

**Joseph Jose Vs. J. Baby and State of Kerala, Rep. by Public Prosecutor, High Court of Kerala**

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**Court :** Kerala

**Decided On :** Jul-11-2002

**Reported in :** 2002CriLJ4392

**Judge :** M.R. Hariharan Nair, J.

**Acts :** N.I. Act - Sections 118, 138, 139 and 313

**Appeal No. :** CRA No. 488 of 1998

**Appellant :** Joseph Jose

**Respondent :** J. Baby and State of Kerala, Rep. by Public Prosecutor, High Court of Kerala

**Advocate for Def. :** R. Harikrishnan, Adv. and; T.K. Latiff, P.P.

**Advocate for Pet/Ap. :** S. Sanal Kumar, Adv.

**Judgement :**

M.R. Hariharan Nair, J.

1. The challenge in the appeal is with regard to the acquittal of the accused in the complaint filed by the appellant alleging offence under Section 138 of N.I.Act against the first respondent herein.

2. The complainant alleged that on receipt of a sum of Rs. 85,000/- from his as loan, the first respondent issued Ext. P1 cheque on 3.9.1996; that the cheque, on presentation, was dishonoured for want of funds vide Exts. P2 and P3; that he sent Ext. P4 notice intimating the dishonour and demanding payment and that Ext. P5 is the envelope whereby the notice was returned. He also stated in his evidence as PW1 that Ext. P5 was returned without acceptance deliberately and that the complainant had even intimated the fact of dishonour of the cheque to the accused in person.

3. According to the learned counsel for the appellant the acquittal of the accused as per impugned judgment is for trivial and untenable reasons.

4. According to the respondent, as long as the postman remains unexamined, refusal to accept Ext. P4 notice cannot be inferred. He would urge that the burden in the matter lay with the complainant.

5. On the arguments advanced in the case, the points that arise for decision are:-

1). Whether the complainant has established the offence under Section 138 of the N.I.Act?

2). Reliefs?

6. Point No. 1:- A perusal of the impugned order shows that the reasons for the rejection of the complainant's case are the following:-

(i). In the complaint he failed to divulge the date on which the amount was lent to the accused; the purpose of loan and the date of advancement of the amounts.

(ii). According to PW1, the accused demanded the loan amount for starting a business with his friend. However, the name of the particular friend is not let known to the complainant and as such the probability of the loan transaction is remote.

7. I am in full agreement with the counsel for the appellant that the reasons given in the impugned judgment are totally insufficient to reject the case of the complainant. The learned Magistrate has thoroughly misconceived the scope of the jurisdiction under Section 138 and ignored the presumptions available under Sections 118 and 139 of the N.I.Act.

8. In a complaint of the present nature it is not necessary for the complainant to allege the details of the original transaction. He need mention only the fact that the issuance of the cheque was to discharge in whole, or in part, any debt or other legal liability. A perusal of the complaint shows that in paragraph 1, it was specifically alleged that the cheque was issued by the accused for a sum of Rs. 85,000/- on 3.9.1996 towards the debt arising from borrowal of Rs. 85,000/- from the complainant. In his evidence when the specific date was asked for he stated that according to his memory the loan transaction took place on 4.7.1996. In a case of the present nature where in the answer to the questions under Section 313 or even in the cross examination of the complainant, there was no case at all for the accused that he had not issued the cheque or that it was issued not in discharge of any legal liability, there was absolutely no justification for discarding the complainant's case on the ground of improbability of the original transaction or want of pleading in that regard. The purpose behind the incorporation of Section 138 of the N.I.Act is to lend credibility for cheque transactions. For establishing the requirements in Section 138, there is no burden on the part of the complainant to prove before court the entire details of the transaction resulting in issuance of cheque.

9. The complainant has produced before court the required documents to show that the cheque was dishonoured for want of funds; that notice thereof was issued within the time allowed by law and that the notice sent to the accused was returned unserved with the endorsement 'unclaimed'. It is clear from the decision in Bhaskaran v. Balan (1999(3) KLT 440) that the endorsement 'unclaimed' can be taken as refusal and that for compliance with Section 138 of the N.I.Act it is not necessary that there should be actual delivery of the notice to the addressee. Sending of notice in the correct address of the accused and return of the same with endorsement 'unclaimed' are sufficient for the purpose of due compliance with Section 138(b) of the N.I.Act. Burden to prove non-tender of the article is on the accused.

10. Under Section 118(a) of the Act there is a presumption that Ext. P1 was issued for consideration and that it was actually issued on 3.9.1996 which is the date mentioned in Ext. P1. Under Section 139 it is to be presumed, in the absence of any contrary evidence, that the complainant received the cheque for discharge, in whole or in part, of a debt or other legal liability. In the present case details of the legal liability have been spoken to by PW1 and also pleaded in paragraph 1 of the complaint and as such the acquittal of the accused by the trial court is absolutely unjustified.

11. Point No. 2:- In view of my findings under point No. 1, the impugned judgment is set aside and the matter is remitted to the trial court for passing fresh judgment bearing in min the legal principles aforementioned and in accordance with law.