

(2025) 10 KL CK 1326

In the High Court Of Kerala

Case No : Original Petition (Crl.) No. 718 Of 2025

Anil K Emmanuel

APPELLANT

Vs

State Of Kerala

RESPONDENT

Date of Decision : 30-10-2025

Acts Referred:

Constitution of India, 1950 — Article 227
Bharatiya Nagarik Suraksha Sanhita, 2023 — Section 239(1), 239(4)
Code of Criminal Procedure, 1973 — Section 195(1)(b), 216, 216(1), 221, 221(1),
321, 340, 340(1), 482
Indian Penal code, 1860 — Section 34, 120B, 193, 201, 217, 405, 409, 420

Citation : (2025) 10 KL CK 1326

Hon'ble Judges : Dr. Kauser Edappagath, J

Bench : Single Bench

Advocate : Ajit G Anjarlekar, G.P.Shinod, Govind Padmanaabhan, Atul Mathews, Gayathri S.B., Rinu. S. Aswan, Sasthamangalam Ajithkumar, Sreejith S. Nair, B.Ajith Kumar, Shyni Das J.S., Gopika H.H, Syam Mohan C., C.K.Suresh

Final Decision : Disposed Of

Judgement

Dr. Kauser Edappagath, J

1. This original petition has been filed by a stranger to the proceedings challenging Ext.P17 order passed by the Judicial First Class Magistrate Court-I, Nedumangad (for short, 'the trial court') dismissing a petition filed by the Assistant Public Prosecutor under Section 239 (1) of BNSS (Section 216 of the Cr.P.C), seeking addition of a charge.

2. The 3rd and 4th respondents herein face trial before the trial court in C.C.No. 811 of 2014 for the offences punishable under Sections 120B, 420, 201, 193, 217 r/w Section 34 of the IPC.

3. The 3rd respondent/1st accused was working as property section clerk (Thondy section clerk) in the Judicial Second Class Magistrate Court-II, Thiruvananthapuram, during the period of the alleged incident. The prosecution

case, in short, is that the 1st accused entered into criminal conspiracy with the 2nd accused, who was the advocate for the accused in S.C.No.147 of 1990 before the Sessions Court, Thiruvananthapuram, pursuant to the said conspiracy, the 1st accused dishonestly delivered to the 2nd accused a material object (an underwear) involved in the said Sessions Case which was in his custody on 09.08.1990, the 2nd accused received the same after endorsing its receipt in the Thondy Register, took the object outside the Court, altered it and resubmitted on 05.12.1990. Thereafter, the 1st accused received it back and forwarded it to the Sessions Court as though it was the original one. It was alleged that the above-mentioned act was done to secure an acquittal for the accused in S.C.No.147 of 1990

4. In the year 2022, both the accused/3rd and 4th respondents preferred Crl. M.C.Nos. 7805/2022 and 5261/2022 before this Court under Section 482 of Cr.P.C., seeking to quash all further proceedings in CC No.811/2014 mainly on the ground that cognisance taken was bad due to the bar created under Section 195 (1) (b) of Cr.P.C. In the said proceedings, the petitioner herein, who is a journalist, and another journalist, namely Sri.M.R.Ajayan, filed intervening petitions to implead them. Those petitions were dismissed. The Crl.M.Cs. filed by the 1st and 2nd accused were allowed as per Ext.P12 order. By that order, the order taking cognisance of the final report in Crime No. 215 of 1994 and all further proceedings pursuant thereto, including the proceedings in C.C.No. 811 of 2014 were quashed. However, it was clarified that the order would not preclude the competent authority or the court concerned from pursuing the prosecution in compliance with the procedure contemplated under Section 195(1) (b) of Cr.P.C. Ext.P12 order was challenged by the 2nd accused as well as Mr M.R.Ajayan referred above before the Supreme Court. The Supreme Court, as per Ext.P13 judgment, set aside Ext.P12 order of this Court and restored C.C.No.811 of 2014 on file. The Supreme Court further directed the trial court to conclude the trial within a period of one year.

