

VRJ

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

**WRIT PETITION NO.851 OF 2022**

Oswal Metal Industries, through  
Dhanesh Zumbarlal Gandhi ... Petitioner  
**V/s.**  
Dhananjay Mahadev Bapat & Anr. ... Respondents

Mr. Sandeep Koregave for the petitioner.

Mr. Kunal D. Ambulkar for respondent no.1.

Mr. A.R. Patil, APP for the respondent No.2/State.

**CORAM : AMIT BORKAR, J.**

**DATED : APRIL 17, 2023**

**P.C.:**

1. The petition is directed against the order dated 2<sup>nd</sup> March 2021 passed by the Judicial Magistrate First Class, Court No.9, Kolhapur in S.C.C. No.5682 of 2018 below Exhibit-21.
2. By the amendment application, the complainant sought to add serial No.1 before the name “Dhananjay Bapat” and serial No.2 before the “Equatorial Engineering Pvt. Ltd. Company” Additionally, name of father of Dhananjay Bapat was sought to be added.
3. The Magistrate by impugned order rejected the application holding that the error is not inadvertent and the complainant never intended to implicate Equatorial Engineering Private

Limited.

4. The parameters for allowing the application for amendment in a proceedings under section 138 of the Negotiable Instruments Act, 1881 have been laid down by the Apex Court in the Case of **S.R. Sukumar v. S. Sunaad Raghuram** reported in (2015) 9 SCC 609. The Apex Court after referring to the judgment in the case of **UP Pollution Control Board v. Modi Distillery and Ors.** reported in (1987) 3 SCC 684 in paragraph No.19, held as under:

“19. What is discernible from **U.P. Pollution Control Board** case is that an 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.”

5. The question, therefore, arises is the scope of inquiry to be held by the Magistrate while allowing the application for amendment in proceedings governed by the Code of Criminal Procedure, 1973. As has been held by the Apex Court, curable legal infirmity can be cured by the application for amendment. The complainant by the application below Exhibit-21 sought to add serial Nos.1 and 2 and name of father. Additionally, the complainant sought to change designation of the parties as complainant and accused. Considering the nature of the

amendment, in my opinion, the defect as pleaded in the application for amendment is curable.

6. The order is sought to be defended on behalf of the accused submitting that the complainant is seeking to introduce altogether new accused which was never intention of the complainant. The effect of such amendment needs to be considered by the Magistrate at the time of trial. The corresponding averments in the complaint needs to be considered by the Magistrate at the time of final adjudication of the complaint. Therefore, in my opinion, the Magistrate could not have gone into merits of the complaint to hold that the complainant never intended to implicate Equatorial Engineering Private Limited as a party. The Magistrate at the time of final hearing of the complaint, can always consider the effect of allowing application for complaint and whether the ingredients of sections 138 and 141 of the Negotiable Instruments Act, 1881 have been fulfilled based on averments and evidence produced by the party. Such exercise has to be carried out at the time of final hearing of the complaint.

7. With the said clarification, the impugned order cannot be sustained. For the reasons stated above, the application below Exhibit-21 in S.C.C. No.5682 of 2018 is allowed however subject to observations made above.

8. The writ petition is disposed of in above terms. No costs.

**(AMIT BORKAR, J.)**