

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.T.RAVIKUMAR

FRIDAY, THE 6TH DAY OF FEBRUARY 2015/17TH MAGHA, 1936

Crl.Rev.Pet.No. 97 of 2015 ()

AGAINST THE ORDER IN CC 83/2010 of COURT OF JUDICIAL FIRST CLASS
MAGISTRATE-V (SPL.COURT FOR MARK LIST CASES), THIRUVANANTHAPURAM
DATED 26-12-2014

REVISION PETITIONER/COMPLAINANT:

K.RAJESH, AGED 45 YEARS
S/O.T.N.KARUNAKARAN NAIR, PROPRIETOR
SREE AYYAPPA AGENCIES T.C.NO.3/2454
T.K.DIVAKARAN ROAD, EAST PATTOM, PATTOM P.O.
THIRUVANANTHAPURAM.

BY ADVS.SRI.K.S.HARIHARAPUTHRAN
SRI.M.D.SASIKUMARAN
SRI.GEORGE MATHEW
SRI.SUNIL KUMAR A.G
SRI.DIPU JAMES

RESPONDENTS/STATE AND ACCUSED:

1. STATE OF KERALA
REPRESENTED BY ITS PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM-682031.

2. SUJITH KRISHNAN
PROPRIETOR, SMARTFONE, SAGA TOWERS
M.G.ROAD, THIRUVANANTHAPURAM-695001.

R1 BY PUBLIC PROSECUTOR SMT.SEENA RAMAKRISHNAN

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON
06-02-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

Crl.Rev.Pet.No. 97 of 2015

APPENDIX

PETITIONER'S EXHIBITS:

ANNEXURE A1: TRUE COPY OF ORDER DATED 26.12.2014 IN C.C.NO.83 OF 2010
OF THE JUDICIAL FIRST CLASS MAGISTRATE'S COURT (SPECIAL
COURT FOR MARK LIST CASES), THIRUVANANTHAPURAM.

// TRUE COPY //

TKS

P.S. TO JUDGE

"C.R."

C.T.RAVIKUMAR, J.

Crl.R.P.No.97 of 2015

Dated 6th February, 2015

ORDER

This revision petition is directed against the order dated 26.10.2014 in C.C.No.83 of 2010 of the Court of Judicial First Class Magistrate-V (Special Court for Mark list cases), Thiruvananthapuram. The revision petitioner herein was the complainant therein. He filed the same alleging commission of offence under Section 138 of the Negotiable Instruments Act against the 2nd respondent and it was taken on file and registered as C.C.No.83 of 2010. On due process the 2nd respondent appeared before the trial court and the proceedings progressed further and it was during the pendency of the said case that the Hon'ble Apex Court rendered the decision in **Dashrath Rupsingh Rathod v. State of Maharashtra (2014 (3) KLT 605(SC))**. Later, it was returned to the petitioner for filing it before the proper court in the light of the said decision of the Hon'ble Apex Court. The question to be decided is whether the complaint filed by the revision petitioner which was registered and taken into file as C.C.No.83 of 2010 was liable to be returned to him for filing/re-filing before the proper court in the light of the decision in **Dashrath Rupsingh Rathod's** case (supra)? The

correctness, legality and propriety of the said action in returning the complaint in such circumstances beckon consideration in the light of the decision in **Dashrath Rupsingh Rathod's** case (supra) and the relevant provisions of law. On 22.1.2015 this Court issued notice by Special Messenger to the 2nd respondent. Despite the receipt of notice the 2nd respondent has not cared to enter appearance and resist the case.

