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

CRIMINAL WRIT PETITION NO.709 OF 2023

1. MR. NIKHIL GIRISH PATT
2. MR. ILESH SHAH
3. MR. SOORAJ KUMAR TAYADE ..PETITIONERS
VS.

1. CENTRAL BUREAU OF INVESTIGATION
2. THE STATE OF MAHARASHTRA ..RESPONDENTS

Dr. Uday Warunjikar i/b. Adv. Pankaj D. Purway for the
petitioners.

Adv. Kuldeep S. Patil a/w Adv. Ashish Kumar Srivastava for
respondent No.1-CBI.

Mr. S. V. Walve, APP for the State.

CORAM : M. S. KARNIK, J.

DATE : FEBRUARY 27, 2024.

JUDGMENT :

1. Heard learned counsel for the petitioners, learned
counsel for respondent No.1-CBI and learned APP for State.

2. The order under challenge is dated 17.02.2023 passed
by the Special Court for CBI at Greater Bombay thereby
framing an additional charge for the offence punishable
under Sections 467 read with 120-B of the Indian Penal
Code, 1860 (hereafter 'the IPC' for short) in view of Section

216 of the Code of Criminal Procedure, 1973 (hereafter 'Cr.P.C.', for short).

3. The respondent No.1-CBI registered a case vide RC No.02/E/2013-Mumbai under Sections 120-B read with 420, 406, 409, 465, 467, 468, 471 of the IPC and Sections 13(2) read with 13(1)(d) of the Prevention of Corruption Act, 1988, (for short "PC Act"), on the basis of the complaint dated 29.01.2013 of Shri K. Rajaraman, Deputy Zonal Manager, Bank of India, Mumbai North Zone, alleging that Shri Nikhil Girish Patt (A-1), Proprietor M/s. Madhav Enterprises; Shri Chandrakant Rajiv Desai (A-2), Proprietor M/s. Parmar Trading Corporation; Shri Samir Natwarlal Shah (A-3), Proprietor M/s. Siddhi Graphics; Shri Himanshu Rajendra Bhatt (A-4); Shri Ailesh Nemishchandra Shah (A-5) & Shri Damodar R. Kamath (A-6), the then Senior Manager (Credit), Vijaya Bank, Barakhamba Road Branch, New Delhi, cheated the Bank of India, Vile Parle (East) branch by submitting false Letter of Credits ('LCs' for short) purportedly issued by the Vijaya Bank, Barakhamba Road Branch, New Delhi and thereby caused loss of

Rs.10,18,02,184/-. On completion of the investigation, a charge-sheet was laid before the Special Judge for CBI cases at Mumbai on 23.11.2023 against the accused. A Special Case No.109 of 2013 was assigned to the instant charge-sheet. On 05.04.2016 the trial Court framed the charges vide Exhibit 112 against the accused persons viz. accused Nos.1 to 7 under Sections 120-B read with 420, 468, 471 of the IPC and Sections 13(1)(d) read with 13(2) of the PC Act. The trial proceeded and presently the matter is posted for cross-examination of the Investigating Officer. Respondent No.1-CBI has already examined 11 witnesses.

4. On 07.02.2023, the respondent No.1-CBI placed an application under Section 216 of the Cr.P.C. for seeking alteration of the charges levelled against the accused persons under Sections 120-B read with 467 of the IPC with a specific prayer made before the Special Court that inadvertently the charges for the offence of aggravated form of forgery could not be framed by Special Court, though the charge vide Exhibit 112 is very well self explanatory to show the ingredients of the said offence. It

was therefore prayed that as the offence of forgery of valuable security has been committed by the accused persons, but as the same has not been inserted into the charge, this will lead to failure of justice.

5. On 17.02.2023 the petitioners filed a detailed counter to the application. By the impugned order dated 17.02.2023 the application is allowed. Hence, this writ petition is filed under Section 482 of the Cr.P.C. and under Article 227 of the Constitution of India challenging the impugned order.

