

IN THE COURT OF THE MUNSIFF, ADOOR

Present: Sri. Amal.S.R, Munsiff.

Friday the 2nd day of February, 202413th day of Magha, 1945 (S.E)**O.S. No.434/2016**

Between:-

Sali David, aged 43 years, W/o K.K.David,
Kochuvadakkethil MSM.P.O, Mangaram,
Pandalam Village, Adoor Taluk. } Plaintiff

(By Adv. R.Radha Krishnan and Adv. B.Binny,
Adv.Biju.M.Thankachan)

And:-

- | | | |
|---------|---|--------------|
| 1. | Fazal Khan, aged 49 years, (No more)
S/o Kassim Rawther, Fazal Manzil,
Chayamkandathil, Thamkarakulam.P.O,
Thamarakulam Village, Mavelikara Taluk. | } Defendants |
| Addl2. | Ushaiba, aged 42 years,
W/o Fazal Khan, Fazal Manzil,
Chayamkandathil, Thamkarakulam.P.O,
Thamarakulam Village, Mavelikara Taluk. | |
| Addl.3. | Fathima Fazal, aged 16 years, (Minor)
D/o Ushaiba, Fazal Manzil,
Chayamkandathil, Thamkarakulam.P.O,
Thamarakulam Village, Mavelikara Taluk. | |
| Addl.4. | Fiya, aged 10 years, (Minor)
D/o Ushaiba, Fazal Manzil,
Chayamkandathil, Thamkarakulam.P.O,
Thamarakulam Village, Mavelikara Taluk.
Represented by Court Guardian
Adv.Reshma.R | |

(Additional defendants 2 to 4 were impleaded as per order in IA
No.2194/2017 dated.28.03.2023)

(D1 no more, D2 and D3 were set exparte, Adv.Reshma.R (Court
Guardian) for D4))

This Suit having been finally heard on 02.02.2024 in the presence of Sri. R.Radhakrishnan and Sri. B.Binny, Sri. Biju.M.Thankachan Advocates for the Plaintiff, Second and third defendants were set exparte, Smt..Reshma.R Advocate (Court Guardian) for the 4th defendant and having stood over for consideration on the same day the Court delivered the following;

JUDGMENT

Suit is filed for realization of money.

2. *The averments in the plaint in brief are as follows:* The defendant came and took a house on rent near to the residence of the plaintiff. The defendant introduced himself as shadow police officer. After that he became acquainted with her, and he represented that if she advance a sum of Rs.5 lakhs he will invest the same for profitable use and he will made double the amount and 50% will be given to her. Due to this attractive offer the plaintiff owned loan from her various relatives and collected 5 lakhs rupees and invested money to him. At that time no document was given by the defendant to the plaintiff for Rs.5,00,000/-. But on April 2016 he vacated the house and afterward development of the transaction was unknown to her. Then she informed the matter with the police and subsequently he came and issued a postdated cheque for an amount of Rs.6 lakh in her favour in July 2015. It was filled up by him in her presence, signed by him and handed over to her at her residence. It is fully supported by consideration. The plaintiff presented the said cheque for encashment on 08.10.2016 with her bank and it was dishonoured for the reason 'funds insufficient.' The plaintiff had no other option than to approach this court to realize the said amount. Hence this suit.

3. Even if summons was served upon the defendant he did not turn up. Hence the suit was ordered to be proceeded against him exparte. On 02.06.2018 he was reported no more and later LR's were impleaded as Additional Defendants 2 to 4. At the time of impleadment additional 3rd and 4th defendants were minors and hence an application was filed for appointing a guardian. Later notices were issued from this court to the 2nd defendant, the natural guardian. But she did not turn up. In the meantime additional 3rd defendant became major and summons was issued to her. But she did not turn up. Hence the suit was ordered to be proceeded against her exparte. For contesting the case of additional minor 4th defendant, Advocate Reshma. R is appointed as the Court Guardian.

4. Additional 4th defendant filed written statement denying the entire allegations in the plaint. Fact that the defendant came and took a rented house as alleged is unknown to her. The original defendant had never advanced any amount of Rs.5,00,000/- from the plaintiff. The original defendant did not execute any cheque in favour of the plaintiff. All other averments raised are absolutely false and hence prayed for its dismissal.