5. Thereafter, the parties went on trial. The trial was over, and the case was posted for arguments. The Assistant Public Prosecutor then filed Ext.P16 petition before the trial court under Section 239(1) of BNSS (Section 216 of the Cr.P.C.) to add Section 409 of the IPC as well, in addition to the existing charge. It was alleged in the petition that, upon scrutiny of the case records and evaluation of the evidence adduced during trial, it was noticed that the offence under Section 409 of IPC was also involved, and the court inadvertently omitted to frame a charge under the said section. According to the prosecutor, the proposed alteration of the charge is essential to facilitate the just, fair and complete adjudication of the matter and to prevent any miscarriage of justice arising from the omission of the relevant charge. The trial court, after hearing both sides, dismissed the said petition as per Ext.P17 order mainly on two grounds: i) The offence under Section 409 of IPC is not prima facie made out ii) In view of the latest decisions of the Supreme Court in *Arshad Neyaz Khan v. State of Jharkhand and Another* (2025 SCC OnLine SC 2058) and *Delhi Race Club* (1940)

Ltd and Others v. State of Uttar Pradesh and Others (AIR 2024 SC 4531), the offences under Sections 409 and 420 of IPC cannot co-exist simultaneously on the same set of facts.

6. The prosecution did not challenge Ext.P17 order. The petitioner, who is a journalist and a stranger to the proceedings, has invoked the jurisdiction of this Court under Article 227 of the Constitution of India to challenge Ext.P17.

7. I have heard Sri.Ajit.G. Anjarlekar, the learned counsel for the petitioner, Sri.B.Ajithkumar, the learned counsel for the 3rd respondent, Sri.Sasthamangalam Ajithkumar, the learned Senior Counsel for the 4th respondent and Sri.C.K.Suresh, the learned Senior Public Prosecutor.

8. The learned counsel for the petitioner Sri.Ajit.G. Anjarlekar submitted that Section 409 of IPC ought to have been added by the trial court as an additional charge having regard to the fact that the 1st accused was a public servant, who was entrusted with the property or with the dominion of the property in his capacity as public servant and he committed a criminal breach of trust in respect of the said property. The learned counsel further submitted that the two decisions of the Supreme Court relied on by the trial court do not apply to the facts of the case. So far as the locus standi of the petitioner to challenge Ext.P17 order is concerned, the learned counsel, relying on the observation of the Supreme Court in Ext.P13 judgment, submitted that since the case involves allegations which are of such nature in gravity that may interfere with judicial functions and thereby polluting the mechanism of administrative justice, the petitioner has every right to bring to the notice of this Court the illegal order passed by the trial court especially in a case where the prosecution has not chosen to challenge the same.

9. The learned counsel for the 3rd respondent/1st accused Sri.B.Ajithkumar submitted that the petitioner, being a stranger to the proceedings, has no locus standi to challenge Ext.P17 order. The learned counsel further submitted that even the petition for alteration/addition of charge under 239 (1) of BNSS (Section 216 of Cr.P.C) could not have been entertained at the instance of the Public Prosecutor since alteration/addition of charge was within the exclusive domain of the court. The learned counsel also submitted that the offence under Section 409 of IPC is not prima facie made out and Ext.P16 petition was rightly dismissed by the trial court.

10. The 4th respondent/ 2nd accused filed a memo stating that he has no objection in allowing Ext.P16 petition. The learned Senior Counsel appearing for the 4th respondent Sri.Sasthamangalam Ajithkumar also took the same stand.

11. The learned Senior Public Prosecutor, Sri.C.K.Suresh, submitted that the evidence let in by the prosecution, coupled with the other materials on record, prima facie show that Section 409 of IPC has also been attracted and hence the trial court ought to have allowed Ext. P16 petition.

