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Crl.R.C.No.197 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.03.2022

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

Crl.R.C.No.197 of 2017 and
Crl.M.P.No.2083 of 2017 in Crl.R.C.No.197 of 2017

1.T.Mokanraj
2.Chandrasekaran
3.C.Raja
4.R.S.Guru Bahadur
5.Suresh S.Samuel
6.V.S.Stalin

... Petitioners

Vs.

The Dy. Commissioner of Central Excise
Headquarters Legal Cell,
6/7 ATD Street,
Race Course Road,
Coimbatore.

... Respondent

PRAYER: Criminal Revision is filed under Section 397 r/w 401 of the Code of Criminal Procedure, to call for the records relating to the Suo-motto order of the Chief Judicial Magistrate, Coimbatore dated 27.12.2016 and set aside the same.

For Petitioner : Mr.S.Senthil Nathan

For Respondent : Mr.A.P.Srinivas,
Additional Central Government
Standing Counsel



ORDER

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The respondent/The Deputy Commissioner of Central Excise, Central Excise Coimbatore has filed a complaint under Section 190(1) r/w 200 Cr.P.C., against the petitioners (A1 to A6) for committing offence under Sections 50, 76(1)b of Customs Act, 1962 r/w Section 11 of The Foreign Trade (Development & Regulation) Act, 1992, Rule 14(2) of The Foreign Trade (Regulation) Rules, 1993 and Section 7 of The Foreign Exchange Management Act, 1999. After completion of arguments on either side, the Trial Court framed additional charges under Sections 132, 135 and 135A of The Customs Act, 1962, vide suo-motu order, dated 27.12.2016. Aggrieved over the same, the present Criminal Revision case filed.

2.The case of the respondent is that the 1st petitioner/A1 in this case mis-declared the goods viz., 36,000 number of ordinary Banians as T-Shirts and over valued as Rs.1,15,02,540/- in the export documents viz., Shipping Bill Nos.198 ,199 & 200, all dated 15.07.2003 and Invoice Nos.CS/37, CS/38 and CS/39, all dated 10.07.2003 in order to avail higher ineligible drawback incentive to the tune of Rs.11,50,254/-. On information, the officials detained the documents, verified the goods and found that the goods were as Baniyans



and not as per the value and description declared in the invoices and export documents. Hence, the goods were detained and seized by the officers of Special Investigation Branch (SIB) under mahazar, dated 24.11.2003 at Cochin for contraventions of provisions of Sections 50, 76(1)b of The Customs Act, 1962 r/w Section 11 of The Foreign Trade (Development & Regulation) Act, 1992, Rule 14(2) of The Foreign Trade (Regulation) Rules, 1993 and Section 7 of The Foreign Exchange Management Act, 1999 and thereby punishable under Sections 132, 135 & 135A r/w 140 of The Customs Act, 1962. During trial, after framing charges, witnesses were examined by the respondent and totally nine witnesses (PW1 to PW9) examined and the same were cross examined by the defence side. Thereafter, the accused were questioned under Section 313(1)(b) Cr.P.C and one defence witness (DW1) was examined. Later, the Trial Court found Sections 132, 135 & 135A of The Customs Act, 1962 erroneously omitted to be framed even though the same has been found in the complaint. Hence, the charges under Sections 132, 135 and 135A of The Customs Act, 1962 framed additionally vide order, dated 26.12.2016.



3.The learned counsel for the petitioners submitted that the Trial Court suo motu ordering framing of additional charges after hearing the final arguments and receiving written submissions, is not proper. The Trial Court failed to consider the circumstances under which the additional charges can be framed especially when the case was awaiting pronouncement of judgment. He further submitted that offences under the provisions of The Foreign Trade (Development & Regulation) Act, 1992, The Foreign Trade (Regulation) Rules, 1993 and The Foreign Exchange Management Act, 1999 are civil in nature and not penal in nature. Inclusion of Sections 50, 76(1)b of The Customs Act, 1962 in the original charges is breach of procedure, for which adjudication proceedings can alone be invoked and not a criminal case. The learned counsel further submitted that a conjoint reading of various provisions referred in the impugned order, does not provide any scope for criminal prosecution, as all of them are civil consequences and hence, the impugned order is liable to be set aside.

