

IN THE COURT OF THE JUDICIAL FIRST CLASS MAGISTRATE-II, ALAPPUZHA

Present:-Ms.Lakshmy.S.,Judicial First Class Magistrate-II

Monday the 11th day of December, 2023/ 20th Agrahayana, 1945

C.C.104/20

Complainant Binu Antony, S/o K.M. Antony, 44 years, Choolayil, Karalakam ward, Thathampally.P.O, Alappuzha (dead) through his wife Jisimol Joseph, represented by Power of Attorney Biju Antony, S/o Antony, Choolayil, Karalakam Ward, Alappuzha (By Adv.G.Priyadarsan Thampi)

Accused	Salimraj, S/o Muhammed Kkunju, Malika House, Avalookunnu.P.O, Alappuzha (By Adv.P.Umasankar)
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Offence : Punishable u/S.138 of the NI Act

Plea : Not guilty

Finding : Guilty

Sentence or order	: The accused is convicted u/S.255(2) CrPC and is sentenced to undergo simple imprisonment for three months and to pay a fine of Rs.10,00,000/- (Rupees Ten Lakhs only) under S.138 of the N.I. Act. In default of payment of fine, the accused shall undergo simple imprisonment for a period of one month. The fine amount; if realised, shall be paid in full to the complainant as compensation u/S.357(1) Cr.P.C.
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Description of the accused

Name	Fathers Name	Occupation	Residence	Age
Salimraj	Muhammed Kunju	Not mentioned	Malika house, Avalookunnu.P.O, Alappuzha	48

Dates of

Occurrence	Complaint	Appearance	Release on bail	Commencement of trial	Close of trial	Sentence or order
10.06.2020	07.08.2020	29.03.2021	29.03.2021	29.03.2021	08.12.2023	11.12.2023

This case having been finally heard on 08.12.2023 and on 11.12.2023, the court delivered the following:-

J U D G M E N T

This is a private complaint filed u/S.190(1)(a) Cr.P.C and Sec.142 of the Negotiable Instrument Act alleging offence punishable u/S.138 of the Negotiable Instruments Act; hereinafter mentioned as N.I.Act.

2. The case of the complainant is briefly stated as follows: The complainant was working Saudi Arabia and the accused made the complainant believe that he was the owner of a house boat and offered to lease out the same to the complainant. Thus he received a sum of Rs.9,00,000/- from the complainant on 05.09.2019. But later the complainant realised that there was no house boat in the name of accused and so he repeatedly demanded to return the money. Thereafter at the interference of mediators, the accused agreed to pay a sum of Rs.10,00,000/- towards the liability which included the loss suffered by the complainant, interest of the sum and mental agony caused. On 05.06.2020, the accused came to the house of complainant and issued a cheque bearing No.579532 dated 06.06.2020 for Rs.3,00,000/- and a cheque bearing No.579531 dt.09.06.2020 for Rs.7,00,000/- both drawn on his account with the SBI, Kaichundimukku Branch to the complainant. The accused made the complainant to believe that the cheques would be honoured on presentation. The complainant presented the cheque for encashment through his bank, South Indian Bank. On 10.06.2020, the cheques got dishonoured and returned unpaid for the reason "Funds Insufficient". Thus the complainant caused to issue a registered legal notice to the accused on 24.06.2020 stating the dishonour of the cheque and demanded payment of the the cheque amount. The accused did not accept the notice and the same was returned on 16.07.2020. He did not make any payment and thus the complaint was filed for the offence

u/S.138 of NI Act.

3. After considering the affidavit of the complainant and perusing the documents produced along with the complaint, the complaint was taken on file on satisfaction of a prima facie case and summons was issued to the accused.

4. The complaint was initially filed before the Chief Judicial Magistrate Court, Alappuzha and taken on file as CC 399/2020. Thereafter the case was made over to this Court on 13.08.2020 and was taken on file as CC 104/2020. On appearance of the accused, he was furnished with copies of records as provided u/S.207 Cr.P.C. After hearing both sides and perusing the records, particulars of offence u/S.138 of N.I Act was read over to the accused, to which he pleaded not guilty. The accused was enlarged on bail.

5. The matter was posted for evidence and it was reported that the complainant was no more. Hence his wife was permitted to conduct the prosecution as per Order in CMP 991/22 dt.01.09.2022. She appointed a Power of Attorney to conduct the case and as per order in CMP 405/23 dt. 03.02.2023 the Power of Attorney was accepted. The said Power of Attorney was examined as PW1 and Exts.P1 to P7 were marked from the side of the complainant. On the closure of the complainant's evidence the accused was questioned u/S.313(1)(b)Cr.P.C. The incriminating circumstances were denied by the accused and the plea of innocence was maintained. The accused filed written statement u/S.313(5) Cr.P.C.

