

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

CRIMINAL WRIT PETITION NO. 752 OF 2018

Saleem Khaled s/o Rashed Saleem,
Age 48 yrs, Occ. Business,
r/o Shirin Heights, Delhi Gate,
Aurangabad, Tq. And Dist.Aurangabad. ..Petitioner

Versus

1. The State of Maharashtra
(Copy for respondent no.1
to be served on Public Prosecutor
High Court bench at Aurangabad).
2. Shaikh Osman s/o Shaikh Qadar
Age 67 yrs. Occ. Pensioner,
r/o Masrat Nagar Beed. ..Respondents

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Mr. R.G. Hange, Advocate for Petitioner.
Mr. Moinuddin N. Shaikh h/f Mr. S.S. Kazi, Advocate
for Respondent No.2
Mr. S.D. Ghayal, AGP for Respondent/State.

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CORAM : P.R. BORA, J.

DATED : 19th OCTOBER, 2018.

ORAL JUDGMENT:-

. The petitioner has filed the present petition challenging the orders passed by the Courts below whereby, the amendment sought in the complaint has been allowed. The present respondent no.2 had filed a criminal complaint against the petitioner under Section 138 of the Negotiable Instruments Act. In the said complaint, on the very first page of it, it was mentioned that 11.11.2013 was the date of offence. In the body of

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the complaint, however, it was elaborated that the cheque in question was of the date 06.05.2016 and when the said cheque was tendered for collection in the bank it stood dishonoured for insufficient funds in the account of petitioner. It was further averred in the complaint that after receipt of the cheque written memo, the present respondent no.2 i.e. original complainant issued notice to the petitioner on 27.05.2016 calling upon the petitioner to pay the amount of cheque within the stipulated period or else he will be constrained to file a complaint under Section 138 of the Negotiable Instruments Act. It was further averred that since the petitioner did not comply with the notice, respondent no.2 was constrained to file the complaint against him under Section 138 of the Negotiable Instruments Act.

2. The learned Magistrate took cognizance of the complaint and issued process against the present petitioner. Before commencement of the evidence in the said matter, the original complainant filed an application seeking correction in the date as mentioned 11.11.2013 to be replaced by the subsequent date 16.06.2016 stating that,

that was a typographical inadvertent mistake. The Trial Court allowed the original complainant to carry out the amendment though the request so made was strongly opposed by the accused i.e. present petitioner. The petitioner aggrieved by the order passed by the Trial Court preferred Criminal Revision bearing Registration No. 81 of 2017 before the Sessions Court at Beed. However, the learned Sessions Judge vide the judgment and order passed on 13.04.2018 dismissed the criminal revision petition so filed. Dissatisfied with the order so passed, the petitioner has filed the present writ petition.

3. Shri Hange, the learned counsel appearing for the petitioner has criticized the orders passed by the Courts below on various grounds. The learned counsel submitted that there is no provision in the Code of Criminal Procedure, which empowers the Magistrate to allow the complaint to be corrected. The learned counsel further submitted that the Courts below have failed in appreciating that the great prejudice was likely to be caused to the petitioner i.e. original accused if the complainant is allowed to correct the date

of offence, which according to the petitioner was correctly stated in the original complainant. The learned counsel submitted that in fact it is the case of the petitioner that the transaction had in fact occurred and completed in the year 2013 itself and nothing was remained to be paid; however, subsequently by taking undue advantage the complaint was filed. The learned counsel submitted that since the learned Magistrate has now allowed the complainant to correct the said date, the right of the accused to raise the said defence has been taken away. It has caused great prejudice according to the learned counsel to the case of the present petitioner.

4. The learned counsel submitted that the Sessions Court also without appreciating the import of the judgment of the Hon'ble Apex Court in the case of **"U.P Pollution Control Board Vs. Modi Distillery and Ors, (1987) 3 SCC 684"**, has dismissed the criminal revision filed by the petitioner. The learned counsel submitted that the Supreme Court has clearly ruled that provisions of Code of Criminal Procedure can only be exercised, either to correct the curable infirmities and the

further important observation by the Supreme Court is that if there is likelihood of prejudice to the other side then the Court shall not allow such amendment in the complaint. The learned counsel submitted that in view of the law laid down by the Hon'ble Apex Court, both the Courts have committed patent error in allowing the amendment sought by the complainant. The learned counsel, therefore, prayed for setting aside the orders passed by the Courts below.

