

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**BENCH AT AURANGABAD**

**CRIMINAL WRIT PETITION NO.100 OF 2018**

Mariya Husaifa Yeolawala,  
Age : 47 years, Occu. Household,  
R/o H.No.36, Professor Colony,  
Delhi Gate, Aurangabad

**PETITIONER**

**VERSUS**

1. Mir Khan s/o Saheb Khan Pathan,  
Age : 68 years, Occu. Business,  
R/o Takalkar Society,  
Baijipura Road, Aurangabad
  
2. Mulla Husaifa Yeolawala,  
Age : 58 years, Occu. Business,  
Prop. Rexuform & Al Hutaib  
Furnishers, Saifi Street,  
Opp. Arhan Gold,  
Aurangabad

**RESPONDENTS**

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Mr. S.S. Kazi, Advocate for the petitioners  
Mr. H.I. Pathan, Advocate for respondent No.1  
Smt. Surti Zainab M., Advocate for respondent No.2

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**CORAM : SANGITRAO S. PATIL, J.**

**DATE : 26th JUNE, 2018**

**ORAL JUDGMENT :**

Rule, returnable forthwith. With the consent  
of the learned counsel for the parties, heard finally.

2. The petitioner has challenged the order dated

11<sup>th</sup> December, 2017 passed by the learned Judicial Magistrate, First Class (Court No.11), Aurangabad below application (Exh.73) in S.C.C. No.2865 of 2014, whereby process has been issued against the petitioner for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 ("NI Act", for short) vide Section 319 of the Code of Criminal Procedure ("Code", for short).

3. Respondent No.1 filed complaint bearing S.C.C.No.2865 of 2014 against M/s Al-Hutaib Furnishers through its Proprietor M.H. Yeolawala, Aged 50 years, for the offence punishable under Section 138 of the NI Act, on the allegation that the cheque in the sum of Rs.70,000/- issued by the said accused was dishonoured. The learned Judicial Magistrate, First Class issued process against the proposed accused for the said offence. Respondent No.1 gave the full name of the proposed accused as Mulla Husaifa Yeolawala i.e. respondent No.2. Accordingly, summons was served on him. Respondent No.2 appeared before the learned Judicial Magistrate. The particulars of the offence were explained to him. He pleaded not guilty. The trial proceeded. Respondent No.1 produced his evidence.

At that time, it was transpired that it was the petitioner, who had actually issued the cheque. Therefore, respondent No.1 filed application (Exh-73) on 21<sup>st</sup> February, 2017 under Section 319 of the Code for issuing summons against the petitioner for the above mentioned offence, on the say that in the evidence of respondent No.2, it was disclosed that the cheque in question was actually issued by the petitioner. The learned Magistrate heard both the sides and as per the impugned order, issued process against the petitioner for the above mentioned offence.

4. The learned counsel for the petitioner submits that as seen from the contents of the complaint, respondent No.1 was very much acquainted with the accused since he had friendly relations with the accused named by him in the complaint. He then submits that respondent No.1 gave the full name of the accused and accordingly, summons was issued in the name of respondent No.2, i.e. Mulla Husaifa Yeolawala. Since the said summons was served on respondent No.2 in his name, he appeared before the learned Magistrate in the year 2015 itself. The plea of respondent No.2 was recorded. The witnesses were cross-examined on behalf of

respondent No.2. In the cross-examination of respondent No.1, it was made clear that the cheque was issued by the petitioner. He then submits that respondent No.2 was examined under Section 313 of the Code. In the statement of respondent No.2 as well as in his evidence, he made it clear that the cheque was issued by the petitioner. The learned counsel submits that there was no question of mistaken identity. If it was the case of respondent No.1 that the cheque was issued by the petitioner, who is a woman, he would not have given full name of respondent No.2 for issuance of summons. Had respondent No.2 wrongly appeared before the Court, respondent No.1 would not have allowed respondent No. 2 to proceed with the case and he would have immediately got the petitioner called as the accused before the learned Magistrate. He submits that in view of the provisions of Section 142 of the NI Act, unless there is a prior demand notice issued within the prescribed period and unless the complaint is filed against the proposed accused within the prescribed time, no cognizance can be taken against the proposed accused. He, therefore, prays that the impugned order, which is against the provisions of Section 142 of the NI Act, is not at all sustainable. In support of his contention,

he relied on the judgment in the case of ***Kamal Lakhotia Vs. Rajesh Parekh and another 2010 (5) Mh.L.J. 569.***