5. Considering the rival contentions of both parties, the following issues were raised: -

1. *Has the 1st defendant issued cheque No.216974 of SBI, Pallickal Branch in favour of plaintiff for a legally enforceable debt?*
2. *Is the plaintiff entitled to recover the plaint amount from the defendants?*

3. *Reliefs and costs.*

6. In order to stake the plaint claim, the plaintiff entered into the witness box and was examined as PW1. Exts.A1 and A2 marked. Other witness was examined as PW2. No evidence adduced from the side of the defendants.

7. **Issue No.1 and 2:** - As the discussion upon both the issues encompasses the same, I am considering these Issues together. The case advanced by the plaintiff is that the 1st defendant obtained an amount of Rs.5,00,000/- from her for investing in a profitable business. Before adverting to the further discussion as to the proof of cheque I may remind myself that the suit was originally filed against the 1st defendant. The summons was properly served on him. But he did not enter appearance and the suit was ordered to be proceeded against him exparte. After his demise, Additional defendant Nos. 2 to 4 were impleaded. So it is to be inferred that the original defendant admitted the plaint claim by showing his hesitance in appearing before the court. So it is to be inferred that they had admitted the execution of Ext.A1 cheque. The mother of the 4th defendant was appointed as the legal guardian. Even if notice was served upon her she did not show any interest in prosecuting this case. So as far as the major LRs are concerned they admitting the plaint claim. The only person who contested the suit is the court guardian so appointed for 4th defendant.

8. The learned counsel for the 4th defendant started argument session stating that she is only a legal representative of the Original 4th Defendant and thus the presumptions under Negotiable Instruments Act could not be made applicable to her. But in ***Kunjiraman v. Patmakshi 1978 KLT 868*** wherein its

para 5 it is held by Hon'ble High Court of Kerala that *"there is nothing in S.118(a) to show that the presumption which it lays down operates only against the maker of the promissory note personally and not against those who claim under him The presumption which such instruments carry applies both to the makers and to those who claim under them. As observed by Varadachariar J. in Narayana Rao v. Venkatapayya, - AIR 1937 Mad. 182 (184):*

"Though this section (S.118) is not. like S.119 to 122 limited in terms to a 'suit Shakur, -instrument,' it seems only reasonable to hold that the 'special rules of evidence' laid down in S.118 must have been intended to apply only as between the parties to the instrument or those claiming under them." and by Shah J. in *Official Receiver v. Abdul Shakur, 1965 (1) SCR 254* approving the above,

"The presumptions which are raised under S.118 do undoubtedly set out special rules of evidence relating to negotiable instruments, but in our opinion the nature of the presumptions from their very nature operate in favour of or against the parties to the negotiable Instrument or their privies and cannot generally apply to persons who do not claim under the parties to the instrument."

9. Coming to the facts of the case, the learned counsel for the 4th defendant argued that in order to attract presumption the plaintiff has to prove the execution of the cheque. Here the 4th defendant is disputing the execution of the cheque. However while going through the averment in the written statement of the 4th defendant it is clear that she had stated that she is having

no knowledge about the alleged transaction. As the 1st defendant itself admits the plaintiff's claim by his non-appearance shows that it was executed for a valid consideration.

10. As the 1st defendant is not alive, it is thus incumbent upon the court to check whether the plaintiff has proved her case. To prove her case the plaintiff entered into box and examined as PW1, and she deposed in tune with the plaint averments. She deposed that the 1st Defendant took a rented house near her house in the month of 2015 and then they became acquainted with each other and out of that acquaintance she had given an amount of Rs.5,00,000/- to invest in a fund for doubling the amount. According to her in the year April 2016 he had vacated the house and therefore he was unaware about the original transactions. Then she had approached the Police and out of some mediation talks, Ext.A1 was issued. According to her when it was submitted before the bank it was returned with endorsement 'fund insufficient' and is evident from Ext.A2.

11. While in the box she stated that Ext A1 was executed in presence of PW2, Ramsa, and Pushpa. The learned counsel for the plaintiff argued that Ramsa had earlier filed a suit as OS 422/16 before this court against the defendant and it was decreed in her favour. According to her, she had collected the amount from her husband and from the near relatives. The learned counsel for the defendant quizzed her whether she had produced any evidence to show that such an amount was collected. Even if she has not produced any document, she stood on her point and stated that it was collected from her friends and relatives. Her evidence stood unassailed.

