

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

Criminal Application No.220 of 2020

Kiran Prakash Kulkarni
503, Konark Classic,
85, Hill Road, Bandra (W)
Mumbai - 400050

...Applicant.

Versus

State of Maharashtra
Through
The Economic Offences Wing
Unit-V, CID, Mumbai

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...Respondent.

Dr Yug M. Chaudhary, Advocate a/w Adv. Ajay Basutkar and Adv.
Ms Shruti Bedekar, for the Applicant.
Mr A.A. Palkar, APP for the respondent/State.

Coram: R. N. Laddha, J.

Reserved on: 5 October 2023.
Pronounced on: 13 December 2023.

Order :

In the present application, the applicant/ accused No.2 seeks to challenge the Order dated 12 December 2019 passed by the learned Additional Sessions Judge, Mumbai, in Miscellaneous Application No.2244 of 2019, and the Order dated 13 June 2016 passed by the learned Additional Chief Metropolitan Magistrate, 47th Court, Esplanade, Mumbai, in CC No.322/PW/2016.

2. The applicant states that on 15 December 2016, one Mr Milind Desai, PI, Economic Offences Wing, Unit 5, Mumbai, filed an FIR bearing No.760 of 2015 against the applicant and others before the MIDC Police Station, Andheri East, Mumbai, for offences punishable under sections 409, 420, 477(A), 120(B) read with 34 of Indian Penal Code ('IPC'), alleging that the accused, a director of Geodesic Limited, along with others hatched a conspiracy to defraud the shareholders and foreign currency convertible bondholders to receive wrongful gain and falsified accounts to the tune of approximately Rs.1062 crores. The investigation was transferred to the Economic Offences Wing, Mumbai ('EOW') and the FIR was re-numbered as EOW CR No.88 of 2015.

3. The applicant was arrested by EOW on 18 January 2016 and released on bail on 10 May 2016. In the meantime, on 16 April 2016, the respondent filed a chargesheet against the applicant and others under sections 409, 420, 477(A), 120(B) read with 34 of IPC. On 13 June 2016, the learned Additional Chief Metropolitan Magistrate, 47th Court, Esplanade, Mumbai, in CC No.322/PW/2016, framed a charge against the applicant and others. Consequently, the applicant filed a Miscellaneous Application bearing No.397/M/2016 before the learned Magistrate for withdrawal of the order dated 13 June 2016. This application

was dismissed by an order dated 21 May 2018 for want of prosecution.

4. The applicant further states that before he could approach the Sessions Court to challenge the order of framing of charge, on 18 June 2018, he was arrested by the Enforcement Directorate for an offence under the Prevention of Money Laundering Act, 2002 ('PMLA') and was released on bail on 11 April 2019 by an order of the Hon'ble Supreme Court. In the interim, CC No.322/PW/2016 was transferred from the Court of learned Chief Metropolitan Magistrate, Esplanade Court, Mumbai to the learned Special Court, PMLA, Mumbai, and renumbered as Sessions Case No.670 of 2018.

5. The applicant alleges that after his release, he applied for certified copies of various documents and consulted advocates. Subsequently, he filed a revision application before the Sessions Court, Mumbai, to challenge the order dated 13 June 2016 passed by the learned Magistrate along with Miscellaneous Application No.2244 of 2019 for condonation of delay. Thereafter, by an Order dated 12 December 2019, the learned Additional Sessions Judge dismissed the application and refused to condone the delay, *inter alia*, on the ground that the order of framing of charge was not an order, finding or sentence, and thus a revision was not

maintainable, and hence the question of condoning the delay did not arise.

6. Aggrieved by the Orders dated 21 December 2019 and 13 June 2016, the applicant filed the present application.

7. I have heard Dr Yug M. Chaudhary, the learned Counsel, appearing on behalf of the applicant and Mr AA Palkar, the learned Additional Public Prosecutor, appearing on behalf of the respondent-State, and perused the material available on record.

8. Dr Yug Chaudhary, the learned Counsel for the applicant, submits that the learned Sessions Court committed a manifest error in rejecting the application on the grounds of maintainability. He further submitted that the learned Sessions Court failed to appreciate that on 13 June 2016, the charge was framed in the absence of the prosecutor and the accused's advocates and the accused were not heard. Before framing the charge against the accused, the learned Magistrate ought to have perused the material on record and heard the applicant as required under section 240 of the Code of Criminal Procedure, 1973 ('CrPC'). To bolster his arguments, he placed reliance on the following judgments:

(i) *Sanjay Kumar Rai Vs. State of Uttar Pradesh and Anr.*¹

1. AIR Online 2021 SC 239

- (ii) *Minakshi Bala Vs. Sudhir Kumar and Ors.*²
- (iii) *Asian Resurfacing of Road Agency P. Ltd. and Anr. Vs. CBF*³
- (iv) *Akshay Manoj Jaisighani Vs. State of Maharashtra*⁴
- (v) *Ambadas Kashirao Kharad Vs. State of Maharashtra*⁵
- (vi) *State of Bihar and Ors. Vs. Kameshwar Prasad Singh and Anr.*⁶
- (vii) *M/s. Mohanlal Devdanbhai Chokshi Vs. J.S. Wagh*⁷.

9. Mr AA Palkar, the learned Additional Public Prosecutor for the respondent-State, submits that the orders dated 13 June 2016 and 21 December 2019 were rightly passed by the learned Magistrate and the learned Sessions Court, respectively. He states that at the time of framing of the charge, all the relevant material, as required under section 240 CrPC, was available before the learned Magistrate, and after considering the same, he has rightly framed the charge in the presence of the accused. Further, while filing the revision before the learned Sessions Court, the applicant failed to explain the delay of 1084 days to challenge the order of framing of charge. According to the learned APP, the present application is not maintainable on two counts. Firstly, the applicant has not

2. (1994) 4 SCC 142

3. (2018) 16 SCC 299

4. Cri.WP No.3599 of 2017 dated 15.12.2017.

5. Cri Revn Appl.No.338 of 2006 dated 18.01.2007 (Nagpur Bench).

6. (2000) 9 SCC 94.

