

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

CRIMINAL WRIT PETITION NO. 2324 OF 2014

Anup Sudhir Pise .. Petitioner
v/s.
Smt. Jayashri Jagannath Patil & Anr. ..Respondents

Mr. Bhushan Walimbe for the petitioner
Mr. K.S. Patil i/b Ranjeet Patil for respondent no.1
Mrs. R.V. Newton, APP for respondent State

**CORAM: SMT. ANUJA PRABHUDESSAI, J.
DATED: 14th OCTOBER, 2015.**

P.C.

1. Heard the learned Counsels for the respective parties. Rule.

By consent, Rule is made returnable forthwith.

2. The petitioner herein has challenged the order dated 20.02.2014 whereby the learned J.M.F.C. 6th Court, Islampur, Dist. Sangli has dismissed his application for amending the complaint.

3. The petitioner herein is the complainant in C.C. No. 851 of 2010 filed against the respondent no.1 under Section 138 of the Negotiable Instrument Act. The petitioner complainant had

alleged that the respondent no.1 accused had issued Cheque dated 29.05.2010 for Rs.7,50,000/-. The complainant had stated in the complaint as well as in the notice that the said cheque was dishonoured for insufficient funds and that despite receipt of the notice, the respondent accused had not paid the cheque amount. Based on the said averments, the petitioner complainant had initiated proceedings under Section 138 of the Negotiable Instrument Act against the respondent accused.

4. The plea of the respondent accused was recorded and the respondent accused pleaded not guilty and claimed to be tried. The petitioner complainant had filed his affidavit in evidence and while the prosecution was in progress, the complainant had filed an application for amendment of the complaint so as to give reasons for the cheque return as “refer to drawer” and “drawer's signature differs”. The learned Magistrate has dismissed the application mainly on the ground that the petitioner complainant was aware of the reasons for dishonour of the cheque despite which he had stated in the complaint as well as in the notice that

the same was dishonoured for insufficient funds. The learned Magistrate further held that the petitioner complainant is trying to introduce entirely new pleas and the same will cause prejudice to the case at the fag end of the trial and if the same is allowed, will cause prejudice to the respondent accused.

5. The learned counsel for the petitioner has relied upon the judgment of the Apex Court in the case of **S.R. Sukumar Vs. S. Sunaad Raghuram**, AIR 2015 SC 2757, wherein in the Apex Court held that :-

“17. Insofar as merits of the contention regarding allowing of amendment application, it is true that there is no specific provision in the Code to amend either a complaint or a petition filed under the provisions of the Code, but the Courts have held that the petitions seeking such amendment to correct curable infirmities can be allowed even in respect of complaints.

18. What is discernible from the U.P. Pollution Control Board's (AIR 1988 SC 1128) case is that easily curable legal infirmity could be cured by means of a formal application for amendment. If the amendment sought to be made relates to a simple infirmity which is curable by means of a formal amendment and by allowing such amendment, no prejudice could be caused to the other side, notwithstanding the fact that there is no enabling provision in the Code for entertaining such amendment, the Court may permit such an amendment to be made. On the

contrary, if the amendment sought to be made in the complaint does not relate either to a curable infirmity or the same cannot be corrected by a formal amendment or if there is likelihood of prejudice to the other side, then the Court shall not allow such amendment in the complaint.”

6. In the case of ***Amol Shripal Sheth Vs. Hari Om Trading Co. 2014(5) Mh.L.J. 222***, Apex Court held that :-

“17. It is not disputed that there is no specific provision dealing with the amendment of the complaint. There is also no provision preventing the Court from allowing the amendment in complaint in such a case. From the aforesaid provisions and particularly, the fact that the Magistrate takes cognizance of the offence, this Court holds that the Magistrate has incidental and ancillary power to the main power of taking cognizance of offence to allow such amendment. In view of the discussion made above, this Court further holds that the power can be exercised before and after taking cognizance of the offence in a case like present one.”

7. In the instant case, the complainant had averred in the complaint as well as in the notice that the cheque was dishonoured due to insufficient funds. It is seen that the complainant had filed the cheque return memo along with the complaint which shows that the cheque was dishonoured with an endorsement “refer to drawer” and “drawer's signature differs”.

8. The learned Counsel for the respondent has submitted that the application for amendment was filed after the petitioner complainant was cross-examined and confronted with the statement made in the complaint as regards the reason of dishonour of cheque vis-a-vis the reasons stated in the cheque return memo. He has further stated that this was not an honest mistake committed by the complainant and allowing such amendment would cause prejudice to the respondent accused. He has stated that the complainant is trying to fill up lacuna and allowing the application would prejudice to the respondent accused.

9. I am unable to accept the contention that the reasons of dishonour, as stated in the complaint, is not a honest mistake. As stated earlier, the complainant had produced the cheque return memo, which clearly spells out the reasons of dishonour. Whether the said reasons of dishonour are covered by Section 138 of the N.I. Act, is a question, which will have to be finally decided by the Magistrate. At this stage, suffice it to say that the defect in

the complaint, which is sought to be corrected is only technical and does not go to the root of the matter. Moreover, no prejudice will be caused to the accused as the complainant is still under cross-examination and the respondent accused will have ample opportunity to cross-examine the complainant on the amended averments.

10. Under the circumstances, in my considered view, the impugned order cannot be sustained. Hence, the Writ Petition is allowed, subject to petitioner-complainant paying cost of Rs.5,000/- to the respondent accused within a period of two weeks from the date of the receipt of a copy of this order. The petitioner complainant is permitted to carry out amendment within two weeks. Opportunity is given to the respondent accused to cross-examine the complainant on the amended averment. Rule is made absolute.

(ANUJA PRABHUDESSAI, J.)