IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.SUDHEENDRA KUMAR

THURSDAY, THE 10TH DAY OF DECEMBER 2015/19TH AGRAHAYANA, 1937

Crl.Rev.Pet.No. 1146 of 2010 ( )

AGAINST THE JUDGMENT IN CRA 303/2009 of VI ADDL.DISTRICT COURT, ERNAKULAM DATED 31-12-2009

AGAINST THE JUDGMENT IN ST 436/2003 of J.M.F.C.,PERUMBAVOOR DATED 15-11-2008

REVISION PETITIONER(S)/PETITIONER/ACCUSED:

P.S.SALIM, AGED 45 YEARS,
S/O. SULAIMAN, PATTARUMADOM HOUSE, ALLAPRA.P.O.
VENGOLA KARA, ERNAKULAM DISTRICT.

BY ADV. SRI.ELDHO PAUL

RESPONDENT(S)/COMPLAINANT/STATE:

1. T.V. GEETHA, REVENUE OFFICER,
PERUMBAVOOR MUNICIPALITY, PERUMBAVOOR.

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

BY PUBLIC PROSECUTOR SRI. R. GITHESH

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 10-12-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

B. SUDHEENDRA KUMAR, J.

....

Crl.R.P. No. 1146 of 2010

....

Dated this the 10th day of December, 2015

ORDER

The accused in S.T. No. 436 of 2003 on the files of the Court of the Judicial Magistrate of First Class, Perumbavor has filed this Revision Petition challenging the concurrent finding of conviction and the order of compensation passed by the courts below under Rule 32 (2) and 39 (1) of the Taxation and Finance Rules under the Kerala Municipalities Act, 1969 (Kerala).

2. Heard.

3. The prosecution allegation can be briefly stated as follows:-

> The revision petitioner was the successful bidder of meat stall No. 13 of Perumbavoor Municipality for the year 2000-2001 for a sum of Rs. 1,10,000/--. He deposited Rs. 10,000/- initially for taking part in the auction. Thereafter, he paid 1/3rd of the said bid amount which comes to Rs. 36650/-. The revision petitioner

continued business in the shop till 6-1-2001. The auction was conducted on 20-7-2000. However, the revision petitioner did not pay the balance amount. Proceedings were initiated against him and seven other persons who had defaulted the payment. Therefore, the distraint warrant was issued. But it could not be executed. Therefore, the complaint was filed before the trial Court under Section 541 and 545 of Municipalities Act and Schedule to Taxation and Finance Rules.

4. The learned counsel for the revision petitioner has argued that no auction was confirmed in this case and in the said circumstances, the revision petitioner was not bound to pay the remaining amount and consequently, the prosecution against the revision petitioner was bad in law. The learned counsel has further argued that no evidence is available before the court to prove that the distraint warrant could not be executed prior to the initiation of the proceedings against the revision petitioner and in the said circumstances, the revision petitioner is entitled to be acquitted.

5. Now the first question to be considered is as to whether the parties accepted and acted upon the conditions in Ext. P3 after the confirmation of the auction. Ext. P3 is the auction condition. Condition No. (3) of the auction conditions provided that after getting intimation from the Secretary with regard to the

confirmation of the auction, the party had to execute an agreement with the Municipality within 7 days of receipt of the said intimation. The party had also to deposit the balance amount in seven instalments before 28-2-2001. The solitary evidence available in this case is the evidence of PW1. PW1 stated that no such agreement was executed by the revision petitioner with the Municipality as stipulated in Ext. P3. As per condition No. (3) in Ext. P3 mentioned above, the Municipality could re-auction the room in the event of failure on the part of the highest bidder to deposit the amount and execute the bond as mentioned in the said clause.

6. Since no agreement was executed by the revision petitioner with the Municipality, the Municipality ought to have cancelled the auction as provided under condition No.3 of Ext. P3 instead of resorting to recovery proceedings against the revision petitioner. Since no agreement had been executed, the Municipality was not legally bound to recover any amount from the revision petitioner as correctly argued by the learned counsel for the revision petitioner. Consequently, there could not be any default in payment of the amount by the revision petitioner. In the said circumstances, the question of issuing distraint warrant and the consequent filing of the complaint did not arise at all. Since no agreement was executed by the Municipality with the revision petitioner as mandated under Condition No. (3) of Ext. P3, it cannot be said that both parties agreed to the terms and

accepted and acted upon the terms after the confirmation of the bid. Consequently, the prosecution against the revision petitioner cannot be legally sustained.

7. The next question to be considered is whether the prosecution proved that the distraint warrant could not be executed prior to the initiation of the proceedings against the revision petitioner.

8. Before considering this aspect, it is relevant to understand Rule 32(1) of the Taxation and Finance Rules under the Kerala Municipalities Act, which is extracted hereunder:-

> "32(1) If the amount due on account of any tax together with the demand notice fee and the cost of service of the notice is not paid within fifteen days from the service of the notice and if the person from whom the tax is due has not shown cause to the satisfaction of the Commissioner why it should not be paid, the Commissioner may recover by distraint under his warrant and sale of the movable property of the defaulter, the amount due on account of the tax together with the demand notice fee and cost of service, warrant fee and the distraint fee and with such further sum as will satisfy the probable charges that will be incurred in connection with

the detention and sale of the property so distrained;

Provided always that movable property described in the provision to S. 60 of the Code of Civil Procedure, 1908 shall not be liable to distraint.

(2) If for any reason the distraint or a sufficient distraint of the defaulter's property is impracticable, the Commissioner may prosecute the defaulter before the Magistrate.

xx xx xx xx "

9. It is clear from the above provisions of the Rules that the prosecution can be initiated only if the distraint or a sufficient distraint of the defaulter's property is proved to be impracticable. The distraint warrant in this case was issued to Mr. P.S. Shaji, who was the Revenue Inspector. However, the said Mr. P.S. Shaji was not examined to prove that the execution of the distraint warrant was impracticable. Ext. P1 (a) was the endorsement on the distraint warrant that the revision petitioner had no movable property to execute the distraint warrant. The person who made the said endorsement was also not examined before the Court to prove that the execution of the distraint warrant was impracticable. In the said circumstances, Exts.

P1 and P1 (a) cannot be sufficient to prove that the execution of the distraint warrant was impracticable. The courts below did not consider the above aspects while appreciating the evidence and in the said circumstances, the concurrent finding of conviction and the order of compensation cannot be sustained.

In the result, this Revision Petition stands allowed, setting aside the conviction and the order of compensation awarded by the courts below under Rule 32 (2) and 39 (1) of the Taxation and Finance Rules under the Kerala Municipalities Act, 1969 (Kerala) and the revision petitioner is acquitted for the said offence. The bail bond of the revision petitioner stands cancelled and the revision petitioner is set at liberty.

B. SUDHEENDRA KUMAR,
JUDGE.

ani/11-12-2015.