IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

CRIMINAL WRIT PETITION NO.1232 OF 2017

Petitioners : 1] Bharat Uttam Rajurkar,
Age 52 years, Occupation : Cultivator,
R/o Shewati Jahagir, District Amravati.

2] Mahadev Uttamrao Rajurkar,
Age 66 years, Occupation : Retired.

3] Sachin Mahadevrao Rajurkar,
Age 29 years, Occupation : Business.

Both r/o Rathi Nagar, Amravati.

-- Versus --

Respondent : The State of Maharashtra,
Through P.S.O. Of P.S. Nandgaonpeth,
District Amravati.

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Shri P.W. Mirza, Advocate for the Petitioners.
Shri C.A. Lokhande, A.P.P. for the Respondent/State.

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CORAM : S.B. SHUKRE, J.
DATE : 12th JANUARY, 2018.

ORAL JUDGMENT :-

Rule. Rule made returnable forthwith. Heard finally by consent.

02] This petition questions the legality and correctness of the orders passed by the Courts below rejecting the petitioners'

application filed under Section 216 of the Code of Criminal Procedure (for short, 'Cr.P.C.') for alteration of the charge.

03] The first order of rejection came from the trial Court, which is the Court of Judicial Magistrate First Class, Court No.8, Amravati, on 21/03/2016. The second order of rejection was in Criminal Revision No.42/2016 passed on 22/11/2017 by the learned Sessions Judge, Amravati.

04] There have been three grounds taken for pressing the prayer for alteration of the charge. The first ground is that the charge, as framed, is defective and the defect is the result of non-compliance with the mandatory provision of law under Section 239 of Cr.P.C. requiring the Court framing the charge to give an opportunity of hearing to the accused before the charge is framed. The second ground is that at least an offence of extortion punishable under Section 386 of Indian Penal Code is not made out in any manner so as to enable the Court to try the accused on such charge. The third ground relates to making a hotchpotch of several distinct offences committed by different accused persons at different places, different points of time thereby violating the mandate of Sections 212, 218, 219, 220 and 223 of Cr.P.C.

05] Shri P.W. Mirza, learned Counsel for the petitioners to justify the grounds of challenge, has taken me through the relevant paragraphs of the impugned orders. Shri C.A. Lokhande, learned Additional Public Prosecutor for the State opposing the argument of learned Counsel for the petitioners submits that even if some errors are there in framing of the charge, no prejudice is going to be caused to the petitioners, as ultimately they would be getting adequate opportunity to prove their defence and show as to how the charge framed against them is without any substance.

06] To deal with first objection, one has to consider the provisions of Sections 239 and 240 of Cr.P.C., this being a warrant trial case. These provisions require the Magistrate to give the prosecution and the accused an opportunity of being heard before the charge is framed. Similar provisions are to be found under Sections 227 and 228 of Cr.P.C., which apply to trial of session case under Chapter XVIII of Cr.P.C. They oblige the Sessions Court to hear the submissions of the accused and the prosecution before the charge is framed. In interpreting these sections, the learned single judges of this Court, in at least two cases, have taken a view that the procedure prescribed in these sections is not an empty formality and a Sessions Judge is bound to comply with these

provisions of law in the letter and spirit. A useful reference in this regard may be made to the cases of *Ambadas Kashirao Kharad and others vs. State of Maharashtra – [2007(1) Mh.L.J. (Cri.) 517]* and *Shri Hitesh Kishorechand Raithatha & Ors. vs. State of Maharashtra & Anr. - [2008 ALL MR (Cri) 3445].*

07] The order passed by the learned Magistrate dated 21/03/2016 discloses that the learned Magistrate "*prima facie* presumed" (paragraph 11 of the oder and page 84 of the paper-book of the writ petition) that accused persons were represented by a lawyer and, therefore, his learned predecessor must have framed the charge after hearing of the accused persons and their lawyers. I do not understand the logic behind such an observation. There cannot be any "*prima facie* presumption" about the predecessor of the learned Magistrate having heard the accused persons before framing of the charge only because on the date on which the charge was framed, the accused persons represented through lawyers were present in the Court. Personal presence of accused is one thing and hearing them is another. To record a finding that the accused were heard before the charge was framed, one needs to satisfy oneself from the notings made in the order-sheet of the case and one cannot do so through presumptions, suppositions and

assumptions as the learned Magistrate has done in this case. He rather ought to have satisfied himself by going through the record as to whether or not his predecessor indeed gave an opportunity of hearing to the accused persons. If there was no noting made in the order-sheet or the Roznama in this regard, there was no question of drawing of any "presumption" much less "*prima facie* presumption". After all, framing of charge is a serious business. When Sections 239 and 240 of Cr.P.C. mandate that charge must be framed after giving an opportunity of hearing to the accused, the mandate must be followed realistically and not presumptively. The view taken in the cases of *Ambadas and Hitesh,* cited earlier, though in respect of scope and applicability of Sections 227 and 228 of Cr.P.C. would, in my considered opinion, cover the issue of right of accused to be heard before framing of charge in terms of Sections 239 and 240 of Cr.P.C., as well, as all these provisions, at their base, are similar.

08] The impugned orders clearly show that no such opportunity of being heard was ever granted to the petitioners before framing of the charge and, therefore, for this reason alone, the charge, as framed, against the petitioners deserves to be quashed and set aside.