12. PW2 also deposed in tune with the plaint averments. She deposed that she had seen the 1st defendant executing the cheque in favour of PW1. Even if she was subjected to grueling cross examination, she stood on that point.

13. Another lament of the 4th defendant is that in the plaint it is stated that a cheque for Rs.6,00,000/- was given to the plaintiff. According to her Ext.A1 is only for an amount of Rs.5,00,000/- and the alleged cheque in the case was not produced. But the cheque numbers mentioned in the plaint is same as that of the Ext.A1. So it can be inferred that it was only a clerical mistake. The learned counsel for the 4th defendant further argued that no legal notice was issued to her. According to her it was due to the reason of absence of any such transactions between them, no notice was sent. On consideration of the facts of the case, I believe that non sending of any legal notice would not be fatal to her case. As far as the suit of this nature, the issuance of demand notice is not a mandate. So the argument of the 4th defendant is not tenable.

14. The oral evidence of PW1 and PW2 is sufficient enough to prove that Ext.A1 was executed by the 1st defendant. No evidence was adduced from the side of 4th defendant either orally or documentary. It is not a mandate that for rebutting the presumption the defendant has to get into the witness box. He can rebut the presumption that stood against him/her by pinpointing the improbabilities in the case of the plaintiff. Here the case of PW1 is so firm and clear, and I do not find any improbabilities in her case.

15. Section 118 (a) of the Negotiable Instrument Act provides that until the contrary is proved, it shall be presumed that every Negotiable Instrument was made or drawn for consideration and that every such instrument, when it was accepted, endorsed, negotiated, or transferred for consideration. So, it is to be presumed that Ext A1 is supported by consideration.

16. Let us consider whether the defendant could rebut the said presumption. In order to rebut the presumptions, the defendant has to show by preponderance of probability that consideration or debt did not exist. It was held by the Apex Court in ***Kamala. S vs. Vidyadharan M.J & another, 2007 (2) KHC 631= 2007 (3) KLT 861***, as follows: - *"30. Applying the said definitions of "proved" or "disproved" to the principle behind S.118(a) of the Act, the Court shall presume a negotiable instrument to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the nonexistence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon."*

17. The defendant could not bring in any material to persuade me to think that consideration did not exist. The conclusion is that the said presumption stands un rebutted. Having regard to the above said facts I am of the opinion the plaintiff succeeded in proving that the 1st defendant borrowed Rs. 5 ,00, 000/- from the plaintiff and issued Ext.A1 cheque in discharge of the

said liability. So, this point is found in favour of the plaintiff.

18. The claim of plaintiff for interest is @ 18% per annum is not reasonable and it is not allowable. Hence Interest @ 12% per annum from the date of suit till the date of decree can be awarded. As it is not a commercial transaction interest @ 6 % per annum from the date of decree till realization can be awarded. Plaintiff is also entitled to get cost of the suit from defendants.

19. **Issue no. (3):** In view of finding in Issue Nos. (1) & (2) it is found that the plaintiff is entitled to realise Rs. 5,00,000/- from the defendants with interest at the rate of 12% per annum from the date of institution of the suit till realisation and to realise costs of the suit from the defendant.

In the result, I decreed the suit against the defendants 2 to 4. It is ordered that defendants 2 to 4 do pay to the plaintiff a sum of ₹5,04,438/- with interest @ 12% p.a from the date of suit till the date of decree and thereafter with interest @ 6 % per annum from the date of decree till realization. The defendants 2 to 4 do also pay the cost of the suit to the plaintiff.

Dictated to the Confidential Assistant, transcribed, and typed by her corrected and pronounced by me in open court on this the 2nd day of February 2024.

Sd/-
AMAL.S.R,
MUNSIFF.

Appendix:-

Exhibits marked for the Plaintiffs:-

A1 08.10.2016 Cheque No.216974 issued from SBI Pallickal Branch.

A2 12.10.2016 Reason for Return Memo

Exhibits marked for the Defendants:- Nil

Witness Examined for the Plaintiff:-

PW1 01.12.2023 Sali David

PW2 06.12.2023 Ramsa.P.H

Witness Examined for the Defendants :- Nil

Typed by: Gangadevi.P
Compared by: Saji

Id/-
MUNSIFF.

Fair/Copy of Judgment in
O.S No. 434/2016
Dated:02.02.2024.