12. The contention raised by the 4th respondent that the trial court ought not to have entertained the application filed by the public prosecutor under 239 (1) of BNSS (Section 216 of Cr.P.C) cannot be accepted in view of the decision of the Supreme Court in *Anant Prakash Sinha @ Anant Sinha v. State of Haryana and Another* [(2016) 6 SCC 105] and the decision of this Court in *Puthiya Purayil Shaji v. State of Kerala* (2025 (3) KLT 711). In *Anant Prakash Sinha* (supra), the Supreme Court took the view that even an informant/victim can seek alteration or addition of charge invoking Section 216(1) of Cr.P.C. Relying on the said decision, this Court in *Puthiya Purayil Shaji* (supra) held that the public prosecutor also can maintain an application for alteration or addition of charge under Section 216(1) of Cr.P.C. That apart, the trial court is well within its power to invoke Section 239 (1) of BNSS (Section 216 of Cr.P.C), if the requirement of alteration or addition of the charge is brought to the notice of the court by the public prosecutor by way of a petition.

13. So far as the next contention of the 4th respondent that the petitioner has no locus standi to challenge Ext.P17 order is concerned, it cannot be said that the petitioner is a total stranger to the proceedings. He, along with another journalist Sri. M.R.Ajayan had filed intervening applications before this Court when the 3rd and 4th respondents filed Cr.M.C's under Section 482 of Cr.P.C, challenging cognisance taken by the trial court resisting the prayer. Thereafter, Sri. Ajayan, who filed the intervening petition before this Court, along with the petitioner herein, challenged Ext.P12 order of this Court before the Supreme Court by filing a Special Leave Petition. Although the 2nd accused objected to the locus of Sri. M.R. Ajayan in preferring the aforesaid petition on the ground that he is a third party, the Supreme Court took the view that since the allegation against the accused raises concerns with regard to tampering with the order of the court, locus is not important especially since the State is not carrying forward the matter any further. The petitioner further preferred CrI.M.P. No.2778/2023 before the Judicial First Class Magistrate Court-XI, Thiruvananthapuram under Section 340(1) read with Section 195(1)(b) (i) and (iii) of Cr.P.C for the initiation of proceedings under Section 340 of Cr.P.C in connection with the tampering of the material object took place in SC.No.147/1990. The said petition was dismissed, finding that the Judicial First Class Magistrate Court-III, Thiruvananthapuram, is the proper court to initiate the proceedings and therefore the petition is not maintainable. The petitioner had also preferred a representation dated 17.12.2024 before the Additional Chief Secretary, Home Department, seeking the appointment of a Special Public Prosecutor for conducting the case. Being aggrieved by the non-consideration of the representation preferred by the petitioner for the appointment of the Special Public Prosecutor, he preferred W.P. (CrI) No.81/2025 before this Court for the appointment of a Special Public Prosecutor. However, it was rejected as per Ext.P15 judgment.

14. The Constitution Bench of the Supreme Court in *Sheonandan Paswan v. State of Bihar and Others* (AIR 1987 SC 877) considered the locus standi of the 3rd party/stranger to oppose the application filed by the public prosecutor for

withdrawal from prosecution and to challenge an order granting consent to withdraw passed under Section 321 of Cr.PC. It was held that if the offence for which a prosecution is being launched is an offence against society and not merely an individual wrong, any member of society must have locus to initiate a prosecution, as also to resist withdrawal of such prosecution, if initiated. It was further held that if he was entitled to oppose the withdrawal of the prosecution, it must follow a fortiori that on the turning down of his opposition by the court, he was entitled to prefer a revision application to the High Court. Again, the Supreme Court in Abdul Wahab K.v. State of Kerala and Others (AIR 2018 SC 4265), held that even a 3rd party or a stranger can challenge an order passed under Section 321 of Cr.P.C in a revision before the High Court in an appropriate case. The dictum laid down in both the above cases can very well be applied in a case where a 3rd party/stranger challenges the order dismissing an application under Section 216 of Cr.P.C as well. That apart, the High Court can exercise the power of superintendence vested with this court under Article 227 of the Constitution of India correct the illegality or impropriety of any order or irregularity of any proceeding of a subordinate criminal court when it is brought to its notice, even by a stranger. [See Abdul Wahab (supra) and George Alexander v. State of Kerala, 2025 (4) KLT 94].

