

AGK

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

WRIT PETITION NO.1329 OF 2023

Mohammed Jabir Gulam Rasool Sheroo ... Petitioner

V/s.

The State of Maharashtra & Ors. ... Respondents

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Mr. Subhash Jha with Mr. Siddharth Jha, Ms. Meena Mishra, Ms. Alka Pandey, Mr. Akash Singh and Ms. Monika Kale i/by Law Global for the petitioner.

Mr. Arfan Sait, APP for respondent no.1/State.

Mr. Aman A. Kothari i/by Mr. Vaibhav G. Bagade for respondent nos.2 and 3.

Mr. Rajendra Rathod for respondent nos.4 and 5.

Mr. Shankar Sarkate, PSI, MRA Marg Police Station, is present.

CORAM : AMIT BORKAR, J.

DATED : APRIL 13, 2023

P.C.:

1. The writ petition is directed against order dated 8th March 2023 passed by the learned Metropolitan Magistrate, 16th Court Ballard Pier, Mumbai in Criminal Case No.277/PW/2005 rejecting application on behalf of the informant under section 216 of the Criminal Procedure Code, 1973 (hereafter "Code", for short) for addition of offence punishable under sections 379, 427 read with section 120-B of the Indian Penal Code, 1860 and section 28 of the Arms Act, 1959 against accused nos.1 to 13.

2. The learned Magistrate rejected the application mainly on the ground that there is no case of prosecution or it has not filed charge-sheet for the said offence. None of the party has vested right to seek addition or alteration of charge. The application is not maintainable.

3. The informant has, therefore, taken exception to the order based on the judgment of the Apex Court in **P. Kartikalakshmi v. Sri Ganesh & Anr.** Reported in (2017) 3 SCC 347. The Apex Court in the said judgment has held that power of invocation of section 216 of the Code is exclusively confined with the Court as an enabling provision for the purpose of alteration or addition of any charge at any time before pronouncement of judgment. No party, neither *de facto* complainant nor accused or prosecution has any vested right to seek any addition or alteration of charge. However, in paragraph 6 of the said judgment the Apex Court has held that power under section 216 of the Code is an enabling provision for the Court to exercise its power under certain contingencies which comes to its notice or brought to its notice. It has been held that in such situation if it comes to the knowledge of the Court that necessity has arisen for charge to be altered or added, it may do so on its own.

4. Learned advocate for the petitioner relied on the judgment of the Apex Court in **Anant Prakash Sinha Alias Anant Singh v. State of Haryana & Anr.** Reported in (2016) 6 SCC 105, wherein the Apex Court entertains an application filed by the informant for addition of charge under section 406 of the Indian Penal Code.

5. On perusal of the order, it appears that the Magistrate has refused to apply its judicial mind as to whether there is sufficient material available on record to frame charge as requested by the informant. Learned Magistrate has simply brushed aside its responsibility by holding that such application is not maintainable by ignoring duty cast on him under section 216 of the Code which enables him to exercise such power as contemplated by section 216 of the Code. The informant by filing such application has brought to the notice of the Magistrate necessity to frame additional charge. Therefore, it was expected of the Magistrate to ascertain whether sufficient material is available on record to frame charge as sought by the informant. The Magistrate has discretion whether to frame such charge, or not based on his satisfaction he hold that there is sufficient material on record or the material is insufficient to frame charge.

6. In absence of such exercise, rejection of application filed by the informant is not sustainable. Hence, following order:

a) The impugned Judgment and Order dated 8th March 2023 passed by the learned Metropolitan Magistrate, 16th Court Ballard Pier, Mumbai in Criminal Case No.277/PW/2005 is quashed and set aside;

b) Learned Magistrate shall consider material on record to ascertain whether there is sufficient material on record to add charge under sections 379, 427 read with 120-B of the Indian Penal Code and section 28 of the Arms Act, 1959. If the Magistrate is satisfied that there is sufficient material he shall frame charge;

however, if he is satisfied that there is absence of sufficient material, he may refuse to exercise suo moto power under section 216 of the Code.

7. The writ petition stands disposed of in above terms. No costs.

(AMIT BORKAR, J.)