

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

Neutral Citation No. 2023:PHHC:118168
CRM-M-16263-2019 (O&M)
Reserved on: August 31, 2023
Date of Decision: September 06, 2023

Devender Yadav

...Petitioner

Versus

Rajesh Kumar Yadav

...Respondent

CORAM: HON'BLE MR. JUSTICE DEEPAK GUPTA

Present: - Mr. Neeraj Gupta, Advocates for the petitioner.

Mr. Amit Jain, Advocate for the respondent.

DEEPAK GUPTA, J.

Whether amendment in the complaint filed under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred as 'the N.I. Act') can be allowed and if so, in what circumstances, is the issue involved in this petition.

2. Rajesh Kumar Yadav (respondent herein) filed a complaint Annexure P-2 in the Court of learned Judicial Magistrate 1st Class, Gurugram to prosecute accused Devender Yadav (petitioner herein) under Section 138 of the N.I. Act. It was alleged that vide an agreement dated 27.05.2016, accused had agreed to sell his land situated in village Badshahpur, Tehsil and District Gurugram and *had received ₹43 lacs vide a cheque No.873717 dated 09.10.2017*. Target date for execution of sale deed was fixed to be 09.10.2016, which was later on extended to 09.12.2016 and then to 30.04.2017. However, accused failed to execute the sale deed. Ultimately, compromise was effected and the agreement to sell was cancelled. Accused handed over cheque No.272500 dated

Neutral Citation No. 2023:PHHC:118168
CRM-M-16263-2019 (O&M)

09.12.2017 for an amount of ₹43 lacs from his account to discharge his legal liability in favour of the complainant. However, on presentation, the said cheque was dishonoured vide return memo dated 21.12.2017 on account of insufficient funds in the account of the accused. Statutory notice through registered post was sent, but in vain, forcing the complainant to file present complaint before learned Judicial Magistrate 1st Class, Gurugram.

3. In preliminary evidence, complainant produced his affidavit (Annexure P-5) to support the case. Summoning order was passed by learned Magistrate.

4. The case was at the stage of considering the notice of accusation, when application (Annexure P-7) was moved by the complainant for amendment of the complaint as well as the affidavit tendered by way of preliminary evidence. It was pleaded that total sale consideration as per the agreement dated 27.05.2016 was ₹45 lacs, out of which complainant had paid ₹43 lacs and that out of this ₹43 lacs, ₹10 lacs were paid through a cheque No.000011 dated 27.05.2016 drawn at Kotak Mahindra Bank, ₹5 lacs were paid through RTGS and rest of ₹28 lacs were paid in cash. It was pleaded further that even in the legal notice dated 12.01.2018 sent to the accused, it was mentioned that complainant had paid a sum of ₹43 lacs through different modes. However, due to over sight and by typographical mistake, the mode of payment of total amount was mentioned to be by cheque. Therefore, complainant-respondent prayed for necessary amendment in the complaint as well as

in the affidavit tendered in preliminary evidence.

5. Accused-petitioner opposed the application by filing reply (Annexure P-11). Learned Judicial Magistrate 1st Class, Gurugram allowed the said application by way of impugned order dated 26.02.2019 (Annexure P-1), which has been assailed by the petitioner-accused by way of this petition.

6. The sole contention raised by learned counsel for the petitioner is that once the Magistrate had taken cognizance of the offence by issuing the summoning order against accused-petitioner, amendment could not have been allowed. Learned counsel has referred upon “*S.R. Sukumar v. S. Sunaad Raghuram*”, 2015(3) R.C.R. (Criminal) 570, wherein it is held by the Hon’ble Supreme Court that there was no provisions in Cr.P.C. to amend criminal complaint, but amendment can be allowed if the amendment is sought before taking cognizance of complaint by the Magistrate.

7. Learned counsel has also referred to the following authorities, in support of his contentions: -

(1) “*S.R. Sukumar v. S. Sunaad Raghuram*”, 2015(3) R.C.R. (Criminal) 570,

(2) “*Jai Mata Traders v. Unique Foundary Regd.*”, 2011(4) R.C.R. (Criminal) 687,

(3) “*V.K. Gupta v. Manjit Kaur*”, 2008(3) R.C.R. (Criminal) 430,
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4) “*Ms Kumar Rubber Industries, Kapurthala v. Sohan Lal*”,

Neutral Citation No. 2023:PHHC:118168
CRM-M-16263-2019 (O&M)

2002(2) R.C.R.(Criminal) 111,

wherein the amendment in the complaint was declined.