2. I have heard the learned counsel for the revision petitioner and also the learned Public Prosecutor.

3. To answer the aforesaid question it is worthy to extract paragraph 20 of the decision in **Dashrath Rupsingh Rathod's** case (supra) and the same reads thus:

20. We are quite alive to the magnitude of the impact that the present decision shall have to possibly lakhs of cases pending in various Courts spanning across the country. One approach could be to declare that this judgment will have only prospective pertinence, i.e., applicability to Complaints that may be filed after this pronouncement. However, keeping in perspective the hardship that this will continue to bear on alleged accused/respondents who may have to travel long distances in conducting their defence, and also mindful of the legal implications of proceedings being permitted to continue in a Court devoid of jurisdiction, this recourse in entirety does not commend itself to us. Consequent on considerable consideration we think it expedient to direct that only those cases where, post the summoning and appearance of the alleged Accused, the recording of evidence has commenced as envisaged in S.145(2) of the Negotiable Instruments Act, 1881, will proceeding continue at that place. To clarify, regardless of whether evidence has been

led before the Magistrate at the pre-summoning stage, either by affidavit or by oral statement, the Complaint will be maintainable only at the place where the cheque stands dishonoured. To obviate and eradicate any legal complications, the category of Complaint cases where proceedings have gone to the stage of S.145(2) or beyond shall be deemed to have been transferred by us from the Court ordinarily possessing territorial jurisdiction, as now clarified, to the Court where it is presently pending. All other Complaints (obviously including those where the accused/ respondent has not been properly served) shall be returned to the Complainant for filing in the proper Court, in consonance with our exposition of the law. If such Complaints are filed/refiled within thirty days of their return, they shall be deemed to have been filed within the time prescribed by law, unless the initial or prior filing was itself time barred."

(emphasis added)

4. The aforequoted passage would reveal that taking into account the magnitude of the impact of the pronouncement of the said decision the Hon'ble Apex Court was pleased to issue certain directions therein to eradicate legal implications in respect of certain categories of complaints where proceedings had reached up to the stage of Section 145(2) of N.I. Act or beyond by then. It was directed that in such cases it should be deemed that they were transferred by the Hon'ble Apex Court from the court ordinarily possessing territorial jurisdiction, as clarified in that decision, to the court where they are presently pending. The said decision was rendered by the Hon'ble Supreme Court on 1.8.2014. Evidently, at that relevant point of time C.C.No.83 of 2010 was pending before the Court of Judicial First Class Magistrate-V (Special Court for Mark list cases), Thiruvananthapuram. The question is whether as on

that relevant date the proceedings in the said Calendar Case had reached the stage of Section 145(2) of N.I. Act or beyond ? To ascertain the same it is apropos to refer to Section 145 of the N.I. Act that deals with the evidence on affidavit and it reads thus:-

"145. Evidence on affidavit.-(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any enquiry, trial or other proceeding under the said Code.

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein."

(emphasis added)

5. Section 145 of N.I. Act is purely a procedural provision and it is introduced to ensure that the procedure in complaints under Section 138 of N.I. Act should not be cumbersome and that there should be expeditious conclusion of trials in such cases. There can be no controversy to the position that no person shall have a vested right in any course of procedure and he has only the right of prosecution or right of defence in the manner prescribed by law for the time being. In the revision petition it is categorically stated that the case on hand has actually reached a stage beyond Section 145(2) of N.I.Act. The learned

counsel for the revision petitioner made available certified copy of the court proceedings which, in so far as relevant for the disposal of this case, reads thus:-

- "6.9.12 - Complainant absent. No complied with the direction. Several chances have given delays defeats justice considering the circumstances, evidence of the complainant is closed. Since there is no incriminating evidence 313, is disbursed. For defence evidence and hearing call on 7.9.12.
- 7.9.12 - Accused absent. No representation. Complainant present filed 311 Application. Accused is directed to be present. 20.9.12.
- 17.10.12 - Complainant present. Accused present. Compt. is examined as PW1. Ext.P1 to P5 are marked. Evidence is closed for 313 Cr.P.C. Call on 25.10.12.
- 4.12.12 - Accused present. Filed 315 petition. Copy given. Accused is directed to be present on 18.12.12. Call on 18.12.12.
- 2.1.13 - Complainant absent. Accused present. Defence evidence closed. For hearing call on 11.1.13.
- 24.4.13 - Complainant present recalled and examined. Ext.D1 and D2 marked. For further defence evidence if any. Call on 26.4.13.
- 12.2.14 - Accused present. For hearing on *de novo* trial and for producing documents 26.2.14.
- 12.11.14 - Complainant and Accused present. A petition is being filed for clarification of *de novo* trial. For hearing 19.11.14.