6. Dr. Warunjikar submitted that the impugned order causes serious prejudice to the petitioners, for as many as 11 witnesses are already examined and now the Investigating Officer is under cross-examination. It is submitted that the application is made at the fag end of the trial. It is further submitted that the petitioners are facing prosecution for more than ten years and the delay in concluding the trial is prejudicial to the petitioners. He submits that the trial Court ought not to have entertained the application at such a belated stage. It is further submitted that the petitioners have opened up their defence

and hence it would prejudice their defence if the petitioners are to again proceed with the trial on the basis of the altered charge. Dr. Warunjikar relied upon the decision of the Supreme Court in *P. Kartikalakshmi vs. Sri Ganesh and anr.*¹ to submit that the writ petition is misconceived. It is submitted that the impugned order is passed on a motion made by the respondent No.1-CBI which course is not permissible in view of the mandate of Section 216 of the Cr.P.C. as explained by the Supreme Court in *P. Kartikalakshmi (supra)*. It is further submitted that the test to be adopted by the Court while deciding upon an addition or alteration of a charge is explained in the decision of the Supreme Court in *Dr. Nallapareddy Sridhar Reddy vs. State of Andhra Pradesh and ors.*² which has not been followed by the trial Court.

7. Mr. Kuldeep Patil, learned counsel for respondent-CBI argued in support of the impugned order.

8. Before advertng to the facts of this case let me examine the law laid down by the Supreme Court while

1 (2017) 3 SCC 347

2 AIR 2020 SC 753

construing Section 216 of the Cr.P.C. The Supreme Court in P. Kartikalakshmi (supra) paragraph Nos.6, 7 and 8 observed thus :-

"6. Having heard learned counsel for the respective parties, we find force in the submission of learned senior counsel for respondent no.1. Section 216 Cr.P.C., 1973 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.P.C., 1973 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 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 & 227 of the Cr.P.C. in this context. In the light of the facts involved in this case, we are only concerned with Section 216 Cr.P.C., 1973. 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 Cr.P.C., 1973 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 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 of alteration of charge, because it is not provided under Section 216 Cr.P.C., 1973. 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 jeopardized.

8. In such circumstances, when the application preferred by the appellant itself before the Trial Court was not maintainable, it was not incumbent upon the Trial Court to pass an order under Section 216 Cr.P.C., 1973. Therefore, there was no question of the said order being revisable under Section 397 Cr.P.C., 1973. The whole proceeding, initiated at the instance of the appellant, was not maintainable. Inasmuch as the legal issue had to be necessarily set right, we are obliged to clarify the law as is available under Section 216 Cr.P.C., 1973. To that extent having clarified the legal position, we make it clear that the whole proceedings initiated at the instance of the appellant was thoroughly misconceived and vitiated in law and ought not to have been entertained by the Trial Court. As rightly pointed out by the learned senior counsel for respondent no.1, such a course adopted by the appellant and entertained by the Court below has unnecessarily provided scope for protraction of the proceedings which ought not to have been allowed by the Court below."

9. The decision in *P. Kartikalakshmi (supra)* was referred in *Dr. Nallapareddy Sridhar Reddy (supra)*. The Supreme Court dealt with the test to be adopted by the Court while deciding upon an addition or alteration of a charge. It would be profitable to rely on the observations of the Supreme Court in *Dr. Nallapareddy Sridhar Reddy (supra)* having regard to the contextual facts of the present case.

Paragraph Nos.18 to 22 which are significant need to be reproduced reading thus :-

"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 (Govt of NCT of Delhi)*, this Court dealt with the question whether the Trial Court was justified in adding a charge under Section 302 of the IPC against the accused persons who were charged under Section 304B of the IPC. Justice T. S. Thakur (as he then was) speaking for the Court, held thus:

"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 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.