5. The learned counsel appearing for the respondent no.2 i.e. original complainant supported the orders passed by the Courts below. The learned counsel invited my attention to the complaint filed by the respondent and more particularly brought to my notice the averments in Para-7 of the complaint. The learned counsel submitted that in Para-7, the complainant has specifically averred that on 16.06.2016 the cause of action arose for filing the complaint and that it is the continuing cause and therefore the complaint filed by the complainant is well within the period of limitation. The learned counsel further submitted that even in the earlier paragraphs the dates which are mentioned reveal

that the cheque in question itself was issued on 06.05.2016, so there could not have been any cause of action for filing the complaint under Section 138 of the Negotiable Instruments Act prior to the said date much less on 11.11.2013. The learned counsel submitted that as was contended by the complainant, it was a typographical inadvertent mistake and the Courts below have rightly allowed the complainant to correct the said mistake. The learned counsel submitted that no prejudice was and is likely to be caused to the present petitioner because of allowing of such amendment. The learned counsel submitted that the petitioner even henceforth can maintain the said defence and elicit the material through the cross-examination of the witness or the complainant. The learned counsel, therefore, prayed for dismissal of the writ petition.

6. I have duly considered the submissions advanced by the learned counsel for the petitioner and the learned counsel appearing for the respondent no.2. I have perused the orders passed by the Courts below. I have also perused the original complaint filed by the respondent. It is

true that on the front page of the complaint, the date of the offence is stated as 11.11.2013 whereas, in the further part of the complaint and more particularly in Para 4, 5, 6 and 7 of the complaint, the particulars which are incorporated reveal that the cause of action had arisen for filing the complaint after the issuance of the cheque and dishonour of the said cheque for insufficient funds in the account of the petitioner. In Para 7 of the complaint, the respondent-complainant has specifically averred that since despite receipt of the statutory notice issued by the complainant under Section 138 of the Act, the petitioner did not pay the amount of the cheque and as such the complainant was constrained to file the complaint against him under the said provision. It is further revealed that before the matter was taken up for evidence, the mistake was realized by the complainant and as such he preferred the application seeking amendment in the date as was mentioned on the first page of the complaint and as noted herein above, the Trial Court allowed the said amendment. Though the said order was challenged in the revision, the learned

Sessions Court also did not cause interference in the said order and dismissed the revision application.

7. In the present petition, the emphasis of the learned counsel Shri Hange is on the point that the Courts below have not considered the aspect that allowing of such amendment has caused great prejudice to the complainant since, his defence has been taken away by allowing such amendment. The learned counsel submitted that according to the petitioner in fact the transaction which was mentioned by the respondent-complainant in his complaint had occurred in the year 2013 and the said transaction was already concluded and no cause of action was subsisting. In the circumstances, according to the learned counsel, the amendment could not have been allowed by the Courts below. I am however not convinced by the submissions so made by Shri Hange.

8. It has to be stated that the complaint has to be read as a whole. While reading page no.1 of the complaint, the contents incorporated in further part of the complaint cannot be ignored. As was

pointed out by the learned counsel for the respondent-complainant, in the further part of the complaint, everywhere the dates are mentioned of the year 2016. It is further not in dispute that the copy of the cheque which is filed on record, the cheque written memo, the copy of the notice, all these documents commensurate with the date 16.06.2016 as is mentioned in the complaint. There is reason to believe that inadvertent mistake had occurred in mentioning the date as 11.11.2013 to be the date of commission of offence at one place in the complaint.

9. It further appears to me that though it has been vehemently argued by the learned counsel for the petitioner that allowing of such amendment has caused great prejudice to the petitioner and his defence has been taken away, it does not appear to me that merely because of allowing such amendment, the petitioner may not be able to take such defence. Had he some more material with him the petitioner can still establish his contention that the transaction is not pertaining to the year 2016 and that a concocted case has attempted to be made out by the respondent-complainant. The

decision in the case of "*U.P. Pollution Control Board Vs. Modi Distillery and Ors*" (cited supra), squarely applies to the facts of the present case. In the circumstances, I do not find any merit in the petition so filed. Hence, the following order:

ORDER

The writ petition is dismissed.

(P.R. BORA, J.)

Mujaheed//