J.M.F.C. vide order dated 12th February, 2021 allowed the application (Exhibit – 141) for alteration and addition of charge. The learned Magistrate framed the charge on 12th February 2021.

9. The accused filed pursis before the trial Court stating that, he is present in the Court premises but due to accident and on account of injury he is unable to climb stare case. Pursis were filed on 11.02.2021 and 12.02.2021.

10. The petitioners made application for adjournment with a view to challenge the order below Exhibit 157. The said application was filed on 15th February, 2021. The prosecution opposed the application on the ground that the matter is time bound. The learned J.M.F.C. vide order dated 15th February, 2021 rejected the said application.

11. Learned Advocate for the petitioner Mr. A.S. Rao submitted that the application for altering the charge was not maintainable in law. The charge was already framed. There was no occasion to alter the charge. The application was preferred at the instance of complainant. The charge can be altered only at the instance of the

Court. There was no evidence or change in circumstance to alter the charge. The power under Section 216 can be exercised only by the learned Magistrate upon perusing the evidence that may be produced during the trial or evidence collected at the time of investigation. It will be an action of the Magistrate himself and not on the application of any party. In case of any alteration or addition, the learned Magistrate was bound to adjourn the case. The altered charge is causing prejudice to the accused. There is no document on record to show that the offence as sought to be altered is made out. It is the duty of the Court to scrutinize the documents so as to arrive at a finding for alteration of the charge. There is no finding on record to show that the contents of documents make out the offence of the altered charge. There has to be nexus between the original charge and altered charge. The learned Magistrate has failed to appreciate the provision of law relating to alteration of charge. The charge was altered mechanically. The learned Magistrate has taken into consideration the objections of the accused while altering the charge in proper perspectives.

12. Learned Advocate for the petitioner has relied upon following decisions :

1. *P. Kartikalakshmi V/s. Sri Ganesh and Anr*¹.
2. *Anant Prakash Sinha alias Anant Sinha V/s. State of Haryana and Another*².
3. *Sambhaji Narsingh Mali and Another V/s. The State of Maharashtra*.³
4. *Dr. Nallapareddy Sridhar Reddy V/s. The State of Andhra Pradesh and Ors.* delivered in Criminal Appeal No.1934 of 2019 on 21st January, 2020.
5. *Deepak Jeevach Mandal V/s. State of Maharashtra*⁴.

13. Learned A.P.P submitted that, there is no infirmity in the impugned orders. The learned Magistrate has applied mind while passing the impugned order. The Court was empowered to alter the charge. There was sufficient material before the trial Court to alter the charge. Although the application was signed by the complainant, it was filed through prosecution. No case is made out for interfering in the impugned orders.

14. Learned Advocate for the respondent No.2 Mr. Ganesh Gole submitted that, the petition is devoid of merits. The Court was empowered to alter the charge in accordance with Section 216 of Cr.PC. Learned Magistrate while passing the order, perused the documents on record filed by the investigating agency and

1 (2017) 3 SCC 347

2 (2016) 6 SCC 105

3 2019 SCC OnLine Bom 12654

4 2019 SCCOnLine Bom 10810

recorded findings that the accused No.1 has supplied false documents to M.S.E.B. and State Excise Department to believe that the shop in the basement belongs to accused and on the basis of such false documents he obtained license of Beer Bar and restaurant and as such there is sufficient ground for framing charge against accused for offences under Sections 465 and 467 of IPC. Section 216 provides the Court wide powers to change or alter any charge. The alteration or addition of charge may be done if in the opinion of the Court there was omission in the framing of charge or if upon prima facie examination of the material brought on record, it leads the Court to form the presumptive opinion as to the existence of the factual ingredients constituting the offence.

15. Learned Advocate for respondent No.2 has relied upon the decision of the Hon'ble Supreme Court in the case of *Anant Prakash Sinha alias Anant Sinha V/s. State of Haryana and Another*⁵.

16. The proceedings were initiated on the basis of private complaint filed by respondent No.2. The learned Magistrate has issued directions under Section 156(3) of Cr.P.C. Charge sheet was filed. Charge was framed. Supplementary charge sheet was filed.

