

(2013) 10 BOM CK 0058

In the Bombay High Court

Case No : Criminal Writ Petition No. 382 of 2013

Madan

APPELLANT

Vs

Ashok Sonaji Hembade and The State of Maharashtra

RESPONDENT

Date of Decision : 10-10-2013

Acts Referred:

Citation : (2014) ALLMR(Cri) 2282 : (2014) 1 BomCR(Cri) 697

Hon'ble Judges : Abhay M. Thipsay, J

Bench : Single Bench

Advocate : Vijay Sharma, for the Appellant; A.B. Shinde, Advocate for Respondent No. 1 and Mr. V.P. Kadam, APP, for the Respondent

Final Decision : Allowed

Judgement

Abhay M. Thipsay, J.—RULE. By consent, Rule made returnable forthwith. By consent, heard finally. The petitioner is the accused in S.C.C. No. 315/2010, pending before the Judicial Magistrate First Class, Nanded. The case is in respect of an offence punishable u/s 138 of the Negotiable Instruments Act and arises on a complaint made by the respondent no. 1 herein.

For the sake of convenience and clarity, the respondent no. 1 shall, hereinafter be referred to as "the complainant" and the petitioner as "the accused".

2. The substance of the complaint is that, the complainant had advanced a hand loan of Rs. 10,00,000/- to the accused, in repayment of which the accused issued a cheque in the sum of Rs. 10,00,000/-, which got dishonoured; and since in spite of notice, the payment in respect of the said cheque was not received, the accused was liable to be prosecuted and punished for an offence punishable u/s 138 of the Negotiable Instruments Act. The case of the complainant is that the amount of Rs. 10,00,000/- given as hand loan to the accused, was so given not on one date but, as on seven different dates. The complainant gave the break-up of the dates and amounts in the complaint itself. Among other things, the complainant asserted in the complaint, that on 7.5.2005, he had paid an amount

of Rs. 50,000/- to the accused.

3. The plea of the accused was recorded by the learned Magistrate on 21.12.2010 and accused pleaded not guilty. The affidavit in lieu of evidence was not filed till 20.1.2011, on which date, the complainant came up with an application (Exh. 14) praying that he be permitted to amend the complaint. In this application, the complainant mentioned that in paragraph No. 2 of the complaint he had given details of the hand loan borrowed by the accused from him, but there were some typographical mistakes in dates and amounts. In spite of saying so, he mentioned only one mistake:- namely that "though the complaint says that on 7.5.2005 an amount of Rs. 50,000/- was paid to the accused, actually an amount of Rs. 1,00,000/- was paid to the accused and that too not on 7.5.2005 but on 7.5.2006". The prayer in the said application was that "the correction being a formal and arithmetical correction, hence, permission to do the same be granted." This application though was opposed by the accused, was allowed by the Magistrate.

4. The accused moved the Court of Sessions by filing an application for revision challenging the said order, but the Court of Sessions did not find anything wrong in the order passed by the Magistrate. The Court of Sessions, therefore, dismissed the revision application.

5. Being aggrieved thereby, the accused has approached this Court by filing the present petition, invoking the Constitutional jurisdiction of this court.

6. I have heard the learned counsel for the petitioner. I have heard the learned counsel for respondent no. 1.

7. The only basis for justification of the amendment is that, it was for correcting only a typographical or arithmetical error that had cropped up in the complaint. It is not possible to agree with this contention. Whether it was a typographical or an arithmetical error, or an error in stating a fact, can be decided only on the basis of evidence.

8. The question of holding the mistake to be a typographical or arithmetical error would arise when a party would be able to point out, by confrontation with some other record, that what is reflected at one place could not have been intended to be stated and is actually due to inadvertence. Here, admittedly, there is no written record of dates of payment and/or the break-up of the amounts paid. It is not the case of the complainant that, the dates on which different amounts were paid, were reflected in some record, and that, while reproducing the dates based on that record, the error had cropped up. The mistake which is in the date and in the amount therefore cannot be construed as a clerical, typographical or arithmetical mistake. It is a mistake in making a statement of fact.

