IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

FRIDAY, THE 25TH DAY OF NOVEMBER 2022 / 4TH AGRAHAYANA, 1944

CRL.MC NO. 8237 OF 2022

AGAINST THE JUDGMENT IN ST 1457/2018 OF JUDICIAL MAGISTRATE OF FIRST CLASS (SPECIAL COURT)FOR TRIAL OF CASES U/S.138, NIACT (TEMPORARY)

PETITIONER/ACCUSED:

SUJITH.A.V
AGED 46 YEARS
PROPRIETOR,
M/S. KRISHNA AYURVEDA PHARMACY,
DOOR NO. KP 9/689 A.,
KOLANCHERY, KANNUR DISTRICT.
PIN - 670601.

BY ADVS.
M.B.SHYNI
V.R.ANILKUMAR
RAJESH KUMAR R.
RAMEES P.K.
ERFANA PARAMBADAN
SARAFUDHEEN T.

RESPONDENTS/STATE & COMPLAINANT:

1 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULM,
PIN - 682031.

2 V.N.RANA SINGH
AGED 56 YEARS, S/O. NARAYANAN KALIYATH,
DREAM VILLA HOUSE, AVITANALLUR P.O., NADUVANNUR,
KOZHIKODE DISTRICT, PIN - 673614.

PUBLIC PROSECUTOR SRI.G.SUDHEER

THIS CRIMINAL MISC.CASE HAVING BEEN FINALLY HEARD ON 17.11.2022, THE COURT ON 25.11.2022 PASSED THE FOLLOWING:

"C.R"

A. BADHARUDEEN, J.

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Crl.M.C.No.8237 of 2022

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Dated this the 25th day of November, 2022

O R D E R

This is a petition filed under Section 482 of the Code of Criminal Procedure (hereinafter referred to as `Cr.P.C' for short) by the petitioner, who is the accused in S.T.No.1457/2018 on the file of the Judicial Magistrate of First Class (Special Court) For Trial of Cases, Kozhikode, for the following relief:

> *"to direct the trial court to give an opportunity to the petitioner to examine the Secretary Kottur Service Co-operative Bank with a limited purpose for proving the transaction of the petitioner and the 2nd respondent by using cheque No.33752 in the interest of justice."*

2. In this petition, the petitioner impugns Annexure 4 order in Crl.M.P.No.479/2022 in S.T.No.1457/2018 dated 04.08.2022 as well as Annexure 5 order in Crl.R.P.No.46/2022 dated 27.10.2022 on

the files of the Sessions Court, Kozhikode.

3. Heard the learned counsel for the petitioner as well as the learned Public Prosecutor, appearing for the 1st respondent. Notice to the 2nd respondent stands dispensed with.

4. *Is it permissible to compel and examine the prosecution witness allegedly examined in chief, cross examined and re-examined as a defence witness in tune with the statutory command under Section 233(3) of Cr.P.C ?* is the querry to be answered.

5. In the case in hand, a petition was filed by the petitioner herein to summon and examine Secretary, Kottur Service Co-operative Bank as a defence witness. As per Annexure 4 order, the learned Magistrate dismissed the same. When the order was challenged before the Sessions Court by way of revision, The Sessions Court also dismissed the same as per Annexure 5 order.

6. It is submitted by the learned counsel for the petitioner that in this case, the petitioner has been defending the allegation of

the 2nd respondent herein, who is the original complainant before the trial court that the petitioner had committed offence punishable under Section 138 of the Negotiable Instruments Act when cheques for for Rs.6 lakh and Rs.5 lakh (total Rs.11 lakh), alleged to be issued by the accused to the complainant, were dishonoured. It is submitted that Secretary, Kottur Service Co-operative Bank was examined as PW3 and during his examination the details regarding cheque No.33751 alone was asked and during cross examination, PW3 stated that the true nature of transaction could be explained by producing cheque No.33752 also. Accordingly, CMP.No.5102/2021 was filed to recall PW3 and the learned Magistrate Court dismissed the same. According to the learned counsel for the petitioner, now the prayer in Crl.M.P.479/2022 is to examine the Secretary, Kottur Service Co-operative Bank, as defence witness and the same is legally permissible.

7. In this matter, the learned Additional Sessions Judge dismissed Crl.R.P.No.46/2022 relying on a decision reported in

[AIR 2006 SC 1769 : 2006 KHC 842 : 2006 (3) KLT 205 : (2006) 9 SCC 549], ***State of Madhya Pradesh v. Badri Yadav***]. In the said decision, the Apex Court considered the impact of Section 233(3) of Cr.P.C. Section 233 deals with `entering upon defence'. Sub section 3 of Section 233 provides that *if the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice.* While interpreting sub section 3 of Section 233 of Cr.P.C, the Apex Court held that *S.233 itself deals with entering upon defence by the accused. The application for recalling and reexamining persons already examined, as provided under S.311 Cr.P.C., was already rejected. The power to summon any person as a witness or recall and reexamine any person already examined is the discretionary power of the Court in case such evidence appears*

to it to be essential for a just decision of the case. Under S.233 Cr.P.C the accused can enter upon defence and he can apply for the issue of any process for compelling the attendance of any witness in his defence. The provisions of sub-s.(3) of S.233 cannot be understood as compelling the attendance of any prosecution witness examined, cross examined and discharged to be juxtaposed as Dws (Defence Witnesses). In the present case PW8 and PW9 were juxtaposed as DW1 and DW2. This situation is not one what was contemplated by sub-s.3 of S.233 Cr.P.C.

8. Thus the law is very clear on the point that the provisions of sub section 3 of Section 233 Cr.P.C could not be understood as one compelling the attendance of any prosecution witness, who was examined in chief already, cross examined and reexamined, to be examined as a defence witness.

In the present case, the prayer that has been canvassed after dismissal of the petition filed to recall PW3 is for the said purpose and, therefore, such procedure cannot be permitted. In view of the

matter, the orders impugned do not require any interference and, therefore, this petition lacks merit and is accordingly dismissed.

Sd/-

(A. BADHARUDEEN, JUDGE)

rtr/

APPENDIX OF CRL.MC 8237/2022

PETITIONER'S ANNEXURES

Annexure 1	A TRUE COPY OF THE DEPOSITION OF PW1 IN S.T.NO. 1457/2018 OF SPECIAL JUDICIAL FIRST CLASS MAGISTRATE COURT, (NEGOTIABLE INSTRUMENTS ACT CASES) KOZHIKODE.
Annexure 2	A TRUE COPY OF THE DEPOSITION OF PW3 IN ST.NO. 1457/2018.
Annexure 3	A TRUE COPY OF THE ORDER PASSED BY THE SPECIAL JUDICIAL FIRST CLASS MAGISTRATE COURT (NI ACT CASES) KOZHIKODE DATED 09/02/2022 IN CMP.5102/2022.
Annexure 4	A TRUE COPY OF THE ORDER PASSED BY THE SPECIAL JUDICIAL FIRST CLASS MAGISTRATE COURT, (N.I ACT CASES) KOZHIKODE IN CMP NO.479/2022 IN ST.NO. 1457/2018.
Annexure 5	A TRUE COPY OF THE ORDER IN CRIMINAL REVISION PETITION NO.46/2022 PASSED BY THE SESSIONS COURT, KOZHIKODE DATED 27/10/2022.