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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MRS. JUSTICE M.R.ANITHA

WEDNESDAY, THE 17TH DAY OF MARCH 2021 / 26TH PHALGUNA, 1942

CRL.A.No.41 OF 2005

CRA 17/2002 OF ADDITIONAL SESSIONS COURT, KOZHIKODE

Crl.L.P. 842/2004 OF HIGH COURT OF KERALA

APPELLANT

K.BASHEER
ANADATHIL,OPP.POOVANNUR MASJID,
RAMANATTUKARA,, KOZHIKODE.

BY ADVS.
SRI.A.RANJITH NARAYANAN
SRI.S.K.SAJU
SRI.G.SREEKUMAR (CHELUR)

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RESPONDENTS

1. C.K.USMAN KOYA
S/O LATE ALASSAN,O.K. HOUSE,
RAMANATTUKARA, KOZHIKODE.

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

R1 BY ADV. SRI.K.M.FIROZ

OTHER PRESENT:

SENIOR PUBLIC PROSECUTOR SRI.S.U.NAZAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 22-02-2021, THE COURT ON 17-03-2021 DELIVERED THE FOLLOWING:

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JUDGMENT

Dated : 17th March, 2021

1. This Appeal is filed against the order of acquittal in Criminal Appeal No.17/2002 on the file of Additional Sessions Court, Kozhikode. The first appellate court reversed the conviction and sentence passed under Sec.138 of the Negotiable Instruments Act, 1881 (hereinafter 'the Act') and acquitted the respondent (hereinafter 'the accused'). A learned Single Judge having come across conflicting opinions in **Divakaran v. State of Kerala (2016 (4) KLT 233)** and **Surendra Das B. v. State of Kerala (2019 (2) KLT 895)**, the case was referred for resolution of conflict to the Division Bench.

2. The case of the appellant (hereinafter 'the complainant') is that accused owed an amount of Rs.30,00,000/- to the complainant and in discharge of the liability, issued Ext.P1 cheque. On presentation of the cheque for collection, it was returned due to 'insufficiency of funds' in the account

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of the accused. Statutory notices were issued in the residential as well as office address of the accused. In spite of receipt of notices, accused neither responded nor paid up the money. The complainant was examined as Pw1 and Exts.P1 to P6 marked and the accused examined himself as Dw1 and the Branch Manager as Dw2, marking Ext.D1 to D7 in defence.

3. In **Divakaran** a learned Single Judge held that the nature and date of transaction and the date of issuance of cheque are material facts; which if not disclosed in the statutory notice, the doors of the Court would be closed for such 'fortune seekers'. It was held that an accused, in a complaint filed under Sec.142 of the Act, is entitled to know before trial the material particulars of the accusation levelled; suppression of which would entail acquittal, without anything more.

4. Whereas in **Surendra Das** another learned Single Judge of this Court held that omission or error in the notice to state the nature of debt or liability does not render it invalid. It was noticed that no form is prescribed under

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clause (b) of proviso to S.138 of the Act and it was found, there is no requirement under Sec.138 of the Act that the complainant must specifically allege the nature of the debt or liability and a demand as specified in clause (b) of Section 138 would suffice.

5. Noticing the conflict of opinion in the decisions and doubting **Divakaran**, the issue referred was as to whether without full disclosure of the details of the transaction in the notice of demand; ie: of what constitutes valid consideration, the statutory notice would be rendered invalid or not. At the outset we notice a Division Bench decision of this Court in **Kallara**

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Sukumaran v. Union of India (1987 (1) KLT 226)

which held that a single Judge is not empowered to refer a question of law alone and the entire case has to be referred. We would hence attempt to resolve the conflict first and then look at the merits of the appeal.

6. According to the complainant, the dictum laid down in **Divakaran** is against the settled position of law laid down by the Apex Court in various decisions and also of this

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Court and hence ought to be reversed. The respondent argues for reversing **Surendra Das**, so as to sustain the order of acquittal.

7. Chapter XVII was inserted in the Act, as per Act 66 of 1988 introducing S.138 to S.147. The very object of introduction of Chapter XVII was to encourage the use of cheques and enhance the credibility of the instrument, with adequate safeguards to prevent harassment of honest drawers. The amendment foresaw the development of businesses, in the wake of opening up of the economy and ensured an effective and quick remedy quite distinct from the existing cumbersome procedure and deterrent penalties.

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8. Sec.138, takes in every cheque drawn by a person, maintaining an account with a banker, to another person in discharge of a liability, either in whole or part. It contemplates the contingency of dishonour of the cheque issued, due to insufficiency of funds or exceeding the arrangement with the banker when an offence is deemed to have been committed; with penalty of imprisonment

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extending to a period of two years or/and fine.

