2023/KER/61453

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.S.DIAS

MONDAY, THE 9TH DAY OF OCTOBER 2023 / 17TH ASWINA, 1945

CRL.REV.PET NO. 3007 OF 2011

AGAINST THE JUDGMENT ST 1125/2005 OF JUDICIAL MAGISTRATE OF FIRST CLASS - III, KOCHI

CRA 685/2010 OF ADDITIONAL SESSIONS COURT (ADHOC-II),ERNAKULAM

REVISION PETITIONER/APPELLANT/ACCUSED:

RAJU J VYLATTU
S/O.LATE V.T.JOSEPH,, AGED 38 YEARS,RESIDING AT VYLATTU HOUSE, FORT KOCHI,FORT KOCHI VILLAGE,KOCHI-1, ERNAKULAM DISTRICT

BY ADVS.
SRI.T.MADHU
SRI.K.V.BINOD

RESPONDENTS/RESPONDENTS/COMPLAINANT & STATE:

1 P.V. ALEXANDER
PROPRIETOR,ST.MARY'S OIL MILLS,, DEVELOPMENT AREA,AROOR,AROOR P.O, ALAPPUZHA DISTRICT PIN- 688 534

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

BY ADVS.
SRI.BLAZE K.JOSE
SMT.B.BINDU
SMT.DEEPA NARAYANAN

SR.PUBLIC PROSECUTOR SMT. SEETHA S.

THIS CRIMINAL REVISION PETITION HAVING COME UP FOR ADMISSION ON 09.10.2023, ALONG WITH Crl.Rev.Pet.3008/2011, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.S.DIAS

MONDAY, THE 9TH DAY OF OCTOBER 2023 / 17TH ASWINA, 1945

CRL.REV.PET NO. 3008 OF 2011

AGAINST THE JUDGMENT IN ST 1126/2005 OF JUDICIAL MAGISTRATE OF FIRST CLASS - III, KOCHI

CRA 687/2010 OF ADDITIONAL SESSIONS COURT (ADHOC-II),ERNAKULAM

REVISION PETITIONER/APPELLANT/ACCUSED:

RAJU J. VYLATTU, S/O LATE V.T. JOSEPH
AGED 38 YEARS, RESIDING AT VYLATTU HOUSE,, FORT KOCHI, FORT KOCHI VILLAGE, KOCHI-1, ERNAKULAM DISTRICT.

BY ADVS.
SRI.T.MADHU
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RESPONDENTS/RESPONDENTS/COMPLAINANT & STATE:

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ST.MARY'S OIL MILLS, DEVELOPMENT AREA,, AROOR, AROOR P.O., ALAPPUZHA DISTRICT, PIN-688 534.

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

BY ADVS.
SMT.N.DEEPA
SRI.BLAZE K.JOSE
SMT.B.BINDU,
SR.PUBLIC PROSECUTOR SMT. SEETHA S.

THIS CRIMINAL REVISION PETITION HAVING COME UP FOR ADMISSION ON 09.10.2023, ALONG WITH Crl.Rev.Pet.3007/2011, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

"C.R."

Dated this the 9th day of October, 2023

COMMON ORDER

Will the failure to question an accused under Section 313 (1) (b) of the Code of Criminal Procedure vitiate the entire proceedings?

2. The revision petitions are directed against the common judgment in Crl.Appeal Nos.685/2010 and 687/2010 of the Court of the Additional Sessions Judge (Adhoc-II), Ernakulam (Appellate Court) confirming the common judgment in S.T Nos.1125/2005 and 1126/2005 of the Court of the Judicial First Class Magistrate-III, Kochi, (Trial Court), whereby the courts have concurrently convicted and sentenced the revision petitioner for the offence under Section 138 of the Negotiable Instruments Act ('Act', in short). As the parties are the same and the complaints and appeals

were disposed of by common judgments, these revision petitions were consolidated, jointly heard, and are disposed of by this common order. For convenience, the parties are referred to as per their status before the Trial Court.

Relevant Factual Narrative

3. The complaints were filed against the accused, alleging him to have committed the offence under Section 138 of the Act. The complainant's common case is that, he is a businessman and is conducting an Oil Mill. The accused had borrowed Rs.10/- lakh from him and in the discharge of the said liability had issued Exts.P2 and P6 cheques. On the cheques being presented to the bank for collection, they got dishonoured, by Exts.P3 and P7 memorandums, due to 'insufficient funds' in the accused's bank account. Even though the complainant had issued Exts.P5 and P9 statutory lawyer notices to the accused, the same were returned with an endorsement as 'unclaimed'. As the accused failed to pay the demanded

amount, he committed the offence.