8. On the other hand, defending the impugned order passed by learned Magistrate, learned counsel for the respondent-complainant submits that amendment sought by the complainant and allowed by the Court did not pertain to the cheque, due to dishonour of which, the prosecution of the accused under Section 138 of the N.I. Act has been sought and rather, amendment has been allowed only in respect of the mode, in which the amount had been paid by the complainant to the accused at the time of agreement to sell, which does not go to the root of the matter and in such circumstances, amendment can be allowed.

9. Learned counsel for the respondent-complainant, to support his case, has referred to the following authorities: -

* *“KUNAPAREDDY ALIAS NOOKALA SHANKA BALAJI V. KUNAPAREDDY SWARNA KUMARI AND ANOTHER”*, (2016) 11 Supreme Court Cases 774

* *“Rajesh Kumar v. Jasbir Singh”*, 2013(22) R.C.R. (Criminal) 382.

* *“Rakesh Kumar v. Naresh Kumar and another”*, 2010(9) R.C.R.(Criminal) 615.

* *“Bhim Singh v. Kan Singh”*, 2004(2) R.C.R.(Criminal) 22.

* *“Koka Lal Saini v. M/s Shankar & Anr.”*, 2015(32) R.C.R. (Criminal) 832.

* *“Rajwinder Singh v. Surinder Singh”*, (CRR-3688-2018, decided on 04.02.2019).

Neutral Citation No. 2023:PHHC:118168
CRM-M-16263-2019 (O&M)

* *“M/s Mittal Trading Company v. Munish Kumar Gupta”,*
[CRM-M-37796 of 2018 (O&M), decided on 04.01.2023].

10. I have considered submissions of both the sides and have perused the record carefully.

11. In **Kunapareddy’s case (supra)**, the amendment was allowed in a complaint filed under the provisions of Protection of Women from Domestic Violence Act, 2005. It was held by the Hon’ble Supreme Court that amendment is permissible in appropriate cases even in the criminal trial, after noticing that though the petition was essentially under Sections 18 and 20 of the Domestic Violence Act, 2005, which are governed under Cr.P.C., but at the same time, Undisputedly, these proceedings are predominantly of civil nature.

12. The present case relates to proceedings under Section 138 of the N.I. Act. The said proceedings are quasi criminal in nature. In *“Meters and Instruments (P) Ltd. v. Kanchan Mehta”* 2018 1 SCC 560, it has been observed by the Hon’ble Supreme Court that offence under Section 138 of the N.I. Act is primarily a civil wrong. The object of the provision being primarily compensatory, punitive element being mainly with the object of enforcing the compensatory element, compounding at the initial stage, has been encouraged though it is not debarred at later stage subject to appropriate compensation. The object of bringing Section 138 to 142 of the N.I. Act is to inculcate faith in the efficacy of banking operations and credibility in transacting business of negotiable instruments. The intention of Section 138 of the N.I. Act is to prevent

dishonesty on the part of the drawer of negotiable instruments to draw a cheque without sufficient funds in his account maintained by him in a bank and induces the payee or holder in due course to act upon it.

13. By applying the analogy of *Kunapareddy's case (Supra)*, and having considered the fact that offence under Section 138 of the N.I. Act is primarily a civil wrong, it can be safely held that amendment in the complaint can be permitted in appropriate cases.

14. Now the question arises as to in what circumstances amendment can be allowed in the criminal complaint under section 138 of NI Act and at what stage.

15. In *S.R. Sukumar's case (supra)*, though the Hon'ble Supreme Court held that there is no provision in Cr.P.C. to amend criminal complaint, but the amendment can be allowed, if same is sought before taking cognizance of complaint by the Magistrate. At the same time, it was clarified by Hon'ble Supreme Court that amendment to correct the curable infirmities can be allowed even in respect of the complaint. It will be apt to reproduce what has been held by the Hon'ble Supreme Court: -

“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. In U.P. Pollution Control Board vs. Modi Distillery And Ors., (1987) 3 SCC 684, wherein the name of the company was wrongly mentioned in the complaint that is, instead of Modi Industries Ltd. the name of the company was mentioned as Modi Distillery and the name was sought to be amended. In such factual

background, this Court has held as follows: -

“...The learned Single Judge has focused his attention only on the [pic]technical flaw in the complaint and has failed to comprehend that the flaw had occurred due to the recalcitrant attitude of Modi Distillery and furthermore the infirmity is one which could be easily removed by having the matter remitted to the Chief Judicial Magistrate with a direction to call upon the appellant to make the formal amendments to the averments contained in para 2 of the complaint so as to make the controlling company of the industrial unit figure as the concerned accused in the complaint. All that has to be done is the making of a formal application for amendment by the appellant for leave to amend by substituting the name of Modi Industries Limited, the company owning the industrial unit, in place of Modi Distillery.... Furthermore, the legal infirmity is of such a nature which could be easily cured...”

