

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.KEMAL PASHA

THURSDAY, THE 8TH DAY OF OCTOBER 2015/16TH ASWINA, 1937

WP(C).No. 13803 of 2014 (A)

PETITIONER :

**P.F.JOSEPH @ JOSEPH FRANCIS,AGED 45 YEARS,
S/O FARANCIS, PORIYATH HOUSE, CHEMMALAMATTOM P.O.,
ERATTUPETTA, KOTTAYAM DISTRICT.**

**BY ADVS.SRI.S.RAJEEV
SRI.K.K.DHEERENDRAKRISHNAN**

RESPONDENT(S) :

- 1. STATE OF KERALA,
REP. BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM- 682 031**
- 2. SEBASTIAN P.T,AGED 51 YEARS,S/O THOMAS,
PURAYIDATHIL HOUSE, KOTTAMURI P.O.,
THRIKKODITHANAM, CHANGANASSERY,
KOTTAYAM DISTRICT -686 101**

**R1 BY PUBLIC PROSECUTOR SMT. P.MAYA
R2 BY SRI.K.RAMAKUMAR,SENIOR ADVOCATE
ADVS. SRI.S.M.PRASANTH
SRI.M.MANOJKUMAR (CHELAKKADAN)
SMT.ASHA BABU
SRI.G.RENJITH
SMT.AMMU CHARLES**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 08-10-2015, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:**

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[CR]

B. KEMAL PASHA, J.

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W.P.(C) No.13803 of 2014
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Dated this the 8th day of October, 2015

J U D G M E N T

Ext.P2 order, by which the court below has found the petitioner guilty of the offence punishable under Section 138 of the Negotiable Instruments Act, and has imposed a sentence of fine of ₹22 lakhs, is under challenge.

2. According to the petitioner, the learned Magistrate has failed to comply with the mandatory provisions contained under Section 265B(4) Cr.P.C. as the court has failed to examine the petitioner *in camera* in the absence of the complainant.

3. On going through Ext.P2 order, it does not say as to whether the petitioner was examined by the court below *in camera*, in the absence of the complainant in the case. It

is a mandatory procedure contemplated under law that in case of plea bargaining the accused shall be examined by the court below *in camera*, in the absence of the complainant or the defacto complainant. The said provision is incorporated for the absolute satisfaction of the court that in case of plea bargaining there was no compulsion or insistence from the part of the complainant or the defacto complainant as the case may be, on the accused to force a settlement. It is in order to avoid the possibility of any such compulsion or pressure tactics from the part of the complainant or the defacto complainant as the case may be, the said provision has been incorporated.

4. In ***Girraj Prasad Meena v. State of Rajasthan and others***[2013 (4) KLT SN 80] it was held by the Apex Court that all the procedures contemplated in Chapter XXIA of the Cr.P.C. are mandatory in nature and the court has to scrupulously follow all such mandatory provisions contemplated under law for invoking the jurisdiction of the

court to entertain a plea bargaining. In such case, when such a mandatory procedure has been contemplated by law, the court below ought to have mentioned specifically the same in the order that such a mandatory procedure was followed. The petitioner herein has been clamouring from the beginning that the court below has failed to observe such a mandatory procedure. Matters being so, Ext.P2 order is bad in law on that aspect alone.

5. This Court has occasion to note down another gross illegality committed by the learned Magistrate in imposing the sentence also. The court below has chosen to impose a sentence of fine of ₹22 lakhs on the petitioner. It seems that the court below has imposed the said sentence of fine as compensation to the complainant under Section 357(3) Cr.P.C. Instead of that, the court below ought to have imposed a fine. If the sentence is imposed as a fine, the court below could have ordered total fine amount or a quantity out of it, as compensation to the complainant under

Section 357(1) Cr.P.C. When the court below has chosen to impose a sentence of fine, the court below has no power or authority to order compensation under Section 357(3) Cr.P.C. In that respect also, the sentence imposed by the court below is illegal.

6. Consequently, an offence under Section 138 of the N.I. Act is not covered by Section 265E clauses (a) to (c). This is not an offence wherein minimum sentence has been prescribed. In such case, in the case of plea bargaining, the court below ought to have complied with the provisions of Section 265E(d) Cr.P.C, and the court below ought to have imposed one fourth of the sentence that can be imposed. The offence under Section 138 of the N.I. Act is punishable with imprisonment with a term which may extend to 2 years, or with fine, which may extend to twice the amount of cheque. Even in the case of fine, the court below could have imposed only half the amount ordered as fine in the present case. In the matter of sentence, the court

below ought to have considered the substantive sentence of imprisonment as well as the fine which could be imposed. In that case the court below ought to have imposed substantive sentence of imprisonment for six months also.

7. Matters being so, there is gross illegality in the procedure followed by the court below, and gross illegality has been crept in Ext.P2 order also. Therefore, Ext.P2 order is liable to be quashed.

In the result, this Writ Petition is allowed and Ext.P2 order stands quashed. The court below is directed to proceed with matter for taking evidence in the case. Being a matter of 2012, the court below shall dispose of the matter, as expeditiously as possible, at any rate, within a period of six months from the date of receipt of a copy of this judgment.

Sd/- B.KEMAL PASHA, JUDGE

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[True copy]

P.S. to Judge