

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.SUDHEENDRA KUMAR

TUESDAY, THE 13TH DAY OF OCTOBER 2015/21ST ASWINA, 1937

Crl.Rev.Pet.No. 3038 of 2009 (M)

JUDGMENT IN CRA 941/2008 OF THE ADDITIONAL SESSIONS COURT (ADHOC-I),
ERNAKULAM DATED 16-06-2009

JUDGMENT IN C.C.238/2008 OF THE JUDICIAL FIRST CLASS MAGISTRATE
COURT-II, MUVATTUPUZHA

REVISION PETITIONER/RESPONDENT/COMPLAINANT:

M/S.SOUTHERN AUTO FINANCE,
MUVATTUPUZHA, REP. BY ITS MANAGER K.V. MATHAI

BY ADVS.SRI.A.T.ANILKUMAR
SMT.V.SHYLAJA

RESPONDENTS:

1. STATE OF KERALA
REP.BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA
ERNAKULAM.

2. E.O.PATHROSE, S/O.OUSEPH,
EDASSERY HOUSE, MALAYATTOOR PO, KALADY.

R, BY PUBLIC PROSECUTOR SRI. R.GITESH
R, R2 BY ADV. SRI.C.P.PEETHAMBARAN

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD
ON 13-10-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

scl.

B. SUDHEENDRA KUMAR, J.

Crl.R.P. No.3038 of 2009

Dated this the 13th day of October, 2015.

ORDER

The revision petitioner is the complainant in C.C.238 of 2008 on the files of the Court of the Judicial Magistrate of First Class-II, Muvattupuzha.

2. The trial court convicted the accused under Section 138 of the Negotiable Instruments Act and sentenced him thereunder to imprisonment till the rising of the court and to pay an amount of ₹70,000/- with interest at the rate of 6% per annum to the complainant as compensation under Section 357 (3) Cr.P.C. Challenging the above said conviction and sentence, the accused filed appeal. The Sessions Court, as per judgment in Crl.A.No.941 of 2008, remanded the matter for de novo trial. Aggrieved by the judgment of the appellate court, this revision petition has been filed.

3. Heard both sides.

4. The prosecution allegation is that towards the

discharge of the liability to the revision petitioner, the accused issued Ext.P6 cheque in favour of the revision petitioner. The revision petitioner presented the said cheque for encashment. However, the same was dishonoured due to the insufficiency of funds in the account of the accused. Statutory notice was issued on behalf of the revision petitioner, which was received by the accused. However, the accused did not pay the cheque amount within the statutory period or thereafter.

5. Before the court below, PW1 was examined and Exts.P1 to P12 were marked for the revision petitioner. Ext.D1 was marked for the accused.

6. The appellate court remanded the case for the purpose of enabling the accused to adduce evidence to substantiate his case on the reason that the trial court observed that the accused did not enter into the witness box to substantiate the defence. It is trite law that it is not necessary that the accused should enter into the witness box or examine any person as a witness to prove his case. It is sufficient if the

accused is able to prove his case by the yardstick of preponderance of probabilities and possibilities from the materials on record. The proceedings sheet of the court below would show that the accused was granted sufficient opportunity to adduce evidence. In the said circumstances, remanding the matter to the trial court for granting opportunity to the accused to adduce evidence, cannot be justified. That apart, the court below made observation in the judgment impugned that Ext.P5 agreement would disprove the case of the complainant that the accused owed money to the complainant and towards the discharge of the said liability, the accused issued Ext.P6 cheque. The court below further observed thus:-

“If the accused could succeed in proving that the facts involved in the instant case does not come within the ambit of Section 138 of the Negotiable Instruments Act, the transaction alleged by the complainant having taken place involving the son of the accused and the accused being a guarantor only, the complainant has to work out his remedies for recovery of arrears in a distinct fashion. By protecting Ext.P6, cheque alleging

the same to be one issued by the accused for discharging the amount alleged to be due from him, the complainant preferred to adopt a short-cut method suppressing vital aspects of the case.”

7. It appears from the above observation of the appellate court that the de novo trial was ordered by the trial court to enable the complainant to build up its case correctly. It is settled law that the court should not order de novo trial to fill up the lacuna in the prosecution case. As I stated earlier, the accused was already granted sufficient opportunity by the trial court to adduce evidence. Therefore, there is no need to grant further opportunity to the accused to adduce evidence. For the above said reasons, the order of remand cannot be sustained. Consequently, I set aside the same.

In the result, this revision petition stands allowed, setting aside the judgment of the appellate court remanding the matter to the trial court and the appeal is remitted to the appellate court for fresh disposal of the appeal on merits, in accordance with law, affording reasonable opportunity to both

sides to substantiate their contentions.

The parties shall appear before the appellate court on
3.11.2015.

Sd/-
B. SUDHEENDRA KUMAR
JUDGE

Scl.

True Copy

PA to Judge