IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.SUDHEENDRA KUMAR

MONDAY, THE 5TH DAY OF OCTOBER 2015/13TH ASWINA, 1937

Crl.Rev.Pet.No. 1396 of 2012 ()

CRA 200/2008 of ADDL. DISTRICT & SESSIONS COURT (ADHOC)1, KOLLAM
CC 851/2004 of J.M.F.C.-II, KOLLAM

REVISION PETITIONER/APPELLANT/ACCUSED:

SHAHUL HAMEED,
SHANITHA NIVAS, PALAKKAL, THEVALAKKARA VILLAGE
KARUNAGAPALLY KOLLAM DISTRICT.

BY ADVS. SRI.GEORGE VARGHESE
SRI.P.R.MILTON

RESPONDENTS/COMPLAINANT AND STATE:
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1. PRADEEP
S/O. PUSHKARAN, PUNARTHAM, KOOTTIKKADA
MAYYANADU, KOLLAM-691020.

2. THE STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM-682018.

R1 BY ADV. SRI.C.RAJENDRAN
R1 BY ADV. SRI.K.R.RANJITH
R2 BY PUBLIC PROSECUTOR, SHRI.R.GITHESH

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 05-10-2015, ALONG WITH CRRP. 2074/2012, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

B.SUDHEENDRA KUMAR, J.

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Crl.R.P. Nos.1396 of 2012 and 2074 of 2012

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Dated this the 5th day of October 2015

O R D E R

The revision petitioner in Crl.R.P. No.1396 of 2012 is the accused and the revision petitioner in Crl.R.P. No.2074 of 2012 is the complainant in C.C.No.851 of 2004 on the files of the Court of the Judicial Magistrate of First Class -II, Kollam.

2. The trial court convicted the accused under Section 138 of the Negotiable Instruments Act, 1881 (for short "the N.I.Act") and sentenced him thereunder to simple imprisonment for four months and a fine of

Rs.4,25,000/- with a default clause for simple imprisonment for four months. The accused filed appeal against the said conviction and sentence. As per judgment dated 3.4.2012 in Crl.Appeal No.200 of 2008, the Additional Sessions Court-I, Kollam confirmed the conviction and modified the sentence to imprisonment till the rising of the court. The compensation ordered by the court below was confirmed by the appellate court. Aggrieved by the said conviction and sentence, the accused filed Crl.R.P. No.1396 of 2012. Since the learned Sessions Judge did not specifically mention about the default sentence, the complainant filed Crl.R.P. No.2074 of 2012.

3. Heard.

4. The prosecution allegation can be briefly stated as follows:- The accused is a civil contractor by profession. He used to purchase construction materials from the complainant and towards the discharge of the said liability, the accused issued Ext. P1 cheque in favour of the complainant. The complainant presented the said cheque for encashment. However, the same was dishonoured due to insufficiency of funds in the account of the revision petitioner. Statutory notice was issued to the accused, which was received by the accused. However, the accused did not make payment of the cheque amount within the statutory period or thereafter.

5. Before the court below, PW1 was examined and

Exts.P1 to P7 were marked for the complainant.

6. It has been submitted by the learned counsel for the accused/ revision petitioner in Crl.R.P. No.1396 of 2012 that no opportunity was granted to the accused to substantiate his case and in the said circumstances, the judgment of the courts below cannot be sustained. It appears from the records that the revision petitioner filed a witness list before the trial court for examination of two witnesses. The said witness list was dismissed by the trial court finding that the names of the said witnesses were not referred either in the cross-examination of PW1 or in the reply notice or in the examination of the accused under Section 313 Cr.P.C. The said finding was upheld in the

appeal. The said finding of the courts below, in my view, cannot be legal, proper and correct. It is the right of the accused to examine his witnesses to prove his case. It is not necessary that the accused should mention either during the cross-examination of the complainant or during the examination of the accused under Section 313 Cr.P.C. about the name of the persons whom he wants to examine as defence witnesses. It is settled law that the accused can take even rival contentions. The accused can also prove his case by the yard stick of preponderance of probabilities and possibilities from the materials produced by the complainant, without adducing any evidence on the side of the accused. Therefore, the mere fact that the names of

persons whom the accused proposed to examine as witnesses, were not mentioned during the cross-examination of PW1, was not a ground to shut the opportunity of the accused to examine the defence witnesses. So also, the non-mentioning of the names of the witnesses during the examination of the accused under Section 313 Cr.P.C. is also not a ground to deny his opportunity to examine defence witnesses. It is also curious to note that even though no reply notice was marked before the court below, the court below made an observation that the names of the witnesses in the witness list submitted by the accused were not mentioned in the reply notice. That would show that the court below did

not apply its mind correctly before dismissing the request of the accused for examination of his witnesses. In the said circumstances, I am of the view that it is only just and proper to grant an opportunity to the accused to adduce evidence to substantiate his case. For the said reasons, the conviction and sentence passed by the trial court, as confirmed by the appellate court, cannot be sustained.

In the result, Crl.R.P. No.1396 of 2012 stands allowed and Crl.R.P. No.2074 of 2012 stands dismissed setting aside the conviction and sentence passed by the courts below under Section 138 of the N.I. Act and the matter is remitted to the trial court for fresh disposal of the case, in accordance with law, affording reasonable opportunity to

the accused to examine the witnesses mentioned in the witness list, as expeditiously as possible and at any rate within four months from the date fixed for the appearance of the parties before the court below. The parties shall appear before the court below on 20.10.2015 without further notice.

I make it clear that the trial court shall dispose of the case independently, untramelled by any of the observations made in this order or any of the observations made by this Court in order dated 25.9.2007 in Crl.R.P. No.3134 of 2007.

Sd// ***B.SUDHEENDRA KUMAR***, *JUDGE.*

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/ True copy /

PA to Judge