09] Apart from above, I find that the charge framed for an offence punishable under Section 386 of the Indian Penal Code could not have been framed in the present case, because admittedly no money has been parted with. Even the learned Sessions Judge in the impugned order has found it to be so. But the learned Sessions Judge refrained from passing any order of withdrawal of the charge on the ground that Section 216 of Cr.P.C. is only about "alteration and addition" of any offence to the charge already framed and not about withdrawal of or removal of an offence from the charge framed.

10] I think, the learned Sessions Judge has not considered the inherent contradictions in such a finding and the futility of holding a trial for a charge whose fate is a forgone conclusion. When it is found and indeed has been found by him in no uncertain words that offence under Section 386 of the Indian Penal Code is not made out, there should be no warrant to lay a charge on a count about which the Court has already made up it's mind against. In the case of *Isaac Isanga Musumba & Ors. vs. State of Maharashtra & Ors. - [2013(7) SCALE 569],* the Hon'ble Apex Court has held that unless property is delivered to the accused person pursuant to the threat, no offence of extortion is made out. In fact, as stated earlier, the Sessions Court entertains no doubt about the offence of extortion punishable under Section 386 of the Indian Penal Code having been not made out. If

this is so, any trial on this count of charge would only be a futility and must be avoided.

11] Of course, the learned Sessions Judge is of the view that withdrawal or removal of one count from the charge, which is for an offence punishable under Section 386 of Indian Penal Code, is not permissible as not falling within the scope and ambit of any power of the Court under Section 216 of Cr.P.C. The view, however, is not sound, rather it goes against the plain meaning of the expression “after or add to any charge” used in Section 216 of Cr.P.C. and also the legislative intent.

12] Speaking about legislative intent, I may say, if the words “any court may alter or add to any charge” are to be understood as only enabling the Court to change the form or nature of one offence so as to convert it into another offence or make addition of an offence, the understanding would agitate against the intention of the legislature. The intention of the legislature is that there must be a clear notice given to the accused of the basic facts constituting offence alleged against him so that he can defend himself effectively, that there is no delay in trial and that harassment of the accused for something which he did not do is avoided. This very intention of the legislature would be frustrated if the accused is made to stand

trial on a charge which the court knows to be baseless.

13] Apart from what is said earlier, I would point out that the expression “alter or add” does not plainly convey that it excludes deletion or removal of one count of charge from out of several heads of charge. Under Section 2(b) of Cr.P.C., charge has been defined as including any head of charge when the charge contains more heads than one. Section 216 of Cr.P.C. invests the Court with the power to alter or add any charge at any time before the judgment is pronounced. It is significant to note here that the legislature has used singular word “charge” and not plural of it which is “charges”. So according to the definition of the charge, a charge may contain just one offence or several offences. When the charge contains more than one offence, withdrawal of one of the offences from the charge so framed would not amount to withdrawal of the charge itself, but would only change the nature or form or appearance of the charge. Whenever, there is change in the form or appearance, it is termed as alteration and that is also the meaning of the word “alter” in its plain and grammatical sense. The *New International Webster's Comprehensive Dictionary of the English Language (2004 Edition)*, defines the word 'alter', at Page No.43, as follows :

1. *To cause to be different; change; modify; transform.*
2. *To castrate or spay.*
3. *To become different; change, as in character or appearance.*

This definition would sufficiently indicate that the word “alter” includes anything in the nature of removal or withdrawal, which ultimately amounts to changing the character or form of the substance from which something is removed or withdrawn, in the context of the power of the Court to alter the charge under Section 216 of Cr.P.C.

14] In the present case, what has been sought by the petitioners, is withdrawal of the charge framed against them for the offence punishable under Section 386 of the Indian Penal Code. Admittedly, this is the case wherein the charge includes more offences than one. So, if one of the offences, which is not *prima facie* made out, is withdrawn from the several heads of charge as in the present case, it would not amount to withdrawal of the charge itself, rather it would amount to change of form or character or appearance of the charge. It would have been a different matter had the legislature used the expression “charges” required to be framed against the accused persons. The legislature has used a

singular expression “charge” and has defined this singular expression as capable of containing one or more than one offence. Therefore, removal or withdrawal of one of the offences, when the charge contains several offences, would not amount to withdrawal of the charge itself and would only amount to alteration of the charge through exercise of excision or cutting or spaying some of the offences not *prima facie* made out against the accused persons. The view taken by the learned Sessions Judge is obviously against the intention of the legislature as well as the plain and grammatical meaning conveyed by the expression “add or alter to any charge” used in Section 216(1) of Cr.P.C. and so cannot stand the scrutiny of law.

15] About the third ground of objection, I would again say, it is with substance. I find that some of the offences charged against the petitioners are joint in nature and, *prima facie,* require reframing, as apparently some of the acts have been committed at different places and different times not by the same accused persons but by different accused persons. Such joint framing of the charge, in the nature of a hotchpotch, has amounted to misjoinder of some of the heads of the charge. On this ground also, the impugned orders cannot be sustained in the eye of law.

16] In the circumstances, I find that this writ petition deserves to be allowed and it is allowed accordingly.

i. The charge as framed against the petitioners stands quashed and set aside.

ii. The matter is remitted back to the learned trial Judge for framing of charge afresh against the petitioners after giving reasonable opportunity of hearing to both sides, in accordance with law.

iii. Rule is made absolute in the above terms.

(S.B. Shukre, J.)

**sdw*