21. The appellant has relied upon a two-judge Bench decision of this Court in Onkar Nath Mishra v. The State to substantiate the point that the ingredients of Sections 406 and 420 of the IPC have not been established. This Court while dealing with the nature of evaluation by a court at the stage of framing of charge, held thus:

“11. It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value,

disclosed the existence of all the ingredients constituting the alleged offence. At that stage, the court is not expected to go deep into the probative value of the material on record. What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence.”

(Emphasis supplied)

22. In the present case, the High Court while directing the framing the additional charges has evaluated the material and evidence brought on record after investigation and held:

“LW1 is the father of the de facto complainant, who states that his son in law i.e., the first accused promised that he would look after his daughter at United Kingdom (UK) and promised to provide Doctor job at UK and claimed Rs.5 lakhs for the said purpose and received the same and he took his daughter to the UK. He states that his son-in-law made him believe and received Rs.5 lakhs in the presence of elders. He states that he could not mention about the cheating done by his son-in-law, when he was examined earlier. LW13, who is an independent witness, also supports the version of LW1 and states that Rs.5 lakhs were received by A1 with a promise that he would secure doctor job to the complainant’s daughter. He states that A1 cheated LW1, stating that he would provide job and received Rs.5 lakhs. LW14, also is an independent witness and he supported the version of LW13. He further states that A1 left his wife and child in India and went away after receiving Rs.5 lakhs.

Hence, from the above facts, stated by LWs. 13 and 14, prima facie, the version of LW1 that he gave Rs.5 lakhs to A1 on a promise that he would provide

a job to his daughter and that A1 did not provide any job and cheated him, receives support from LWs. 13 and 14. When the amount is entrusted to A1, with a promise to provide a job and when he fails to provide the job and does not return the amount, it can be made out that A1 did not have any intention to provide job to his wife and that he utilised the amount for a purpose other than the purpose for which he collected the amount from LW1, which would suffice to attract the offences under Sections 406 and 420 IPC. Whether there is truth in the improved version of LW.1 and what have been the reasons for his lapse in not stating the same in his earlier statement, can be adjudicated at the time of trial.

It is also evidence from the record that the additional charge sheet filed by the investigating officer, missed the attention of the lower court due to which the additional charges could not be framed.”

(Emphasis supplied)”

10. The Supreme Court has thus observed that Section 216 provides the Court an exclusive and wide-ranging power to change or alter any charge. The alteration or 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. It is held that 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.

11. In the present case, it is the contention of Dr. Warunjikar that on an application made by the respondent No.1-CBI which is not maintainable in the light of the mandate of Section 216 of the Cr.P.C., the additional charge came to be framed. I do not find any merit in this submission of Dr. Warunjikar. The trial Court was conscious of the proposition of law laid down by the Supreme Court in P. Kartikalakshmi (supra). The trial Court observed that there is no dispute in regard to the submission made by the learned counsel for the accused as well as principles laid down in P. Kartikalakshmi (supra) that power of invocation of Section 216 of the Cr.P.C. is exclusively confined with court as enabling provision for the purpose of alteration of addition of a charge at any time before pronouncement of

judgment. In such scenario the trial Court adopted the course where the application of the prosecution was treated as information bringing to its notice about the defect in framing charge whereupon the trial Court invoked its powers under Section 216 of the Cr.P.C. for the addition of the charge. In my opinion, such a course adopted by the trial Court is in conformity with the scope of the Court's powers under Section 216 of the Cr.P.C.

12. I have perused the order of the trial Court. The trial Court while directing the framing of the additional charge has evaluated the material and evidence brought on record after investigation. The trial Court applied its mind as to whether grounds exist to frame additional charge for the offence punishable under Section 467 read with 120-B of the IPC. It was the contention of learned counsel for the accused that there is no iota of evidence for framing the charge for criminal conspiracy. The objection of the accused that at the fag end of the trial when only evidence of Investigating Officer remained to be recorded the trial Court ought not to have altered the charge, was also considered.

