

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.HARILAL

WEDNESDAY, THE 3RD DAY OF JUNE 2015/13TH JYAISHTA, 1937

Cr1.Rev.Pet.No. 226 of 2015

AGAINST THE JUDGMENT IN CC 40/2013 of J.M.F.C.-II,
(ADDITIONAL MUNSIF), KASARAGOD DATED 20-11-2014.

REVISION PETITIONER(S)/COMPLAINANT:

RAJESH MARTIS, AGED 44 YEARS,
S/O. PAUL MARTIS, RESIDING AT MATHA NILAYA,
GK NAGAR,
EDANAD P.O., KASARAGOD DISTRICT.

BY ADV. SRI.SURESH KUMAR KODOTH

RESPONDENT(S)/ACCUSAED & STATE:

1. M MOHAMMED, AGED 47 YEARS,
S/O. ABDUL KHADER, RESIDING AT D NO. 4-62/1,
KRISHNA NAGARA, KUNJATHBAIL POST, MARAKADA,
MANGALORE - 575 015.

2. STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM-682 031.

R2 BY PUBLIC PROSECUTOR SMT. MADHU BEN

THIS CRIMINAL REVISION PETITION HAVING COME UP FOR
ADMISSION ON 03-06-2015, THE COURT ON THE SAME DAY
PASSED THE FOLLOWING:

K. HARILAL, J.

Crl.R.P. No.226 of 2015

Dated this the 3rd day of June, 2015

ORDER

The revision petitioner was the complainant in C.C.No.40 of 2013 on the files of the Judicial First Class Magistrate's Court-II, Kasargod. The above C.C. alleging offence punishable under Sec.138 of the Negotiable Instruments Act, 1881 (for short 'the N.I. Act') against the 1st respondent was originally instituted in the Court of the Chief Judicial Magistrate, Kasaragod, and subsequently it was transferred to the Judicial First Class Magistrate's Court-II, Kasaragod. By order dated 20/11/2014, the learned Magistrate returned the complaint to the petitioner/complainant to be presented before the proper court in view of the pronouncement of the Supreme Court in the decision

in Dashrath Rupsingh Rathod v. State of Maharashtra [2014 (3) KLT 605 (SC)].

2. The above complaint was filed on the allegation that the accused borrowed from the complainant an amount of ₹20 lakhs for his business purpose and thereafter, in discharge of the said liability, he had issued a cheque drawn on the Corporation Bank, Padavu, Mangalore. When the complainant presented the cheque for collection through the Ednad Kannur Service Co-operative Bank Ltd., it was dishonoured on the reason of 'insufficiency of funds'. Thereupon, the complainant issued notice to the accused demanding payment of the cheque amount; but the accused failed to pay the amount.

3. During the course of enquiry under Sec.202 of the Cr.P.C., the learned Magistrate found that major portion of evidence was recorded and there is no order in the order sheet indicating switching over of summary trial to summons trial and the Presiding

Officer who held the proceedings till that stage was transferred to another court. So, the learned Magistrate ordered a fresh trial, in view of the legal position stated by the Apex Court in the decision in *Nitinbhai Saevantilal Sha and another v. Manubhai Manjibai Panchal and another* (AIR 2011 SC 3076).

4. Pursuant to the order for fresh trial, the evidence had to be let in again. When the matter came up before the learned Magistrate, the counsel for the accused pointed out that the cheque in question was drawn on the Corporation Bank, Padavu, Mangalore and the said bank had dishonoured the cheque for want of sufficient funds and in view of the decision in *Dashrath Rupsingh Rathod v. State of Maharashtra* [2014 (3) KLT 605 (SC)], the court within whose jurisdiction the cheque was dishonoured alone will get jurisdiction to trial the case. The court below accepted the said contention and passed an order returning the complaint to the petitioner so as to file

the same before the proper court. The legality of the finding whereby the court below returned the complaint for filing before the proper court, is under challenge.

5. The learned counsel for the petitioner advanced arguments assailing the findings, whereby the court below returned the complaint for filing before the proper court. It is contended that, earlier, trial was conducted and reached up to Sec.313 of the Cr.P.C. stage. Therefore, it cannot be held that the proceedings had not reached up to the stage envisaged in Section 145(2) of the N.I. Act.

6. But, going by the impugned order, it is seen that the proceedings had been reached up to the stage of Sec.313 Cr.P.C. and thereafter, de novo trial had been ordered on the reason that the Presiding Officer switched over the proceedings to summons trial without passing a specific order switching over the proceedings to summons trial and thereafter, the

Presiding Officer, who had taken evidence, was transferred to another court. It is true that the said order is not specifically challenged, in revision, by the complainant. But that order is the basis of the impugned order passed in view of Dashrath Rupsingh Rathod v. State of Maharashtra [2014 (3) KLT 605]. But, I am of the opinion that the basic order by which the learned Magistrate ordered de novo trial is not legally sustainable in view of the decision laid down by the Apex Court in J.V. Baharuni v. State of Gujarat (2014 (10) SCC 494). The learned Magistrate went wrong in ordering de novo trial relying on the decision in Nitinbhai Saevantilal Sha and another v. Manubhai Manjibai Panchal and another (AIR 2011 SC 3076) in ignorance of the above decision. In J.V. Baharuni v. State of Gujarat (2014 (10) SCC 494), the Apex Court settled the legal position in such a way that merely on the reason that no specific order switching over the proceedings from summary trial to summons trial has

not been passed by the predecessor Officer, the succeeding Officer need not take the entire evidence afresh by way of de novo trial. The real test is whether it was only the substance of the evidence that was recorded or whether complete record of the depositions of the witness in the chief-examination and cross-examination. Therefore, the basic order by which the learned Magistrate ordered de novo trial is legally unsustainable, due to the non-application of the above test.

7. Consequently, the impugned order as well as the order by which the de novo trial had been ordered will stand set aside and the matter is remitted back to the trial court for fresh consideration in view of the decision in J.V. Baharuni v. State of Gujarat (2014 (10) SCC 494). Needless to say, according to Dashrath Rupsingh Rathod v. State of Maharashtra [2014 (3) KLT 605 (SC)], in pending matters, remittance of the complaint for filing the same in the court within

whose jurisdiction the dishonour of the cheque occurred is applicable to cases which has not been reached up to the stage envisaged in Sec.145(2) of the N.I. Act. But in the instant case, the earlier proceedings had already reached up to Sec.313 Cr.P.C. stage. Therefore, if the basic order directing de novo trial is unsustainable, certainly, the present complaint can be maintained in the court which passed the impugned order. The court below shall pass order afresh at the earliest.

This revision petition is disposed of accordingly.

Sd/-

(K. HARILAL, JUDGE)

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P.S. to Judge