⁵ (2016) 6 SCC 105

17. Section 216 of Cr.P.C. reads as follows :-

“ 216. Court may alter charge. -

(1) Any Court may alter or add to any charge at any time before judgment is pronounced.

(2) Every such alteration or addition shall be read and explained to the accused.

(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.

(4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

(5) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded.”

18. The aforesaid provision empowers the Court to alter or add any charge 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 notices or brought to its notice.

19. In the case of *P. Kartikalakshmi V/s. Sri Ganesh and Anr.* in paragraph – 6 it was observed as follows :-

" 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 of Cr.P.C. 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 be 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. "

Thus, the necessity of altering charge can be brought to the notice of Court. In this case the prosecution/complainant by preferring the application brought the said fact to the notice of the Court and in the interest of justice, the trial Court has passed the impugned order and altered the charge. Hence, the submission of the learned Advocate for the petitioners that, the trial Court ought

not to have passed the impugned order on the basis of the application preferred by the prosecution/complainant is devoid of merits.

20. The learned Magistrate while passing the impugned order dated 12th February, 2021 has observed that the allegations made in the FIR, statements of witnesses and documents filed on record shows that, Barrack No.319/B, Room No.12 situated at Ulhasnagar, purchased by Shri. Baldev Motiram Khatri in his name. Shri. Baldev Khatri had constructed the building including the basement, ground floor and three floors over the said plot. The said building is known in the name of Padam Market at Ulhasnagar. After the death of Baldev Khatri, the said property become the joint family property of his legal heirs namely Deepak Khatri (accused No.1), informant and elder son Jagdish. The said building contains 16 shops on the ground floor, 8 shops on the basement with 3 upper floors. Accused No.1 was collecting the rent of 16 shops on the ground floor and 8 shops in the basement. Accused No.1 has criminally misappropriated the amount collected by way of rent. Similarly, he has dishonestly prepared false and fabricated registered sale deed of shop Nos. 15 & 16 in the name of accused No.2. Accused No.1 has – also dishonestly prepared the false and fabricated gift deed in the name of his minor daughters. Accused

No.1 with the dishonest intention illegally sold shop Nos. 1 to 4, 6, 8, 10, 13 & 14 on the ground floor and shop Nos.1, 2, 3A, 4A, 4B, 5 to 7 in the basement of the said building. Accused No.1 has submitted the false documents to the State Excise Department and obtained the license of the beer bar in the name of his wife. The prosecution has contented that these aspects were not considered while framing charge. These allegations and documents disclose that there is sufficient ground to frame the charge for offences under Sections 465, 467, 468 & 471 of IPC. Therefore it is necessary to add the Sections in the charge. The Court also noted the objection of the accused by observing that the accused have opposed the application on the ground that the contents of FIR and documents filed on record are inconsistent with each other. The alleged Padam Market construction is on two properties. One of them is in the name of accused No.1. There is no documentary evidence that, Barrack No.319, Room No.12/B is purchased by accused No.1 from the funds generated by his father or by the informant. His mother does not have any title or right over any portion of the building. The informant has not filed any document to show the right over the said property. There is no documentary evidence that the accused have cheated the informant. The informant has made false allegations that they have cheated Public

Authorities. The FIR is silent about the number of shops sold by the accused after the death of the father. After considering the submissions of both the sides, the learned Magistrate has provided detailed reasons for allowing the said application. It was observed that, the charge has been framed vide Exhibit-53 for offences under Section 406, 420, 504, 506 r/w Section 34 of IPC. The allegations made in the first information report and the documentary evidence filed prima facie shows that the property situated at Barrack No.319, Room No.12/A at Ulhasnagar purchased by Shri. Baldev Khatri i.e. the father of the informant. His father has constructed basement, ground floor and three floors over the said property. The said property known in the name of Padam Market. After the death of Shri. Baldev Khatri became the joint family property of the informant, accused No.1 elder son Jadgish and the wife of Mr. Baldev M. Khatri. By way of family arrangement the first floor occupied by accused No.1, second floor by the informant and third floor by the elder brother Baldev Khatri. The basement consist of 7 shops plus bar and restaurant, ground floor consist of 16 shops, each of three floors having halls and terrace above the 3rd floor. The sale deeds in respect of shop no.1 to 4, 6, 10, 13, 14 show that accused No.1 sold out these shops to third person and shop No.15 and 16 of the ground floor transferred