15. Section 239 (1) of BNSS (Section 216 of Cr.P.C) gives considerable power to the trial court to alter or to add to any charge subject to the conditions mentioned therein, even after completion of the evidence, arguments heard, and the judgment reserved. The expressions "add at any time" and "before 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 court should also see that its orders would not cause any prejudice to the accused [See Central Bureau of Investigation v. Karimullah Osan Khan (2014) 11 SCC 538]. Sub-section (4) prescribes the approach to be adopted by the court where prejudice may be caused. It is settled that the alteration or addition of 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 object on record, it leads the court to form presumptive opinion as to the existence of the factual ingredients constituting the alleged offence [See Dr.Nallapareddy Sridhar Reddy v. State of Andhra Pradesh and Others, (2020) 12 SCC 467].

16. In Ext.P16 petition, it was alleged that the charge under Section 409 of IPC had inadvertently not been framed and that during the examination of material prosecution witnesses, cogent and credible evidence had emerged disclosing the commission of the offence under Section 409 of IPC as well, and the addition of the charge is necessary to ensure a fair and just adjudication.

17. Section 409 of the IPC deals with the criminal breach of trust by public servant, or by banker, merchant or agent, which reads as follows:

"409. Criminal breach of trust by public servant, or by banker, merchant or agent - Whoever, being in any manner entrusted with property, or with any dominion

over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

What amounts to criminal breach of trust is provided under Section 405 of the IPC, which reads as follows:

“405. Criminal breach of trust.—Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits “criminal breach of trust”.

18. Going by the above provisions, to attract the offence under Section 409 of the IPC, two ingredients are to be established; namely, (i) the accused, a public servant or a banker or an agent was entrusted with the property of which he is duty bound to account for; and (ii) the accused dishonestly misappropriated or converted it to his own use to the detriment of the persons who entrusted it.

19. The crucial question is whether the essential ingredients of the offence under Section 409 of IPC are prima facie attracted to frame a charge under the said provision. The prosecution case as born out from the final report and charge framed by the trial court is that the 1st accused who was working as property clerk in the Judicial Second Class Magistrate Court-II, Thiruvananthapuram entered into a criminal conspiracy with the 2nd accused and pursuant to the said conspiracy, he dishonestly delivered the 2nd accused the material object involved in SC No.147/90 to secure acquittal of the accused therein, and the 2nd accused returned it after three months after altering. The trial court in the impugned order found that the 1st accused who was in the charge of the property section of the court received the material object in question in the ordinary course of his official duties and there is no material to show that any authority had lawfully entrusted the property to him in fiduciary capacity and mere receipt of the property for custody or processing, in discharge of his official duty, without any obligation to deal with it in a particular manner does not amount to entrustment as contemplated under Sections 405 and 409 of the IPC. It was further found that the prosecution has not demonstrated that the 1st accused dishonestly misappropriated or converted the property for his own use and that the alleged tampering, by itself, does not establish misappropriation within the meaning of Section 405 of the IPC and therefore, in the absence of proof of both entrustment and dishonest misappropriation, the essential ingredients of Section 409 of the IPC are not satisfied. I am unable to subscribe to the said findings for the following reasons.