*18. What is discernible from the U.P. Pollution Control Board’s 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.**”*

16. In *Rakesh Kumar v. Jasbir Singh’ case (supra)*, it was stated in the complaint that the petitioner had taken a loan of ₹50,000/, whereas the petitioner had taken the loan to the tune of ₹4,00,000/-. The mistake was also committed in the affidavit tendered by the complainant by way

of his preliminary evidence. By holding the error to be of clerical in nature and due to accidental slip, the amendment was allowed by the Trial Court and the said order was upheld by this High Court after noticing that petitioner will not suffer any prejudice as he had to yet to cross-examine the complainant.

17. In *Rakesh Kumar v. Naresh Kumar's case (supra)*, complaint under Section 138 of the N.I. Act was filed qua dishonour of cheque amounting to ₹7,00,000/-. It was stated that M/s Naresh Marketing was also CSA agent of M/s. Paras Pharmaceuticals Limited, Ahmadabad and said M/s. Paras Pharmaceutical Limited, Ahmadabad had authorized M/s Naresh Marketing, Ambala Cantt. vide its resolution to institute the complaint against the accused. Though, the cheques had been issued in the name of M/s. Paras Pharmaceutical Limited, Ahmedabad, a complaint was filed by M/s. Naresh Marketing. The amendment allowed by the Trial Court so as to implead M/s Paras Pharmaceutical Limited, Ahmedabad, was upheld by this High Court by noticing that no prejudice has been caused to the petitioner-complainant because of the impleadment and by also holding that said impleadment did not result in amendment to the complaint in real sense.

18. In *Bhim Singh's case (Supra)*, complaint was filed regarding dishonour of cheque No.383326 dated 08.01.2021. The amendment was sought to the effect that correct number of the cheque was 383336 and its dated was 09.01.2021. Amendment was declined by the Trial Court, which order was set aside by the Rajasthan High Court by holding that

the Trial Magistrate has inherent power to correct the error in the complaint in the interest of justice. The Rajasthan High Court also held as under: -

“7. It is an established proposition of law that court of justice must possess inherent powers, apart from the express provisions of law, which are necessary to their existence and the proper discharge of duties imposed upon them by law. The Criminal Procedure Code or for the matter of that no procedural law is ever exhaustive and in cases where circumstances required it, the courts have acted on the assumption that they possess inherent powers (as of right) to do justice for which they really exist. At the same time, it must be remembered that a court has no inherent power to do that which is prohibited by the Code.

In this view of the matter every court whether civil or criminal in the absence of any express provision to the contrary, shall be deemed to possess as inherent in its very constitution, all such powers as are necessary in the course of the administration of justice. The rule of inherent powers has its source in a latin maxim "Quod lex aliquid alicui concedit, concedere videtur id sine quo ipsa esse non potest", which means that when law gives any thing to any one, it gives also all those things without which the thing itself could not exist.

8. The Courts exist for dispensation of justice and not for its denial for technical reasons when law and justice otherwise demand. Even though inherent power saved under Section 482 Cr.P.C. is only in favour of High Courts, the subordinate criminal courts are also not powerless to do what is absolutely necessary for dispensation of justice in the absence of a specific enabling provisions provided there is no prohibition and no illegality or miscarriage of justice is involved.

Thus, this Court is of the view that all the criminal courts are having such an auxiliary power subject to restrictions which justice, equity, good conscience and legal provisions demand provided it will not unnecessarily prejudice somebody else.

9. For the reasons stated above, the typographical mistakes, which have been pointed out by the complainant petitioner, should have been rectified by the trial court, as trial court has inherent power to rectify such typographical mistakes to do justice between the parties.”

19. In ***Koka Lal Saini’s case (supra)***, in a complaint under Section 138 of the N.I. Act, number of a bill was mentioned to be 146 in the complaint as well as in the affidavit. Amendment was sought to the effect that correct number of the bill was 346. The said amendment was allowed. The Rajasthan High Court refused to interfere in the order of the Trial Court after holding that when mistake is not construed as a clerical, the same cannot be amended, but in the case in hand the mistake clearly appeared to be clerical and that such type of minor clerical mistake can be corrected, in the criminal Complaint.

20. Similarly, this High Court in ***M/s Mittal Trading Company’s case (supra)*** allowed the amendment seeking correction in the year of the cheque, as it was found that complainant was not pursuing the case with respect to a different cheque.