The observations of the trial Court in paragraph Nos.4 to 6 while forming an opinion to frame the additional charge is material. The same read thus :-

"4. It is to be considered whether grounds are exists to frame additional charge for the offence punishable under section 467 r/w 120- B of the IPC. Ld. advocate for the accused no.1, 5 and 7 submits that there is no iota of evidence to frame charge for criminal conspiracy Further, it is not permissible to frame the charge at the fag end of the trial when only evidence of IO is remained to be recorded. To frame charge for the graver offence and graver punishment will cause prejudice to the accused as right now the charges are framed against the accused for the offence punishable upto the imprisonment for 7 years. The proposed charge prescribe punishment imprisonment for life. In ordinate delay will be caused to conclude the trial as prosecution as well as accused are eligible to recall the witnesses, if charge is altered. Further, he referred section 216 (4) of Cr.P.C., according to him if, graver additional charge is framed against the accused then the court has to direct new trial for it. So, he claimed for the rejection of the application. He referred the case of Samaj Parivartan Samudaya V/s. State of Karnataka (SC) Law Finder Doc Id 378391, wherein it is observed that if the trial court is of the opinion that the case has been made out for alteration of charge etc., it may exercise such powers without directing further investigation.

5. It is to be noted that on perusal of the evidence more particularly charge framed below Exh. 112 very well self explanatory to show that the basic ingredients of the offences of criminal conspiracy, forgery or forgery for cheating are enumerated in it. Even there is reference of forgery of letter of credit. Letter of credit is a valuable security as defined in the section 30 of the IPC. Thus, accused is in position at the time of framing charge below Exh.112 and thereafter during the course of trial that charges of forgery of letter of credit, cheating criminal conspiracy were framed against them. In spite of having evidence on record inadvertently the aggravated form of

forgery i.e. forgery of valuable security is remained to be framed. When there is basic facts of forgery are exhaustively described in the charge relating to the forgery of letter of credit then framing of aggravated form of forgery, which prescribed under section 467 of IPC will not any way cause prejudice to the accused. Further, Ld. PP submits that there is no need to the prosecution to recall witnesses if, additional charge is framed.

6. Considering the above referred facts there will be no grounds for a new trial after addition of charge. Accordingly grounds are exists to frame additional charge for the offence punishable under section 467 r/w 120-B of the IPC against the accused. The accused are at liberty to avail the opportunity in accordance with section 217 of Cr.P.C., if they wish to do so. The court is empowered to frame the charge at any stage before the pronouncement to the judgment. It does not make any difference to frame additional charge either lessor or higher punishment as compared to the punishment prescribed for the framed charges. Thus, in the ends of the justice grounds are exists to invoke section 216 of the Cr.P.C. by this court to frame additional charge against the accused for the offence punishable under section 467 r/w 120-B of the IPC."

13. In my opinion a perusal of the order passed by the trial Court is sufficient to satisfy the test to be adopted by the Court while deciding upon an addition or alteration of a charge. The trial Court on the basis of examination of the material brought on record formed the presumptive opinion as to the existence of the factual ingredients constituting the alleged offence. The materials on record have a direct link or nexus with the ingredients of the alleged offence. Furthermore the trial Court has observed that the accused

are at liberty to avail the opportunity in accordance with Section 217 of Cr.P.C., if they wish to do so. The trial Court has already recorded the submission of learned PP that there is no need for the prosecution to recall witnesses if additional charge is framed. Though the trial is at the fag end, in my opinion, the trial Court has exercised its powers under Section 216 of the Cr.P.C. in the interest of justice, thereby also ensured that no prejudice will be caused to the accused as he is allowed to have a fair trial. In my opinion the approach of the trial Court cannot be faulted. Consequently, I do not see any merit in the writ petition. The same is dismissed.

14. Dr. Warunjikar at this stage requested for continuing the interim order passed by this Court for a period of six weeks. I am not inclined to accede to the request made in the facts and circumstances of the present case. The request is rejected.

(M. S. KARNIK, J.)