4.The learned Additional Central Government Standing Counsel appearing for the respondent submitted that the complainant received information from the Trichy Commissionerate on 18.07.2003 that one exporter



under the name of M/s.C.S.Textiles Importer-Exporter Code (IEC) No.3201010928 had exported 300 cartons of 100% cotton knitted Men's T-Shirts through Inland Container Depot (ICD) Coimbatore to M/s.Mavet Private Limited, Singapore under three drawback shipping bill Nos.198, 199 and 200, all dated 15.07.2003 by wrong declaration over invoicing with an intention to avail more drawback benefits and that the goods have been stuffed into a 20 feet container. When the container was likely to leave Cochin Port, it was detained, examined and found that the goods were valued Free On Board (FOB) for 5.95 Euro equivalent Indian Rs.319.51/- per T-shirts. On 30.07.2003, the container were opened and examined in detail by the officers of the Special Investigation Branch, Customs House, Cochin in presence of independent witnesses. T-shirts found were actually ordinary vests (in common parlance called as Banian) normally worn underneath the shirt. Four samples were drawn in respect of each of the shipping bills and thereafter, the samples were sent to M/s.South Indian Textile Research Association, Coimbatore for testing and analysing, who in their report, dated 08.08.2003 furnished the cost of manufacturing the test garment may be around Rs.30/- per piece, informations were also gathered from the market and the market value revealed that Baniyans were valued between Rs.19/- to Rs.20/- to



Rs.21.50/- Thereafter, on recording the statements of witnesses and collecting documents, complaint filed against the petitioners for contravention of provisions of the above said Acts.

5.He further submitted that since it is private complaint, it warrants procedure. Initially, PW1 to PW4 examined and documents marked, on perusal of the same, the Trial Court framed charges against the petitioners/accused, thereafter, PW1 to PW9 examined and documents marked, the accused were questioned under Section 313(1)(b) Cr.P.C, the defence side examined one witness (DW1) and the Trial Court heard elaborate and detailed arguments made on either side and posted the case for judgment. Later, the Trial Court, on going through the materials, found the punishable provisions under Sections 132, 135 & 135A of The Customs Act, 1962 though mentioned in the complaint, were erroneously omitted while framing charge. Hence, the trial Court suo motu opened the case, heard arguments on either side and included the omitted charges invoking Section 216 of Cr.P.C., giving liberty to both parties to adduce additional evidence if any and giving right for cross examination to either side. The procedure adopted by the Trial Court is proper and no prejudice is caused to the petitioners. The petitioners taking



adumrage of the same, projected a different case before this Court as though the charges under the Foreign Trade (Development & Regulation) Act, 1992, Foreign Trade (Regulation) Rules, 1993 and Foreign Exchange Management Act, 1999 is not proper. He further submitted that the Trial Court in the impugned order had framed two issues, first one is whether the charges framed under Section 7 of the Foreign Exchange Management Act, 1999 and under Section 11 of The Foreign Trade Development Act, 1992 and Rule 14 of The Foreign Trade Regulation Rules are civil in nature? The Trial Court answered that they are civil in nature. As regards the second issue, whether it is justifiable at this stage to frame charge for offences under Sections 132, 135 & 135A of the Customs Act, 1962 as additional charges and the case to be disposed accordingly? The Trial Court answered that at any time, the Court can add or alter the charges before the judgment is pronounced, which is perfectly in order. Hence, he prayed for dismissal of this Criminal Revision case.

6.This Court considered the rival submissions and perused the materials available on record.



7.The respondent, as a public servant, filed the complaint for over valuation and availing higher ineligible drawback incentive. On receipt of the information, the Authorities intercepted the container, examined the same in presence of witnesses and found false declaration in the export invoices and also found shipping bills are not genuine and not corresponding to the export goods. Thereafter, the goods were detained and seized by the officers of the Special Investigation Branch (SIB) under mahazar, dated 24.11.2003 at Cochin for contraventions of provisions of Sections 50, 76(1)b of The Customs Act, 1962 r/w Section 11 of The Foreign Trade (Development & Regulation) Act, 1992, Rule 14(2) of The Foreign Trade (Regulation) Rules, 1993 and Section 7 of The Foreign Exchange Management Act, 1999 and thereby punishable under Section 132, 135 & 135A r/w 140 of The Customs Act, 1962. The goods were sent to the M/s.South Indian Textile Research Association, Coimbatore for testing and analysing the nature of goods and its value. The report of M/s.South Indian Textile Research Association, Coimbatore confirms the cost of the garment may be around Rs.30/- per piece and found the wholesale value of Banians range from Rs.19/- to Rs.20/- to Rs.21.50/-.