4. The accused on receipt of the summons, entered appearance and pleaded not guilty to the substance of the accusations read over to him. In the trial, the power of attorney holder of the complainant was examined as PW1 and Exts.P1 to P9 were marked in evidence. The records reveal that the learned Magistrate without questioning the accused under Section 313 (1) (b) of the Code of Criminal Procedure (for brevity, 'Code'), proceeded with further proceedings. The accused did not let in any defence evidence.

Trial Court common judgment

5. The learned Magistrate, by the common judgment, convicted and sentenced the accused for the above offence.

6. Aggrieved by the common judgment, the accused preferred the appeals before the Appellate Court.

Appellate Court common judgment

7. The Appellate Court, after re-appreciating the

materials placed on record, by the impugned common judgment confirmed the conviction but modified the substantive sentence imposed by the learned Magistrate.

8. It is questioning the legality, propriety and correctness of the above common judgments these revision petitions are filed.

9. Heard; Sri. T.Madhu, the learned counsel appearing for the revision petitioner and Smt. Seetha S, the learned Public Prosecutor appearing for the second respondent - State.

Arguments

10. Sri.T. Madhu strenuously argued that the courts below have failed to comply with the mandate under Section 313 of the Code, which is an indefeasible right of the accused. Therefore, the entire proceedings and the impugned judgments are vitiated, and the accused is to be acquitted. He relied on the judgments of the Honourable Supreme Court in **Janak Yadav and Others**

v. State of Bihar[1999 KHC 1499], **TGN Kumar v. State of Kerala and Others**[2011 (1) KHC 142],**Keya Mukherjee v. Magma Leasing Limited and Another[**2008 KHC 6282] and **Sunil v. State of NCT of Delhi** [Crl.Appeal No.688/2011], to fortify his contention. He further argued that the power of attorney holder of the complainant (PW1) was ignorant of the alleged transaction, and there is a lack of pleading in the complaints regarding PW1's knowledge of the transaction, which is imperative in the light of the law laid down by this Court in **Razak Mether v. State of Kerala** [2023 (1) KHC 377]. He prayed that the revision petitions be allowed, and the impugned judgments be set aside.

Prosecution case

11. The complainant's common case in the two complaints is that the accused had borrowed Rs.10/- lakh from him, and in discharge of the liability he had issued Exts.P2 and P6 cheques, which got dishonoured due to

'insufficient funds' in the accused's bank account. Although the complainant had issued statutory lawyer notices to the accused, he failed to pay the demanded amount. Hence, the accused committed the offence.

12. It is trite that the revisional jurisdiction of this Court is to be sparingly exercised to correct patent errors and manifest illegalities committed by the courts, and when there is an apparent misreading of the records.

13. Keeping in mind the above principles, this Court proceeds to examine the revisions petitions.

Statutory Provision

14. Section 313 of the Code reads as follows:-

> 313. Power to examine the accused**.—(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court—**
>
> (a) may at any stage, without previously warning the accused put such questions to him as the Court considers necessary;
>
> **(b) shall after the witnesses for the prosecution have been examined and before he is called on for his defence question him generally on the case:**
>
> **Provided that in a summons-case where the Court has dispensed with the personal attendance of the accused, it may also dispense with his**

examination under clause (b).

(2) No oath shall be administered to the accused when he is examined under sub-section (1).

(3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.

(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

[(5) The Court may take help of Prosecutor and Defence Counsel in preparing relevant questions which are to be put to the accused and the Court may permit filing of written statement by the accused as sufficient compliance of this section.]

15. Clause (b) of sub-section (1) of Section 313 makes it obligatory for every Court, in an inquiry or trial, to enable the accused to explain the circumstances appearing against him in the evidence, after the witnesses for the prosecution have been examined and before the accused is called upon to let his defence, to question him generally on the case. The word used in clause (b) is 'shall' unlike the word 'may' in clause (a) of sub-section (1) of Section 313 of the Code.

Precedents

16. In **Jai dev v. State of Punjab** [AIR 1963 SC 612], Gajendragadkar (J) (as he then was), speaking for

a three-judge Bench, while interpreting Section 342 of the old Code, which is pari-materia to Section 313 of the present Code, observed thus:

> "21. xxx xxx xxx The ultimate test in determining whether or not the accused has been fairly examined under Section 342 would be to inquire whether having regard to all the questions put to him, he did get an opportunity to say what he wanted to say in respect of prosecution case against him. If it appears that the examination of the accused persons was defective and thereby a prejudice has been caused to him, that would no doubt be a serious infirmity.'