7. 1981 Cri LJ 454.

challenged the order dated 21 May 2018, which has now attained finality, and directly challenged the orders dated 13 June 2016 and 21 December 2019. Secondly, the applicant cannot be permitted to address this Court on the merits of the correctness of the order dated 13 June 2016 without a prior adjudication by the Courts below. He relies on the roznama to contend that the applicant has engaged in dilatory tactics by filing frivolous applications to prolong the trial. He further submits that the present application ought to be dismissed *in limine*. To bolster his submissions, he relied upon the following judgments:

- (i) *State of Maharashtra Vs. Som Nath Thapa and Ors.*⁸
- (ii) *Asian Resurfacing of Road Agency P. Ltd. and Anr. Vs. CBI*⁹.

10. Chapter XIX of CrPC, consisting of Sections 238 to 243, lays down the procedure for the trial of warrant cases by Magistrates in the cases instituted on a police report. The stage of framing a charge arises after the Magistrate is satisfied that the accused cannot be discharged under Section 239. Section 240 provides for the framing of the charge. Before framing a charge, the Magistrate must consider the police report under Section 173 and the documents sent along with it and hear both the prosecution and the accused. Thereafter, the Magistrate, after determining whether *prima facie*

8. (1996) 4 SCC 659

9. (2018) 16 SCC 299

grounds exist to presume that the accused has committed an offence, shall proceed to frame a charge against the accused. Granting an opportunity of hearing to the accused at the stage of framing a charge is a mandatory requirement under the law. At this juncture, this is the only right available to him. A reference in this regard can be made to the decision of the Hon'ble Supreme Court in *State Anti-Corruption Bureau, Hyderabad Vs. P. Suryaprakasam*¹⁰.

11. The term “*hearing*” appearing in Section 240 of CrPC must be construed to mean affected persons presenting oral arguments/submissions before the Magistrate before he decides whether a charge ought to be framed or not against the accused. An accused, who is an affected person, ought to be given an opportunity to be heard before the charge is framed against him. Further, section 303 of CrPC permits him, as a matter of right, to be defended by a pleader of his choice before a criminal court when proceedings are instituted under the Code. A layperson may not be well versed with the criminal law and its consequences and, thus, requires the assistance of his pleader at all stages. Thus, in the absence of his pleader, it would not be appropriate for the Magistrate to frame a charge against him as it would cause him great harm and prejudice. However, on the pretext of a hearing, it would not be appropriate

10. 1999 SCC (Cri) 373.

on the part of the pleader to remain absent despite being given several opportunities and delay the framing of the charge. In such a situation, it is expected that the Magistrate ought to hear the accused himself instead of his pleader before framing the charge and to consider the police report filed under Section 173 and the documents sent along with it.

12. When a case is triable as a warrant case, the Magistrate is required to proceed in accordance with Sections 239 and 240 of CrPC at the time of framing of the charge. Under the above Sections, the Magistrate is first required to consider the police report and the documents sent with it under Section 173 CrPC and examine the accused, if he thinks necessary, and give an opportunity to the prosecution and the accused of being heard. If on such consideration, examination and hearing the Magistrate finds the charge groundless he has to discharge the accused in terms of Section 239 CrPC. However, if he finds that there is a ground for presuming that the accused has committed an offence triable by him he has to frame a charge in terms of Section 240 CrPC.

13. To determine the issue in the present application, it is necessary to peruse the order dated 13 June 2016, whereby a charge was framed against the applicant. The order reads as follows:

*“Ld APP absent/ transferred.
Accused No.1 & 4 produced from jail.*

*Their JC is extended till 27/6/16.
Accused No.2 & 3 are present.
Advocates are absent.
Plea and charge of accused.
Charge u/sec 409, 420, 477(A), 120(B) r/w. 34 of IPC
is framed, read over and explained to all accused
persons in their language.
All APNG
Issue ss to PWs for evidence.
Adj to 27.06.2016.*

*Sd/-
ACMM 47th court.
13/6/16"*

14. On a bare perusal of this order dated 13 June 2016, it is apparent that the advocate for the State and the accused were not present when the Magistrate proceeded to frame charges against the accused. Further, the roznama, as placed on record, neither indicates that prior to the date of framing of the charge, an opportunity was granted to the parties to present their arguments against the framing of a charge, nor does it show that the respective Counsel of the parties failed to appear on several occasions and due to their non-appearance, the Magistrate proceeded to frame the charge against the accused. Moreover, nothing is on record even to indicate that before framing of the charge the Magistrate perused the charge sheet and considered the allegations therein against the accused nor did he hear the accused. The order dated 13 June 2016 simply states that a charge under Sections 409, 420, 477(A), 120(B) r/w 34 of IPC is framed.

15. Given the foregoing, the order dated 13 June 2016 passed by the learned Additional Chief Metropolitan Magistrate, 47th Court, Esplanade, Mumbai, in CC No.322/PW/2016, is quashed and set aside *qua* the applicant only, with a direction to hear the parties as contemplated under Sections 239 and 240 CrPC and to pass an appropriate order in accordance with the law. Consequently, the order dated 12 December 2019 passed by the learned Additional Sessions Judge, Mumbai, in Miscellaneous Application No.2244 of 2019, is also set aside.

16. It is made clear that this Court has not examined the merits of the case, and all contentions of all the parties are left open.

17. Accordingly, the present application is disposed of in the aforesaid terms.

[R.N. Laddha, J.]