9. The provisos stipulate three conditions for attraction of the section. Proviso (a) stipulates the time within which a cheque is to be presented as six months from the date on which it is drawn or within the period of validity, whichever is earlier. Proviso (b) brings in a condition of demand being made in writing to the drawer within 30 days of receipt of information of dishonour, prior to the filing of the complaint. Proviso (c) enables the drawer to pay the amount covered by the cheque within 15 days failing which alone the complainant gets a right to prosecute. Proviso (c) and the Explanation that the debt or liability should be legally enforceable, are safeguards for the drawer. Section 139 is the heart and soul of the newly introduced scheme which statutorily provides a presumption in favour of the holder that the cheque is received for discharge of a debt or other liability, in whole or part; unless the contrary is proved. The compelling argument against **Divakaran** is that it renders otiose Section 139.

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10. Sec.140 of the Act expressly bars the drawer from taking a defence that at the time of drawing the cheque, it was without knowledge (anticipating) of dishonour on presentation. That is a protection to the payee prohibiting an unnecessary defence to wriggle out from the liability once the cheque is issued in the account maintained with a banker.

11. Sec.142 of the Act deals with the procedure for taking cognizance of offences and makes mandatory a written complaint by the payee or the holder in due course, within a month of the date on which the cause of action arose. It starts with a *non obstante* clause which excludes the procedure under the Code of Criminal Procedure. Sec.143 of the Act further empowers the Court to try the cases summarily. Sec.143A inserted by Amendment Act, 2018 with effect from 1.9.2018 also confers power on the Courts to direct payment of compensation. Sec.145 empowers the Magistrate to take evidence on affidavits. The provisions above referred clearly indicate the intention of the Parliament to have a speedy procedure for

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taking cognizance, conduct of trial and imposition of penalties. In other words, the procedure prescribed under the Cr.P.C has been expressly excluded by the Parliament by insertion of Chapter XVII.

12. **Harihara Krishnan N. v. J. Thomas (2017 (4) KHC 699)** arose in the context of an application for impleading being allowed during the course of trial which was upheld by the High Court. The accused took up the matter before the Apex Court wherein the scope and ambit of prosecution under Sec.138 of the Act as distinctly opposed to that of the Crl.P.C was discussed. Paragraph No.23 is relevant in this context which reads as follows :

> "The scheme of the prosecution in punishing under S.138 of the Act is different from the scheme of the Cr.P.C. S.138 creates an offence and prescribes punishment. No procedure for the investigation of the offence is contemplated. The prosecution is initiated on the basis of a written complaint made by the payee of a cheque. Obviously such complaints must contain the factual allegations constituting each of the ingredients of the offence under S.138. Those ingredients are (1) that a person drew a cheque on an account maintained by him with the banker; (2) that such a cheque when presented to the bank is returned by the bank unpaid; (3) that such a cheque was presented to the bank within a period of six

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> months from the date it was drawn or within the period of its validity whichever is earlier; (4) that the payee demanded in writing from the drawer of the cheque the payment of the amount of money due under the cheque to payee; and (5) such a notice of payment is made within a period of 30 days from the date of the receipt of the information by the payee from the bank regarding the return of the cheque as unpaid. It is obvious from the scheme of S.138 that each one of the ingredients flows from a document which evidences the existence of such an ingredient. The only other ingredient which is required to be proved to establish the commission of an offence under S.138 is that in spite of the demand notice referred to above, the drawer of the cheque failed to make the payment within a period of 15 days from the date of the receipt of the demand. A fact which the complainant can only assert but not prove, the burden would essentially be on the drawer of the cheque to prove that he had in fact made the payment pursuant to the demand."

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13. What emerges from the above is that, a complaint filed under Sec.138 of the Act should contain factual allegations regarding the five ingredients underlined in the extract above. Those are : (i) the cheque drawn in a valid account by the holder, (ii) its presentation within six months or validity period; whichever is earlier, (iii) dishonour, (iv) demand by the payee or holder in due course, (v) which demand is within 30 days of dishonour.

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It is also held that all these ingredients are imbibed in Sec.138 of the Act itself. The only fact which has to be proved in addition to attract the offence under Sec.138 is that in spite of the demand of notice, the drawer of the cheque failed to make payment within 15 days from the date of receipt of the demand.

14. The legislative intention is to overcome the cumbersome procedure of filing police report or complaint and subsequent enquiry or investigation etc., in matters of cheque dishonour. It also seeks to avoid the filing of a civil suit and a further execution for realisation of the decretal amount. This is the reason why Proviso (b) to Sec.138 provides that once the cheque is returned on presentation for reason of insufficiency of funds or for exceeding the arrangement, the payee or the holder in due course may make a demand for payment of money by giving a notice in writing to the drawer of the cheque, but within 30 days of the receipt of information of dishonour from the Bank. Time frame prescribed under the proviso further is an indication to ensure the bonafides of the drawee.