8.It is to be seen that this case falls under Chapter XIX B of the Code of Criminal Procedure i.e., Cases instituted otherwise than on Police report. The respondent/complainant had let-in evidence under Section 244 of Cr.P.C and thereafter, Sections 246 and 247 of Cr.P.C., are complied with. Thereafter, arguments heard and the case was posted for pronouncing judgment. At this stage, the Trial Court found mistake committed omitting punishable charges under Sections 132, 135, 135A of Customs Act and thereafter, the said charges included invoking Section 216 Cr.P.C., giving all rights to both the complainant as well the accused. The procedure followed by the Trial Court is proper in order.

9.The Hon'ble Apex Court in the case of “***DP.Nallapareddy Sridhar Reddy Versus The State of Andhra Pradesh & Ors., reported in [2020] 1 S.C.R 1116***” held that the Trial Court on its own on the materials available can proceed to alter the charge at any time before the judgment is pronounced. The only aspect that has to be considered is no prejudice is caused to the accused and he is allowed to have a fair trial. It would be apposite to extract the paragraph Nos.15 to 20 from ***D.P.Nallareddy Sridhar Reddy's*** case:

“***15. Section 216 appears in Chapter XVII CrPC. Under the provisions of Section 216, the court is authorised to alter or***



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add to the charge at any time before the judgment is pronounced.

Whenever such an alteration or addition is made, it is to be read out and explained to the accused. The phrase “add to any charge” in sub-section (1) includes addition of a new charge. The provision enables the alteration or addition of a charge based on materials brought on record during the course of trial. Section 216 provides that the addition or alteration has to be done “at any time before judgment is pronounced”. Sub-section (3) provides that if the alteration or addition to a charge does not cause prejudice to the accused in his defence, or the prosecutor in the conduct of the case, the court may proceed with the trial as if the additional or alternative charge is the original charge. Sub-section (4) contemplates a situation where the addition or alteration of charge will prejudice the accused and empowers the court to either direct a new trial or adjourn the trial for such period as may be necessary to mitigate the prejudice likely to be caused to the accused. Section 217 CrPC deals with recalling of witnesses when the charge is altered or added by the court after commencement of the trial.

16. *The decision of a two-Judge Bench of this Court in P. Kartikalakshmi v. Sri Ganesh [P. Kartikalakshmi v. Sri Ganesh, (2017) 3 SCC 347 : (2017) 2 SCC (Cri) 84] , dealt with a case where during the course of a trial for an offence under Section 376 IPC, an application under Section 216 was filed to frame an additional charge for an offence under Section 417 IPC. F.M.*



Ibrahim Kalifulla, J. while dealing with the power of the court to

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alter or add any charge, held : (SCC p. 350, para 6)

“6. ... Section 216 CrPC 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 CrPC 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.”

(emphasis supplied)

17. In Anant Prakash Sinha v. State of Haryana [Anant Prakash Sinha v. State of Haryana, (2016) 6 SCC 105 : (2016) 2 SCC (Cri) 525] , a two-Judge Bench of this Court dealt with a situation where for commission of offences under Sections 498-A and 323 IPC, an application was filed for framing an additional charge under Section 406 IPC against the husband and the mother-in-law. After referring to various decisions of this Court



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that dealt with the power of the court to alter a charge, Dipak Misra, J. (as the learned Chief Justice then was), held : (SCC p. 116, paras 18-19)

“18. ... 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 the material available on record. It can be on the basis of the complaint or the FIR or accompanying documents or the material brought on record during the course of trial. It can also be done at any time before pronouncement of judgment. It is not necessary to advert to each and every circumstance. Suffice it to say, if the court has not framed a charge despite the material on record, it has the jurisdiction to add a charge. Similarly, it has the authority to alter the charge. The principle that has to be kept in mind is that the charge so framed by the Magistrate is in accord with the materials produced before him or if subsequent evidence 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 CrPC.

19. In addition to what we have stated hereinabove, another aspect also has to be kept in mind. It is obligatory on the part of the court to see that no prejudice is caused to the accused and he is allowed to have a fair trial. There are in-built safeguards in Section 216 CrPC. It is the duty of the trial court to bear in mind that no prejudice is caused to the accused as that has the potentiality to affect a fair trial.”

18. *In CBI v. Karimullah Osan Khan [CBI v. Karimullah Osan Khan, (2014) 11 SCC 538 : (2014) 3 SCC (Cri) 437] , this Court dealt with a case where an application was filed under*



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Section 216 CrPC during the course of trial for addition of charges against the appellant under various provisions of IPC, the Explosives Act, 1884 and the Terrorist and Disruptive Activities (Prevention) Act, 1987. K.S.P. Radhakrishnan, J. speaking for the Court, held thus : (SCC p. 546, paras 17-18)

“17. Section 216 CrPC gives considerable power to the trial court, that is, even after the completion of evidence, arguments heard and the judgment reserved, it can alter and add to any charge, subject to the conditions mentioned therein. The expressions “at any time” and before the “judgment is pronounced” would indicate that the power is very wide and can be exercised, in appropriate cases, in the interest of justice, but at the same time, the courts should also see that its orders would not cause any prejudice to the accused.

