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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.SUDHEENDRA KUMAR

MONDAY, THE 19TH DAY OF OCTOBER 2015/27TH ASWINA, 1937

Crl.Rev.Pet.No. 1071 of 2015 ()

AGAINST THE JUDGMENT IN CRA 223/2011 of ADDL. SESSIONS COURT - IV,
KOLLAM, DATED 30-04-2015

AGAINST THE JUDGMENT IN ST 339/2009 of J.M.F.C.-IV, KOLLAM DATED
16-05-2011

REVISION PETITIONER(S)/APPELLANT/ACCUSED:

R.VIJAYA KUMARAN PILLAI, AGED 45 YEARS
S/O RAGHAVAN PILLAI, KIHAKKE VEETIL, PURAYAM PO
PANAYAM VILLAGE

BY ADV. SRI.M.DINESH

RESPONDENT(S)/STATE AND COMPLAINANT:

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

2. R. SREEKUMAR
PROPRIETOR, ARATHY CASHEW COMPANY, CHATHINAMKULAM
CHANDANATHOPE PO, KOLAM 691 014

R2 BY ADV. SRI.V.A.AJIVAS
R1 BY PUBLIC PROSECUTOR SRI. R. GITESH

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD
ON 19-10-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

B. SUDHEENDRA KUMAR, J.

.....
Crl.R.P. No. 1071 of 2015
.....

Dated this the 19th day of October, 2015

ORDER

The revision petitioner is the accused in S.T. No. 339 of 2009 on the files of the court of the Judicial Magistrate of First Class-IV, Kollam.

2. The trial Court convicted the revision petitioner under Section 138 of the Negotiable Instruments Act, 1881 and sentenced him thereunder to simple imprisonment for one month and a fine of Rs. 1,50,000/-. In the appeal, the conviction was confirmed and the sentence was modified and reduced to imprisonment till the rising of the Court and a fine of Rs. 1,50,000/-.

3. Heard.

4. The prosecution allegation is that the revision petitioner borrowed an amount of Rs. 1,50,000/- from the complainant and towards the discharge of the said liability, the revision petitioner executed 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 on behalf of the complainant. The revision petitioner received the notice. However, the revision

petitioner did not pay the cheque amount within the statutory period or thereafter.

5. Before the trial Court, PW1 was examined and Exts. P1 to P6 were marked for the complainant. No evidence was adduced on the side of the defence.

6. The learned counsel for the revision petitioner has argued that since Ext. P1 is the photo copy of the cheque, the same cannot be admitted as secondary evidence and in the said circumstances, the conviction and sentence cannot be sustained.

7. In *Sreedevi Amma v. Jayalakshmi* [1998 (1) KLT 197], a learned Judge of this Court held that secondary evidence is admissible only if the original is lost or is in the custody of the defendants, and if it is not explained as to what happened to the original, secondary evidence is not admissible. The Apex Court in *Ram Suresh Singh v. Prabhat Singh* [(2009) 6 SCC 681] held that photocopy of a document in the absence of the original is not admissible in evidence. The Apex Court in *Siddiqui v. Ramalingam* [2011 (1) KLT SN 107 (Case No. 151)] held that mere admission of a document in evidence does not amount to its proof.

8. In a case where the original documents are not produced at any time, nor, any factual foundation has been led for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is inadmissible, until the non-production of the original is accounted for, so as to bring it

within one or other cases provided for in Section 65 of the Evidence Act. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. Mere admission of a document in evidence does not amount to its proof. Therefore, the documentary evidence is required to be proved in accordance with law. In this case, Exts. P1 to P3, P5 and P6 are photocopies. No original was produced before the Court at any time. However, PW1 during the course of examination clarified that the originals of the documents were produced in the civil case instituted by him in respect of the same transaction.

9. Sec. 63 of the Evidence Act provides the definition of secondary evidence. Section 63 (1) of the Evidence Act provides that the certified copy given under the provisions of the Evidence Act includes secondary evidence. Section 63 (3) provides that copy made from or compared with the original, includes secondary evidence. In this case, the original documents were produced before the civil Court as per the evidence of PW1. Therefore, the certified copies are, no doubt, available. If certified copies are available, Section 65 (f) allows secondary evidence. It is evident from Section 65 of the Evidence Act that only certified copy and no other kind of secondary evidence is permissible where the original is a document referred to under clause (f) of Section 65 of the Evidence Act.

10. In this case, the original of the cheque was not produced before the court at any time for comparison with the

photocopy. Original of the other documents was also not produced before the Court to compare with the copies. No certified copy of the documents was also produced before the court. Since the original cheque was not produced for comparison as the original cheque was before the Civil Court, the certified copy of the cheque alone is admissible as secondary evidence and not the photocopy of the same in the absence of the original. It is true that the said documents were marked without raising any objection from the side of the revision petitioner. However, mere marking of a document in evidence does not amount to its proof. Since Exts. P1 to P3, P5 and P6 are not admissible as secondary evidence, the judgment of conviction and sentence passed by the courts below, relying on the said documents, cannot be sustained. However, since PW1 has stated that the originals were produced before the Court in the civil suit in connection with the same transaction, I am of the view that the complainant can be granted an opportunity to produce the certified copy of the original documents to prove his case. The court had an obligation to decide the question of admissibility of a document in secondary evidence before making endorsement thereon as held by the Apex Court in Siddiqui (supra). No party shall suffer due to the mistake on the part of the Court. Therefore, granting an opportunity to the complainant to produce the original or the certified copy will not amount to filling up the lacuna in the prosecution case.

11. In the result, this revision petition stands allowed setting aside the conviction and sentence passed by the courts below and the matter is remitted to the trial court for the disposal of the case afresh, in accordance with law, affording one more opportunity to both sides to substantiate their contentions.

This being a case of 2009, the trial court is directed to dispose of the matter as expeditiously as possible and at any rate, within four months from the date of receipt of a copy of this order. I make it clear that no de novo trial has been ordered by this Court.

The parties shall appear before the trial court on 16-11-2015.

Sd/-B. SUDHEENDRA KUMAR,
JUDGE.

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P.S. To Judge