in the name of his wife accused No.2. Accused No.1 has converted shop Nos.1 and 2 situated at basement into Beer Bar and Restaurant. Similarly, accused No.1 has gifted the shop No.9/A on ground floor in the name of his daughter. He has gifted the shop No.5 on the ground floor to his other daughter. The above transactions performed by accused No.1 with representation that he was the sole and absolute owner of the above mentioned shops. Similarly, he has submitted the document to the State Excise Department and obtained the license of Beer Bar and Restaurant by representing that he is the absolute owner of it. He started the business with active participation of accused No.1. The allegations and documents filed on record shows that accused No.1. has carried out the series of transaction without obtaining the consent of his two brothers even having the knowledge that the property of Padam Market is his joint family property. He has concealed the material fact to the purchaser as well as the informant and his elder brother Jagdish by entering into the series of transaction of sale and gift deed. Similarly, he has received the rent arising out of that property and converted for own use. The above act of accused come within the offence under Section 420 of the Indian Penal Code. The charge framed by learned predecessor under Section 420 and 406 of Indian Penal Code are totally silent and no

particulars of documents, manner in which they are executed and in respect of which shops of Padam market documents are executed for committing the offence of under Section 420 and 406 of the Indian Penal Code. Therefore, charge nos.1 and 2 needs to be altered for that purpose. The allegations and documents filed on record further shows that accused No.1 has supplied the false document to the M.S.E.B. and the State Excise Department to believe that the shop in the basement belongs to them and they have obtained the license of Beer Bar and Restaurant. These allegations shows that accused Nos.1 and 2 have made the false document in respect of the shop Nos.1 and 2 in the basement of Padam Market and they have obtained the license in the name of accused No.2. while acting of making the false document accused have represented to the Public Authority that these documents are genuine which they knows have reason to believe to be a forged documents. Therefore, there is sufficient ground to frame a charge against accused nos.1 and 2 for the offence punishable under Section 465 and 471 of the Indian Penal Code. Similarly, the allegations and documents in particulars the series of transaction performed by accused no.1 shows that accused no.1 received the money from the third person by entering into the agreement. Similarly, he has gifted the property without obtaining the consent

of his two brothers representing himself to be absolute owner although he has knowledge that the same property belong to the joint family. Therefore, he has created a forged documents and received the amount. The said act of accused no.1 come within the offence punishable under Section 467 and 468 of the Indian Penal Code. But the charge in respect of the said offence has not been framed. Therefore, it needs to be added. The object of alternation or addition of charge is that the accused should be given the particular of the offence of which they charged. But at the same time the charge in particularly the cheating and forgery should specify the manner in which and in respect of which property the cheating or forgery has been committed. The charge (Exh. 53) has not given the particular detail of all properties and the manner in which the cheating and forgery has been committed by accused. If the charge could not be framed properly then it will cause prejudice to the accused himself. Therefore, charge in respect of the offence punishable under Section 406 and 420 of the Indian Penal Code in need to be altered and the charge in respect of the offence punishable under Section 465, 467, 468 and 471 of the Indian Penal Code needs to be added.

21. Thus, the learned Magistrate has considered the documents on record and by assigning cogent reasons allowed the application.

I do not find any illegality in the said order. The learned Magistrate then framed the charge against the accused maintaining the charge under Sections 406 & 420 of IPC and framed the charge under Section 417 r/w Section 34 of IPC, Sections 465, 467, 468, 504 r/w Section 34 of IPC and Section 506 r/w Section 34 of IPC. There is no reason to interfere in the order allowing the application for alteration of charge and the order framing charge. The order rejecting the application for adjournment (Exhibit-157) also does not call for interference. The learned Magistrate vide order dated 15th February 2021 had observed that matter is time bound. As soon as permission to alter and add the charge is granted, the altered charge needs to be framed. The accused had exhausted remedy of discharge. The Court had decided Exhibit – 141 on the basis of allegations made and documentary evidence filed on record. The accused can challenge the said order. The order passed on Exhibit – 141 is part and parcel of the altered and added charge. The matter cannot be adjourned to grant time to read over and explain the added and altered charge because the added and altered charge itself a part and parcel of the application decided (Exhibit – 141).