18. Section 216 CrPC confers jurisdiction on all courts, including the Designated Courts, to alter or add to any charge framed earlier, at any time before the judgment is pronounced and sub-sections (2) to (5) prescribe the procedure which has to be followed after that addition or alteration. Needless to say, the courts can exercise the power of addition or modification of charges under Section 216 CrPC, only when there exists some material before the court, which has some connection or link with the charges sought to be amended, added or modified. In other words, alteration or addition of a charge must be for an offence made out by the evidence recorded during the course of trial before the court.”

(emphasis supplied)

19. In Jasvinder Saini v. State (NCT of Delhi) [Jasvinder Saini v. State (NCT of Delhi), (2013) 7 SCC 256 : (2013) 3 SCC (Cri) 295] , this Court dealt with the question whether the trial



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court was justified in adding a charge under Section 302 IPC against the accused persons who were charged under Section 304-B IPC. T.S. Thakur, J. (as he then was) speaking for the Court, held thus : (SCC pp. 260-61, para 11)

“11. A plain reading of the above would show that the court's power to alter or add any charge is unrestrained provided such addition and/or alteration is made before the judgment is pronounced. Sub-sections (2) to (5) of Section 216 deal with the procedure to be followed once the court decides to alter or add any charge. Section 217 of the Code deals with the recall of witnesses when the charge is altered or added by the court after commencement of the trial. There can, in the light of the above, be no doubt about the competence of the court to add or alter a charge at any time before the judgment. The circumstances in which such addition or alteration may be made are not, however, stipulated in Section 216. It is all the same trite that the question of any such addition or alternation would generally arise either because the court finds the charge already framed to be defective for any reason or because such addition is considered necessary after the commencement of the trial having regard to the evidence that may come before the court.”

(emphasis supplied)

20. From the above line of precedents, it is clear that Section 216 provides the court an exclusive and wide-ranging power to change or alter any charge. The use of the words “at any time before judgment is pronounced” in sub-section (1) empowers the court to exercise its powers of altering or adding charges even after the completion of evidence, arguments and reserving of the judgment. The alteration or



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addition of a charge may be done if in the opinion of the court there was an omission in the framing of charge or if upon prima facie examination of the material brought on record, it leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the alleged offence. The test to be adopted by the court while deciding upon an addition or alteration of a charge is that the material brought on record needs to have a direct link or nexus with the ingredients of the alleged offence. Addition of a charge merely commences the trial for the additional charges, whereupon, based on the evidence, it is to be determined whether the accused may be convicted for the additional charges. The court must exercise its powers under Section 216 judiciously and ensure that no prejudice is caused to the accused and that he is allowed to have a fair trial. The only constraint on the court's power is the prejudice likely to be caused to the accused by the addition or alteration of charges. Sub-section (4) accordingly prescribes the approach to be adopted by the courts where prejudice may be caused.”

10. In this case, the Trial Court in its order ordered framing of additional charges by giving liberty to complainant to adduce any further evidence if any warrant and permitted the defence to cross examine further witness if any examined on the side of the complainant and also permitted to make further



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cross examination of relevant prosecution witnesses already examined.

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11.In view of the above, this Court finds no prejudice is caused to the petitioners/accused from the order passed by the Trial Court and hence, the impugned order, dated 27.12.2016 does not warrant any interference and the same is hereby confirmed. Accordingly, this Criminal Revision case stands dismissed.

12.Finding that the complaint lodged in the year 2005 for the offence committed in the year 2003 and considering that even after eighteen years the trial is yet to reach its logical end, this Court directs the Trial Court to complete the case in C.C.No.37 of 2005 within a period of three months from the date of receipt of the copy of this order. The connected Miscellaneous Petition is closed.

08.03.2022

Speaking order/Non-speaking order

Index: Yes/No

Internet: Yes/No

Note: Issue Order Copy on 27.03.2023.

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To



Crl.R.C.No.197 of 2017

1.The Chief Judicial Magistrate,
Coimbatore.

2.The Deputy Commissioner of Central Excise
Headquarters Legal Cell,
6/7 ATD Street,
Race Course Road,
Coimbatore.

3.The Public Prosecutor,
High Court, Madras.



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