19.11.14 - Accused present. Filed petition stating that this Court has no jurisdiction. Call on 20.11.14."

6. The proceedings of the court, as extracted above, if verified in the light of the provision under Section 145(2), N.I. Act, would undoubtedly reveal that by the time the Hon'ble Apex Court rendered the decision in **Dashrath Rupsingh Rathod's** case (supra) viz., on 1.8.2014 the proceedings in the aforesaid Calendar Case had, in fact, reached beyond the stage of Section 145(2). Evidently, on 2.1.2013 the defence evidence was closed and the case was posted for hearing. On 24.4.2013 the complainant was recalled and examined. Exts.D1 and D2 were marked and the case was posted for further evidence, if any, of the defence. When such a stage had reached prior to 1.8.2014 the learned Magistrate could not have held that Section 145(2) stage had not reached as on 1.8.2014. Merely because an application for *de novo* trial was filed in the meanwhile, it is not discernible as to how and under what circumstances such an application was filed and maintainable, and later an application for clarification of *de novo* trial was filed and it was posted for hearing, the Court below ought not to have returned the file to the revision petitioner in purported compliance with the direction in the decision in **Dashrath Rupsingh Rathod's** case (supra). The proceedings as extracted above when revealed the indisputable position

that they had gone not only up to the stage of 145(2), N.I. Act but, even beyond that stage and the case was in fact, once posted for hearing after closing the defence evidence as well, the action on the part of the court below can only be taken as one contrary to the direction in the said decision. In this context it is apposite to note the decision of this Court in **M/s. Sree Venkatadeswara Enterprises v. G.Rajasekharan Nair ((2007) CrI.L.J. 1626 (Ker)(DB))**. As per the same 'trial' would stand terminated only on pronouncing the judgment either acquitting the accused or awarding the sentence after conviction. When the original trial is yet to be concluded can there be any question of *de novo* trial ? The word '*de novo*' means 'from the beginning', 'anew', 'over again in a different way'. Can a trial court, *suo motu* order *de novo* trial that too, when the trial is yet to be concluded ? Since the application therefor, is pending before the trial court and also, in view of the order I propose to pass in this revision petition I do not think it proper or necessary to consider the said aspect at this stage and in this proceedings. At the same time, when once it is found that in C.C.No.83 of 2010 on the files of the Court of Judicial First Class Magistrate-V (Special Court for Mark list Cases), Thiruvananthapuram the proceedings had reached Section 145(2) stage and, in fact, even beyond as on 1.8.2014, the date of pronouncement of the decision in **Dashrath Rupsingh Rathod's** case (supra) the action on the part of the said court in returning the

complaint, has to be held as not one in tune with the dictum thereunder whilst, only as one contrary to the same. In such circumstances, this Court is bound to correct the same in exercise of the revisional power to regulate the proceedings strictly in tune with the exposition of law by the Hon'ble Supreme Court. In view of the decision of the Hon'ble Apex Court in **Dashrath Rupsingh Rathod's** case (supra) C.C.No.83 of 2010 deemed to have been transferred by the Hon'ble Apex Court from the court ordinarily possessing territorial jurisdiction to the Court of Judicial First Class Magistrate-V (Special Court for Mark list cases), Thiruvananthapuram. In the said circumstances, the impugned order is set aside. The learned magistrate is directed to receive and restore the complaint on file and to proceed with the disposal of the aforesaid Calendar Case as if it was not returned and in accordance with law, with notice to the 2nd respondent, from the very stage it reached when the same was returned to the revision petitioner.

The revision petition is allowed to the above extent.

Sd/-
C.T.RAVIKUMAR
Judge

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