5. The learned counsel for respondent No.1 (original complainant) strongly opposed the petition. He submits that in the complaint, the initials of the proprietor of M/s Al-Hutaib Furnishers were given as "M.H. Yeolawala". The initials of the petitioner and that of respondent No.2 are the same. The notice was issued in the name of "M.H. Yeolawala" as proprietor. A complaint also has been filed against the firm in the same name. Respondent No.2 did not disclose that he was not the proprietor having initial "M.H. Yeolawala" and that it was the petitioner, who had issued the cheque, until his examination under Section 313 of the Code was conducted by the learned Magistrate. He submits that in the circumstances, the provisions of Section 142 would not come into play. The notice has been rightly issued in the name of the proprietor of the firm and complaint also has been filed against the right person. He supports the impugned order and prays that the Writ Petition may be dismissed.

6. The question before this Court would be whether the complaint was filed against a male or female

accused, since both the petitioner and respondent No.2 are having the same initials i.e. "M.H. Yeolawala".

7. The copy of the summons has been produced with the petition. Full name of the accused is mentioned therein as "Mulla Husaifa Yeolawala". It was given by respondent No.1 himself. This fact itself makes it clear that the proposed accused was a male person.

8. The learned counsel for the petitioner pointed out to the contents of paragraph No.5 of the complaint, which read as under:-

"That, the proposal put forth by the accused was felt to the complainant reasonable, therefore the complainant first of all agreed to invest the amount of Rs.30,000/- for the work of department of Management Science, but at that time the complainant asked to the accused that the official license and other formalities are not in his name and there is no partnership firm is in the name of complainant, then how it can be possible."

9. In the above mentioned paragraph also, the adjective "his" refers to masculine gender in respect of accused contemplated in the complaint.

10. As seen from the complaint, the age of respondent No.1 was 65 years, while that of respondent No.2, 50 years in the year 2014. In this Writ Petition, the age of respondent No.1 is shown as 68 years and that of respondent No.2 as 58 years. She might be aged about 43 years in the year 2014. The age of the petitioner is 47 years. Thus, the age difference between the petitioner and respondent No.2 also would make it clear that the accused contemplated in the complaint was respondent No.2 and not the petitioner.

11. As seen from the contents of the complaint, respondent Nos.1 and 2 were having friendly relations. Therefore, there was absolutely no possibility of there being any mistaken identity on the part of respondent No.1 in respect of the proposed accused. Though respondent No.2 appeared before the learned Judicial Magistrate, First Class in the year 2015 itself and faced the trial for about two years, respondent No.1 did not make any grievance before the learned Magistrate about trial being conducted against a wrong person. If respondent No.1 wanted to prosecute the petitioner, a woman, he would have immediately taken objection after

appearance of respondent No.2, a male, as an accused for facing the trial. Nothing of that sort was done by respondent No.1. All the above circumstances show that the proposed accused was a male person and not a female. Now as per the impugned order, the petitioner, a female, is proposed to be prosecuted for the offence punishable under Section 138 of NI Act. As mentioned in Section 142 of the NI Act, the stage of giving notice has already gone. In the absence of prior notice, the petitioner cannot be prosecuted for the offence under the NI Act. The learned Magistrate did not consider this legal bar for issuing process against the petitioner. The impugned order, therefore, cannot be said to be legal, proper and correct. It is not sustainable. In the result, I pass the following order:

**O R D E R**

(A) The Writ Petition is allowed.

(B) The impugned order dated 11<sup>th</sup> December, 2017, passed by the learned Judicial Magistrate, First Class (Court No.11), Aurangabad below application (Exh.73) in S.C.C. No.2865 of 2014, is quashed and set aside.

- (C)       The petitioner is set at liberty.
- (D)       Rule is discharged.
- (E)       The Writ Petition is disposed of accordingly.

**[SANGITRAO S. PATIL]**  
**JUDGE**

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