6. The defence case is as follows: The accused had no transaction with the complainant. When the complainant returned from Saudi Arabia, he approached the accused to arrange a houseboat for lease and thus he introduced one Rejila of Punnapra to the complainant. They entered into an agreement on terms to give Rs.9,00,000/- as advance and Rs.50,000/- as monthly rent. Both of them signed the agreement for which one George was a witness. At the time when the complainant entered into agreement with

Rejila, he obtained five undated signed cheques from the accused towards security as he had introduced Rejila to the complainant. As there occurred default in payment of rent, Smt.Rejila went abroad and the complainant misused the cheques of accused and filed this complaint.

7. Heard both sides and perused records.

8. Points that arise for consideration are:-

- (1) *Did the complainant comply with the procedural formalities in filing the complaint u/S.138 NI Act?*
- (2) *Whether the accused executed Ext.P1 and P2 cheques in favour of the complainant in discharge of a legally enforceable debt or other liability?*
- (3) *Did the accused commit the offence punishable u/S.138 of the N.I.Act?*
- (4) *If found guilty, what is the proper sentence or order?*

9. **Point No.1:-** The complaint is filed alleging offence punishable under S.138 of the N.I.Act. The N.I.Act laid down certain conditions under S.138 and S.142 of the NI Act to institute a complaint in order to prevent unnecessary prosecution against dishonest drawers and to give them an opportunity for repayment. So the prime matter for consideration is whether the complainant has complied with the statutory formalities.

10. In the present case Ext.P1 cheque is dated 06.06.2020 and Ext.P2 cheque is dated 09.06.2020. The cheques got dishonored on 10.06.2020 as per Ext.P3series return memo ie; within the period of validity of the cheques. Ext.P4 demand notice was issued on 24.06.2020 within the statutory period of 30 days as evidenced from Ext.P5 postal receipt. The legal notice was returned 'unclaimed' on 16.07.2020 and the complaint was filed on 07.08.2020. All these are done within the time frame and there is no dispute

on the compliance of statutory formalities. The complainant has complied with all the procedural formalities in filing the complaint. Accordingly the point is found in favour of the complainant.

11. **Point No.2:-** In order to prove the existence of debt and execution of Ext.P1 cheque, the power of attorney of the wife of complainant was examined as PW1. PW1 gave evidence through his affidavit in tune with the averments in the complaint. The case of the complainant is that he paid a sum of Rs.9,00,000/- to the accused to avail a houseboat on lease as the accused made him believe that he owned a houseboat. But later complainant realised that the accused had no such houseboat and so he requested the accused to return his money. After repeated demands and through the intervention of mediators, the accused agreed to pay Rs.10lakhs towards advance amount, its interest and also for the suffering and loss sustained by the complainant. Thus the accused had issued Ext.P1 and P2 cheques which were dishonoured when presented for collection.

12. The defence version is that the agreement for lease with respect to the houseboat was between the complainant and one Rejila. The advance amount of Rs.9,00,000/- was given to the said Rejila and at that time, the complainant collected five undated signed blank cheques from the accused towards security as Rejila was introduced to the complainant by the accused. It is further alleged that the accused had not borrowed any amount and not executed cheques in favour of complainant.

13. The learned counsel for the accused argued that initial burden lies upon the complainant to prove the circumstances under which cheques were issued in his favour and that the same was issued in discharge of a legally enforceable debt. The learned counsel further argued that the accused has not admitted the execution of the cheques and so the complainant is bound to adduce evidence to prove the execution. The learned defence counsel further advanced an argument that PW1 had no direct knowledge

about the alleged transaction and hence his evidence is not sufficient to prove the execution of cheques herein.

14. PW1 is the brother of deceased complainant and he gave evidence through his affidavit about the transaction which the complainant had with the accused. But the defence on the other side has not challenged that PW1 has no direct information about the transaction, when he was cross examined. The learned defence counsel pointed out that when PW1 was asked about the lease agreement between the complainant and one Rejila, PW1 deposed that he did not know about such an agreement. But the same is not sufficient to discard the evidence of PW1, as the complainant never had a case that there was an agreement between himself and the said Rejila. The evidence of PW1 was not challenged with regard to his knowledge as to when and where the transaction happened and as to how the cheques were handed over to the accused. Moreover, the defence version would show that the accused has no dispute on Ext.P1 and P2 cheques and his signature in both the cheques. He has further admitted that the complainant had approached the accused to get a house boat on lease and that a sum of Rs.9,00,000/- was paid as advance. As Ext.P1 and P2 cheques and its signature are admitted, the statutory presumption u/S.139 NI Act would attract and hence the onus is upon the defence to rebut the presumption.