17. In **Janak Yadav's** case (supra) the Honourable Supreme Court held as under:

> "5. S.313 CrPC prescribes a procedural safeguard for an accused facing the trial to be granted an opportunity to explain the facts and circumstances appearing against him in the prosecution's evidence. **That opportunity is a valuable one and cannot be ignored. It is not a case of defective examination under S.313 CrPC where the question of prejudice may be examined but a case of no examination at all under S.313 CrPC and as such the question whether or not the appellants have been prejudiced on account of that omission is really of no relevance.** It was open to the High Court to have either examined the accused, whose statements under S.313 CrPC had not been recorded, itself under S.313 CrPC and then proceeded with the hearing of the appeal or directed retrial of the case confined to the stage of recording of the statements of the appellants under S.313 CrPC but it was not justified to order the retrial of the entire case by framing de novo charges and examining afresh prosecution evidence. The direction of the High Court to that extent cannot be sustained".
>
> **(emphasis supplied)**

18. In **TGN Kumar's** case (supra), the Honourable Supreme Court held as follows:

> "14. In Basavaraj R. Patil and Others (supra), while advocating a pragmatic and humanistic approach in less serious offences, Thomas, J. speaking for the majority in a Bench of three learned Judges, explained the scope of clause (b) to S.313(1) of the Code as follows:
>
> 'The word 'shall' in clause (b) to S.313(1) of the Code is to be interpreted as obligatory on the Court and it should be complied with when it is for the benefit of the accused. But if it works to his great prejudice and disadvantage the Court should, in appropriate cases, e.g., if the accused satisfies the Court that he is unable to reach the venue of the Court, except by bearing huge expenditure or that he is unable to travel the long journey due to physical incapacity or some such other hardship, relieve him of such hardship and at the same time adopt a measure to comply with the requirements in S.313 of the Code in a substantial manner. How could this be achieved? If the accused (who is already exempted from personally appearing in the Court) makes an application to the Court praying that he may be allowed to answer the questions without making his physical presence in Court on account of justifying exigency the Court can pass appropriate orders thereon, provided such application is accompanied by an affidavit sworn to by the accused himself containing the following matters:
>
> (a) A narration of facts to satisfy the Court of his real difficulties to be physically present in Court for giving such answers.
>
> (b) An assurance that no prejudice would be caused to him, in any manner, by dispensing with his personal presence during such questioning.
>
> (c) An undertaking that he would not raise any grievance on that score at any stage of the case."

19. The Hon'ble Supreme Court in **Alister Anthony**

Pareira v. State of Maharashtra[(2012) 2 SCC 648] summarising the law relating to the examination of an accused under Sec.313 of the Code took a slightly different view from the earlier line of decisions by observing thus:

> **"61. From the above, the legal position appears to be this: the accused must be apprised of incriminating evidence and materials brought in by the prosecution against him to enable him to explain and respond to such evidence and material. Failure in not drawing the attention of the accused to the incriminating evidence and inculpatory materials brought in by prosecution specifically, distinctly and separately may not by itself render the trial against the accused void and bad in law; firstly, if having regard to all the questions put to him, he was afforded an opportunity to explain what he wanted to say in respect of prosecution case against him and secondly, such omission has not caused prejudice to him resulting in failure of justice. The burden is on the accused to establish that by not apprising him of the incriminating evidence and the inculpatory materials that had come in the prosecution evidence against him, a prejudice has been caused resulting in miscarriage of justice."**

20. Again in **Nar Singh v. State of Haryana** [2015 (1) SCC 496], the Honourable Supreme Court after a survey of the decisions on the point in question, has laid down the courses available when there was a failure to record the statement of the accused under Section 313 of

the Code. In that context, it was observed as follows:

> "30. Whenever a plea of omission to put a question to the accused on a vital piece of evidence is raised in the appellate court, courses available to the appellate court can be briefly summarised as under:
>
> 30.1 Whenever a plea of non-compliance of Section 313 CrPC is raised, it is within the powers of the appellate court to examine and further examine the convict or the counsel appearing for the accused and the said answers shall be taken into consideration for deciding the matter. If the accused is unable to offer the appellate court any reasonable explanation of such circumstance, the court may assume that the accused has no acceptable explanation to offer.
>
> 30.2 In the facts and circumstances of the case, if the appellate court comes to the conclusion that no prejudice was caused or no failure of justice was occasioned, the appellate court will hear and decide the matter upon merits.
>
> **30.3 If the appellate court is of the opinion that noncompliance with the provisions of Section 313 CrPC has occasioned or is likely to have occasioned prejudice to the accused, the appellate court may direct retrial from the stage of recording the statements of the accused from the point where the irregularity occurred, that is, from the stage of questioning the accused under Section 313 CrPC and the trial Judge may be directed to examine the accused afresh and defence witness, if any, and dispose of the matter afresh.**
>
> 30.4 The appellate court may decline to remit the matter to the trial court for retrial on account of long time already spent in the trial of the case and the period of sentence already undergone by the convict and in the facts and circumstances of the case, may decide the appeal on its own merits, keeping in view the prejudice caused to the accused."
>
> (emphasis given)

21. However, a contrary view was taken by the Honourable Supreme Court in **Shobhit Chamar and Another v. State of Bihar**[(1998) 3 SCC 455], wherein it is held that a challenge to the conviction based on non-compliance of Section 313 of the Code cannot be taken for the first time in an appeal unless the accused demonstrates that prejudice has been caused to him. The relevant observation in paragraph 24 is extracted below:

> "24. We have perused all these reported decisions relied upon by the learned advocates for the parties and we see no hesitation in concluding that the challenge to the conviction based on non-compliance of Section 313 CrPC first time in this appeal cannot be entertained unless the appellants demonstrate that the prejudice has been caused to them. In the present case as indicated earlier, the prosecution strongly relied upon the ocular evidence of the eyewitnesses and relevant questions with reference to this evidence were put to the appellants. If the evidence of these witnesses is found acceptable, the conviction can be sustained unless it is shown by the appellants that a prejudice has been caused to them. No such prejudice was demonstrated before us and, therefore, we are unable to accept the contention raised on behalf of the appellants."

Finding

22. A reading of the above statutory provision and the principles laid down in the above-cited precedents makes

it obligatory for the courts, in an inquiry or trial, unless in a summons case where the Court has dispensed with the personal attendance of the accused, to question the accused generally on the case for the purpose of enabling the accused to explain the circumstances against him in the evidence, after the witnesses for the prosecution have been examined and before the accused is called upon to let his defence. The provision is to be interpreted to the advantage of the accused and not to nail him to any position and as a corollary to benefit the court in arriving at the correct conclusion. The salutary intention of the provision is to align with the principles of natural justice, specifically, the "audi alteram partem" principle, which dictates that both sides must be heard; otherwise, the inculpatory materials and circumstances of the exhortation not put to the accused under Section 313 cannot be used against him. Even though it is by now settled, the failure to put the incriminating circumstances to the accused may not ipso - facto vitiate the entire trial,

it can be established that the non-compliance of the mandate of the provision would vitiate the proceedings from the stage of Section 313 of the Code.

23. Viewed in the above factual and legal background, especially when there has been a denial of a fair opportunity to revision petitioner/accused to explain the incriminating circumstances appearing in the evidence against him and other grounds raised in the memorandums, this Court is of the firm view that the failure on the part of the learned Magistrate in not questioning the accused under Section 313 (1) (b) of the Code has resulted in miscarriage of justice, which warrants interference by this Court. Thus, I am constrained to set aside the judgments of the courts below and remit the complaints to the Trial Court to the stage of questioning of the accused under Section 313 (1) (b) of the Code and, thereafter, to proceed to decide the complaints afresh from the said stage, which will do complete justice and eliminate the prejudice caused to

the revision petitioner.

Decision

24. Resultantly, I order the revision petitions as follows:

(i) The impugned judgments in Crl.A. Nos.685/2010 and 687/2010 and S.T. Nos. 1125/2005 and 1126/2005 are set aside;

(ii) The Trial Court is directed to question the revision petitioner/accused under Section 313 (1) (b) of the Code in the two complaints and proceed to decide the complaints from that stage in accordance with law;

(iii) The revision petitioner and the first respondent are directed to mark their appearance before the Trial Court on 1.12.2023;

(iv) The Registry is directed to forthwith transmit the lower courts records to the Trial Court;

(v) The revision petitioner and the first respondent would be at liberty to raise all the contentions before the Trial Court;

(vi) The learned Magistrate shall dispose of the complaints, in accordance with law and as expeditiously as possible.

Sd/-

C.S.DIAS, JUDGE

rmm10/10/2023