22. There was sufficient material before the Court to alter the charge. Learned Magistrate has also noted that the cross

examination by the accused is not yet completed. It cannot be expected that the defence of the accused is opened up and it would prejudice the accused.

23. Although the application was signed by the complainant, it was filed through prosecution and the title of the application itself indicate that, it was an application on behalf of the prosecution.

24. In the case of *Sambhaji Narsingh Mali and Another V/s. The State of Maharashtra* (supra) this Court has set aside the order allowing the application filed by the prosecution for framing charge. In the case of *Anant Prakash Sinha alias Anant Sinha V/s. State of Haryana and Another* (supra) it was observed that, the Court can change or alter the charge if there is defect or something is left out. The test is, it must be founded on material available on record during the course of trial. It can be on the basis of complaint or FIR or accompanying documents or material brought on record. It can be done at any time before pronouncement of judgment. If the Court has not framed the charge despite material on record, it has jurisdiction to add charge. It has authority to alter charge. The principle that has to be kept in mind is that the charge so framed by Magistrate is in accord with materials produced before him or if subsequent material comes on record. It is not to

be understood, that unless evidence has been let in, charges already framed cannot be altered, for that, is not the purport of Section 216 of Cr.P.C. There are in-built safeguards in Section 216 of Cr.P.C. It is pertinent to note that the application in the said case was preferred by the wife of informant for framing of additional charge under Section 406 of IPC. The Court allowed the application under Section 216 of Cr.P.C. The said order was challenged by preferring revision application before the sessions Court. The revisional Court dealt with the law relating to alter or addition of charge. The revision was partly allowed by setting aside the charge against the mother-in-law. The order framing charge against the husband was challenged before the High Court. The High Court had observed that, the trial Court spelt out reasons that they have insisted for addition of charge. It was submitted before the apex Court that the trial Court had no power under Section 216 of Cr.P.C. to alter or modify the charge on the basis of application filed by the informant. The trial Court could have altered the charge, if such evidence had come on record. The apex Court observed that, the Court can change or alter the charge if there is defects or something is left out the Court also considered the objection that the learned Magistrate ought not to have entertained the application preferred by the informant. The apex

Court observed that the decision in the case of *Shiv Kumar V/s. Hukam Chand*⁶ can be distinguished. The application was filed by the informant to add the charge under Section 406 of IPC as there were allegations against the husband about criminal breach of trust as far as her stridhan is concerned. It was in a way, bringing to the notice of the learned Magistrate about defect in framing of the charge. The court could have done it *suo motu*. In such a situation, there is no fault on the part of the Magistrate in entertaining such application. The learned Advocate has referred the material and recorded the prima facie satisfaction. Even in the present case, although the application was signed by the complainant, it was signed by the prosecutor and tender his application at the instance of prosecution. The infirmity in charge was brought to notice of Court. The order of alteration/addition cannot be said to be illegal or contrary to Section 216 of Cr.P.C. The decision in the case of *Dr. Nallapareddy Sridhar Reddy V/s. The State of Andhra Pradesh and Ors.* (supra) relied upon by the learned Advocate for the petitioner was delivered in the facts of the said case. The Court has considered all the earlier decisions. It was observed that the veracity of the depositions of the witnesses is a question of trial. Appreciation of evidence on merits is to be done

⁶ (1999) 7 SCC 467; 1999 SCC (Cri) 1277

by the Court only after the charges have been framed. For the purpose of framing of charge the Court needs to prima facie determine that there exists sufficient material for the commencement of trial.

25. Considering the aforesaid circumstances, I do not find any reason to interfere and set aside the impugned order. Hence I pass the following order :

ORDER

(i) Writ Petition No. 1013 of 2021 is rejected and stands disposed of.

(ii) At this stage, the learned counsel for the petitioners seek extension of interim relief granted by this Court for a period of eight weeks, to enable the petitioner to challenge the order before the Higher Court.

(iii) Since interim order was in operation from 01.03.2021, the same is extended for six weeks.

(PRAKASH D. NAIK, J.)

SAJAKALI
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JAMADAR

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