9. The reasoning of the learned Additional Sessions Judge in holding the revision to be without merit is as follows. That, the claim of the complainant is that he had advanced an amount of Rs. 10,00,000/- as a hand loan to the accused and

that, the accused in repayment thereof had issued a cheque in the sum of Rs. 10,00,000/-. The learned Additional Sessions Judge calculated the amounts mentioned in paragraph No. 2 of the complaint and observed that if the amount of Rs. 50,000/- as originally mentioned is retained the total comes to Rs. 9,50,000/-. That, since according to the complainant the hand loan was of Rs. 10,00,000/-, mention of Rs. 50,000/- as having been paid on 7.5.2005 must be a clerical or typographical mistake. It is impossible to accept the view of the learned Additional Sessions Judge. On what basis the learned Additional Sessions Judge concluded that the mistake could be only in quoting the amount supposedly paid on 7.5.2005, or 7.5.2006, and why the mistake could not have taken place while mentioning the other amounts said to have been given on other dates, is impossible to comprehend. The fact is that the total amount which the complainant claimed to have been given to the accused as per the details in paragraph no. 2 of the complaint was Rs. 9,50,000/-, inspite of his claim that, hand loan of Rs. 10 lacs was paid; and obviously, therefore, the complainant needed to insert something at some place to remove this discrepancy. Now, this could be done by adding an amount of Rs. 50,000/- said to have been paid on any the dates of payment mentioned in the complaint or by adding a new date and stating that Rs. 50,000/- was paid on such newly given date. The logic of the Sessions judge that total amount of loan was Rs. 10 lac, therefore, amount of Rs. 50,000/- mentioned against the entry dated 7.5.2005 must be a clerical or typographical mistake, is unacceptable. All that could be inferred from this was that either the record of the payment of Rs. 50,000/- had not been mentioned in the complaint, or some entry relating to the payments said to have been made on different dates, was wrong, being short by Rs. 50,000/-.

10. Consequently, it is clear that correction that was sought to be made in the complaint was not in respect of any clerical or typographical error. It was the correction of a fact, which according to the complainant was wrongly stated. I am not suggesting for a moment that what was earlier stated was correct and what is now being stated by the complainant is incorrect, as obviously that would be a matter to be decided during the trial. However, the complainant cannot be allowed to remove or erase his original version from the record, though he shall be free to state that he had earlier made a wrong statement.

11. The so called "correction" is nothing different from other corrections which parties or witnesses seek to make. For instance, if the FIR states that "A" and "B" assaulted the victim, the first informant cannot be prevented from subsequently saying that this statement was wrong and "that only "A" had assaulted victim", or that "A", "B" and also "C" (three) had assaulted the victim though he had not mentioned the name of "C" earlier. He, however, cannot seek the F.I.R. to be "amended" by saying so.

12. Thus, the order passed by the Additional Sessions Judge in revision is patently illegal and suffers from total non-application of mind. At the cost of repetition, it may be observed that the only conclusion which he could have

arrived at, is that, there was some mistake somewhere as the total loan amount claimed in the complaint was Rs. 10,00,000/-, but, as per the details thereof given in the complaint, it amounted to Rs. 9,50,000/-. He, however, could not have arrived at a conclusion that the mention of Rs. 50,000/- as having paid on 7.5.2005 was a "clerical" or "arithmetical" mistake. Interestingly, how he derived satisfaction about the date 7.5.2005 also having been wrongly mentioned, instead of date 7.5.2006 is absolutely unclear.

13. In my opinion, the change was in a statement of fact made in the complaint. If a mistake had occurred in the complaint, the only way of correcting the same was in the course of evidence. No amendment with respect to the relevant statement could have been permitted by the Magistrate. The order passed by the Magistrate, as also by the Sessions Judge, being patently illegal, need to be interfered with while exercising the Constitutional jurisdiction of this Court.

14. The Petition is allowed.

The impugned orders are set aside.

The amendment carried out pursuant to the impugned orders be cancelled, and the complaint be restored to its original position.

15. Rule is made absolute in the aforesaid terms. The learned Magistrate shall expedite the trial of the case and endeavor to complete it as early as possible.