20. It is not in dispute that the 1st accused was a property clerk at the relevant time. The property clerk, by virtue of his office, is the custodian of all the properties kept in the property room/thondi room. When the property involved in the case is kept in the property room/thondi room, there need not be a separate order of entrustment entrusting the property to the property clerk. That apart, the Thondi Register Book has been marked during trial as Ext.P3. The relevant pages of the Thondi Register Book have been separately marked as Ext.P3(a) and Ext.P3(d). The entry in Ext.P3(a) shows that the 1st accused has entrusted the material object involved in the case and the 2nd accused has received the same from the 1st accused on 09.08.1990. Ext.P3 (d) would show that after three months, i.e., on 05.12.1990, the 2nd accused returned the material object to the 1st accused. The very case of the prosecution is that the 2nd accused, after receiving the material object from the 1st accused, altered it and gave it back to the court so as to secure an acquittal. The forensic examination report produced and marked before the trial court would also show that the material object was subjected to tampering.

21. At the time of framing of charge, it is sufficient if the court is able to form a presumption regarding the existence of ingredients constituting the offence found upon the materials placed before it. The court doesn't need to undertake an analysis of credibility, veracity or evidentiary value of the materials placed before it [See *Sajjan Kumar v. Central Bureau of Investigation* (2010) 9 SCC 368]. At that stage, even a strong suspicion founded on material which leads to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of the charge [See *Onkar Nath Mishra and Others v. State (NCT of Delhi) and Another* (2008) 2 SCC 561]. As stated already, the materials on record suggest that the 1st accused, who by virtue of his office was the custodian of the material object in question, delivered it without any order of the court to the 2nd accused who tampered it and returned it to the 1st accused after three months which are sufficient to attract the ingredients of Section 409 of IPC for the purpose of framing charge. Therefore, the finding of the trial court in the impugned order that the ingredients of Section 409 of the IPC are not prima facie attracted cannot be sustained.

22. It is true that the Supreme Court in *Delhi Race Club Ltd. (supra)* and in *Arshad Neyaz Khan (supra)* has held that the offence under Sections 406 and 420 of the IPC cannot co-exist simultaneously in the same set of facts. Section 221 of Cr.P.C deals with the charging of an accused where it is doubtful what offence has been committed. Sub-section (1) of Section 221 reads thus:

"221. Where it is doubtful what offence has been committed - (1) If a single act or series of acts is of such nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having

committed some one of the said offences.”

Illustration (a) to Section 221 reads thus:

“(a) A is accused of an act which may amount to theft, or receiving stolen property, or criminal breach of trust or cheating. He may be charged with theft, receiving stolen property, criminal breach of trust and cheating, or he may be charged with having committed theft, or receiving stolen property, or criminal breach of trust or cheating.”

Sub-section (1) of Section 221 of Cr.P.C allows the accused to be charged with multiple offences in the alternative, or for all potential offences, and can be tried together. The said provision, along with illustration (a), provides that an accused could be charged with both criminal breach of trust and cheating if the facts are unclear, and then convicted of whichever offence is proven by the evidence. The question whether, on merits, the offences under Sections 409 and 420 of the IPC are attracted in this case is something to be ultimately decided in the trial. The above-mentioned decisions of the Supreme Court were not rendered in the context of Sections 221 and 216 of Cr.P.C and hence cannot be applied to the facts of this case.

23. For the aforementioned reasons, I hold that since the ingredients of the offence under Section 409 of the IPC have been prima facie attracted, the trial court ought to have allowed Ext.P16 petition. Hence, Ext.P17 order is set aside, and Ext.P16 petition is allowed. The trial court is directed to proceed under sub-clause (3) or (4) of Section 239 of BNSS, as the case may be. It is made clear that I have not expressed any final opinion that the prosecution evidence adduced so far discloses an offence under Section 409 of the IPC. The observation made in this judgment that the offence under Section 409 of the IPC has been prima facie attracted and a charge under that section also could be framed is for the limited purpose of deciding the petition under Section 239 (1) of BNSS (Section 216 of Cr.P.C).

24. If the trial court feels that, in view of the addition of charge, the trial cannot be completed within the period stipulated in Ext.P13 judgment of the Supreme Court, it is free to address the Supreme Court seeking an extension of time.

OP(CrI) is disposed of as above.