21. In the present case, no amendment is being sought by the respondent-complainant with regard to the cheque No.272500 dated 09.12.2017 for ₹43 lacs, due to dishonour of which, the prosecution of the accused-petitioner is being sought under Section 138 of the N.I. Act. No change in cheque number, date or amount mentioned thereon are sought to be amended. Amendment has been allowed by the Trial Court only with regard to the mode in which the amount of ₹43 lacs under an agreement to sell dated 27.05.2016 had been paid by the complainant-

respondent to the petitioner-accused.

22. It is worth noticing that even in the legal notice, which was sent by the complainant to the accused prior to filing of the complaint as referred in the application (Annexure P-7) seeking amendment of the complaint, it has been mentioned that complainant had paid the amount of ₹43 lacs to the accused through different modes.

23. Thus, amendment sought is purely clerical/typographical, not going to the root of the matter, as far as ingredients of Section 138 of the N.I. Act are concerned. Even if, the complainant had mentioned that he had paid ₹43 lacs to the accused at the time of agreement, without mentioning the mode and that due to the cancellation of the agreement, the cheque was issued by the accused, which was dishonoured, it would not have made any difference. Besides, the accused-petitioner shall get full opportunity to cross-examine the complainant and his witnesses. Even the Hon'ble Supreme Court has allowed amendment to correct such type of curable infirmities in *S.R. Sukumar's case (supra)*, relied by Ld. Counsel for the petitioner.

24. As far as other authorities cited by learned counsel for the petitioner are concerned, these are on different footing. In *Jai Mata Traders' case (supra)*, amendment was sought to change the identity of complainant, as HUF is a separate entity than the proprietorship concern and the application for amendment was filed at a stage when the matter was fixed for defence evidence.

25. In *V.K. Gupta's case (supra)*, amendment was declined

because complainant had wrongly mentioned the date of presentation of the cheque as well as the date of dishonour of the cheque in the complaint. 26.

In *M/s Kumar Rubber Industries v. Sohan Lal's case (supra)* following observations were made by this Court: -

“49. The defect that has crept into the complaint i.e., the omission to give the correct cheque numbers, is not due to any act or omission on the part of the petitioners or the other accused. The complainant himself, have been taken back and fresh cheques were issued. Therefore, the accused are in no way responsible for this defect in the complaint. Even otherwise, the question is whether the complainant can amend the complaint or supplement the complaint by giving the correct cheque numbers etc.....

.....But, in the present case, the complainant knowing fully well that the cheques bearing No.466337 to 466340 were taken back and cheques Nos.2287334 to 2287337 were issued, and despite the fact that this fact has been mentioned in the notice issued under Section 138 of the Negotiable Instruments Act on behalf of the complainant to the accused, based the complaint on the cheques bearing Nos.466337 to 466340 without even mentioning anything about the other set of cheques. Obviously, the complaint is based upon the cheques bearing Nos.466337 to 466340. While that being so, the complainant introduced into evidence the cheques bearing Nos.2287334 to 2287337 in proof of the complaint. So, we find that the cheques on which the complaint is based, have not been produced, whereas a different set of cheques was produced into evidence. The summoning order has been passed only on the basis that the cheques concerned in the complaint were 466337 to 466340 only without taking note of the fact that a different set of cheques was introduced into evidence.

50. Therefore, we find that not only the complaint is defective, but also there is total non-application of mind by the learned Magistrate also. This is not a mere technical defect or a mere misdescription of the parties which could be allowed to be amended. The cheques are the very

Neutral Citation No. 2023:PHHC:118168
CRM-M-16263-2019 (O&M)

basis of foundation of the complaint. So, when the very foundation has not been properly laid by giving the correct numbers of the cheques, the complaint itself becomes not maintainable. Such as defect which goes to the root of the matter, cannot be allowed to be amended and the complaint cannot be allowed to supplement the complaint by giving the numbers of fresh cheques as the basis of the complaint. The complaint cannot thus be made to suit the evidence introduced. Therefore, in my view, the complaint has to fail and to be quashed on that account.”

Thus, it is clear that complainant completely wanted to change the cheques due to dishonour of which prosecution of the accused had been sought and the amendment was not permitted.

27. Having regard to all the facts and circumstances of the case and applying the legal position as discussed above and having noticed the nature of amendment allowed by the Trial Court by way of the impugned order, which is certainly to correct the curable infirmities and which is not likely to prejudice the petitioner-accused in any manner, the impugned order dated 26.02.2019 (Annexure P-1) passed by the Trial Court is upheld by holding the present petition to be devoid of any merits.

As such, present petition is hereby dismissed.

September 06, 2023
sarita

(DEEPAK GUPTA)
JUDGE

Whether reasoned/speaking:	Yes/No
Whether reportable:	Yes/No