15. The decisions of the Hon'ble Apex Court in **Kalamani Tex & Another v. Balasubramanian.P; ILR 2021 (1) Ker.855** and **Bir Singh v. Mukesh Kumar; AIR 2019 SC 2446**, the Hon'ble Apex Court has held that statute mandates that once the signature on the cheque is established, then the reverse onus clause become operative and the obligation shifts upon the accused to discharge the presumption u/S.118 and 139 NI Act imposed upon him. Similarly in **Bir Singh's** case, the Hon'ble Apex Court held that even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption u/S.139 NI Act, in the

absence of any cogent evidence to show that the cheque was not issued in discharge of a debt.

16. In this case, the defence version would show that the accused had involvement in the transaction alleged by the complainant. He has further admitted that he handed over Ext.P1 and P2 as signed blank cheques, but on a different situation. In order to explain the said situation, the accused can rely upon the circumstantial evidence and the standard of proof for rebutting the presumption is that of preponderance of probabilities. So the matter to be considered is whether the accused could make out a probable case to rebut the presumption in favour of the complainant. The defence version is that the lease agreement with respect to houseboat was between the complainant and one Rejila. It is further contended that the complainant gave Rs.9lakhs to the said Rejila. If that be so, it is not clear as to why the accused had handed over his blank signed cheques to the complainant. If the accused had no role or liability then he would never give cheques to the complainant. The alleged lease agreement is not before the court and Smt.Rejila who allegedly collected money from complainant is also not examined. No persons who had some information about the alleged transaction was also not examined and the circumstances advanced by the accused remain as a figment of his imagination. There is no evidence to find that there was any earnest effort from the side of accused to get back his blank cheque which he allegedly gave as security. The accused had not cared to receive the legal notice and his silence after notice also makes the defence improbable. In short, it cannot be found that the accused has made out a probable case to make the prosecution case suspicious.

17. The next argument of the defence is that the amount mentioned in the cheques is Rs.10lakhs whereas the complainant's case is that he handed over Rs.9lakhs to accused. The learned defence counsel argued that the amount quantified for the mental suffering of complainant cannot be

considered as a legally enforceable debt or liability. It is true that the contention of the complainant is that he paid Rs.9lakhs as advance and Ext.P1 and P2 cheques are issued for Rs.10lakhs. But there is a specific contention by the complainant that when he made repeated demands, the accused agreed to make a full payment of Rs.10lakhs which included the interest for the principal amount as well as the suffering undergone by him. The said amount in Ext.P1 and P2 cheques were not challenged at the time of evidence and as the evidence is that accused himself has agreed upon to pay the amount mentioned in Ext.P1 and P2, the same would come within the pervue of 'legally enforceable debt or liability' under S.138 of the NI Act.
PW2

18. On the basis of the above evidence, the only possible conclusion is that the complainant has successfully proved the execution of Ext.P1 and P2 cheques and the complainant is entitled to get the benefit of presumptions available u/S.118 and S.139 of NI Act. It is evident that the accused despite of Ext.P4 notice had not paid the amount and the offence under S.138 is attracted. Hence the accused is found guilty of the offence under S.138 of the N.I Act.

19. **Point Nos:3 and 4:-** In the result, the accused is found guilty of the offence punishable u/S.138 of the Negotiable Instruments Act and he is convicted for the said offence u/S.255(2) Cr.P.C. In order to meet the ends of justice and to prevent the commission of like offences, the accused has to be punished properly and the complainant has to be compensated. So I am not inclined to invoke any of the benevolent provisions of the Probation of Offenders Act.

20. **In the result, the accused is sentenced to undergo simple imprisonment for three months and to pay a fine of Rs.10,00,000/- (Rupees Ten Lakhs only) under S.138 of the N.I. Act. In default of payment of fine, the accused shall undergo simple imprisonment for a**

period of one month. The fine amount; if realised, shall be paid in full to the complainant as compensation u/S.357(1) Cr.P.C.

Dictated to the Confdl. Asst., typed by her, corrected by me and pronounced in the open Court on this the 11th day of December, 2023.

Lakshmy.S
Judicial First Class Magistrate-II

APPENDIX

Witnesses for prosecution:

PW1	Biju Antony
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Exhibits for prosecution:

P1	Cheque no.579532 dtd 06.06.2020 proved through PW1 on 24.07.2023.
P2	Cheque no.579531 dtd 09.06.2020 proved through PW1 on 24.07.2023.
P3	Dishonor memo dated 10.06.2020 proved through PW1 on 24.07.2023.
P3(a)	Dishonor memo dated 10.06.2020 proved through PW1 on 24.07.2023.
P4	Legal notice dated 24.06.2020 proved through PW1 on 24.07.2023.
P5	Postal receipt dated 24.06.2020 proved through PW1 on 24.07.2023.
P6	Inclined cover dated 16.07.20 proved through PW1 on 24.07.2023.
P7	Power of Attorney dated 30.08.2022 proved through PW1 on 24.07.2023.

Witnesses for defence: Nil

Exhibits for defence: Nil

Judicial. First Class Magistrate -II
Alappuzha

Judgment in CC 104/20
Dated 11.12.2023