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15. We may also place reliance on **Central Bank of India & Anr. v. M/s. Saxons Farms & Ors. [AIR 1999 SC 3607 : 1999 KHC 622]**, wherein it has been categorically held that no form of notice is prescribed under Clause (b) of the proviso to Section 138 of the Act. Paragraph No.8 of the said judgment is relevant in this

context to be extracted, which reads as follows:

> "8. The object of notice is to give a chance to the drawer of the cheque to rectify his omission and also to protect honest drawer. Service of notice of demand in Clause (b) of the proviso to S.138 is a condition precedent for filing a complaint under S.138 of the Act. In the present appeals there is no dispute that notices were in writing and these were sent within fifteen days of receipt of information by the appellant bank regarding return of cheques as unpaid. Therefore, only question to be examined whether in the notice there was a demand for payment."

16. The learned counsel for the complainant placed reliance on **Vijay v. Laxman (2013 (3) KLT 157 [SC])** which was relied on in **Divakaran**. **Vijay,** by another two judge Bench was earlier to **Harihara Krishnan** and proceeded on peculiar facts. There the S.L.P was against the acquittal of an accused in a complaint instituted u/s.138 of

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the Act. The case of the complainant was that accused borrowed an amount of Rs.1,15,000/- from the complainant for his personal needs and in repayment issued a cheque, which stood dishonoured, on account of insufficient funds. The defence of the accused, a villager, was that he used to supply milk at the dairy of the complainant's father, to ensure which advance payments were made. The dairy owner obtained blank cheques from the suppliers as security; to prove which an independent witness was also examined. In the course of settlement of accounts the accused asked for return of the blank cheque issued which led to an altercation leading to the accused lodging an FIS against the assault committed on him. As a counter blast, the cheque was presented for encashment. In the said fact situation, it was observed that although the respondent failed to prove that the cheque was not signed by him, there appears to be a glaring loophole in the case of the complainant who failed to establish the cheque having been issued by the accused towards repayment of a personal loan. There the

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complaint was lodged by the complainant without specifying the date on which loan was advanced. The complainant himself admitted that the cheque was issued assuring repayment of the loan in two months and the cheque was presented on the date shown on it. It was in the said circumstances that the omission to mention the date on which the loan was advanced was found to be fatal to the complainant's case. We cannot discern a dictum laid down by the Apex Court that in every complaint the nature of the transaction has to be disclosed in the notice of demand for initiating a prosecution under Section 138 to enable the accused to effectively defend himself and suppression of such particulars is sufficient to order acquittal.

17. In **Harihara Krishnan** Apex Court noticed the scheme of prosecution under Sec.138 of the Act to be different from that in the Cr.P.C. No procedure for investigation of an offence is contemplated and a complaint must contain the factual allegations constituting each of the ingredients of the offence under Sec.138. The ingredients have

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already been referred to in the preceding paragraphs. At best these are the bare facts that should find a place in the statutory notice of demand.

18. **Surendra Das** actually arose in a petition filed under Sec.482 Cr.P.C to quash the proceedings instituted upon a complaint filed under Sec.142 of the Act. While disposing that matter, the learned Single Judge quoted **Harihara Krishnan** to hold that there is no requirement that the complainant must specifically allege in the complaint that there was a subsisting liability and it was also held that the omission or error in the notice to mention the nature of debt or liability does not render it invalid. One of the grounds raised in support of the petition for quashing the prosecution initiated was that no proper notice was sent by the complainant since nature of the debt or liability was not mentioned therein. Ultimately the Court dismissed the Crl.M.C finding that complaint contains averments with regard to the aspects noticed in **Harihara Krishnan** and that the notice meets the requirement under clause (b) of proviso to Sec.138.

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19. No particular form has been prescribed under the Act with respect to a notice u/s.138(b) of the Act except that the payee or holder in due course should make a demand for the payment of the amount of money within 30 days from the receipt of intimation from the bank regarding the return of the cheque. The court cannot legislate by prescribing a particular form and cannot require that the nature of the transaction, leading to the issuance of cheque, be disclosed in the notice when the statute does not provide for it. It is also to be noted in this context that the offence u/s.138 of the Act is an offence which would be attracted on the ingredients above referred being satisfied. The statute also provides a presumption in favour of the holder which cannot be rendered otiose. We are, with utmost respect, unable to agree with the requirement mandated by **Divakaran** that the nature of the transaction should be disclosed in the notice; as that does not appear to be the correct position of law.

20. Now coming to the merits of the present Appeal. The averment in the notice and complaint is about a business

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transaction between the complainant and accused. The complainant alleges that an amount of Rs.30,00,000/- is due from the accused out of the business transaction. In discharge of that liability, Ext.P1 cheque for Rs.30,00,000/- was issued on 2.7.1997. There is no contention about violation of statutory formalities prior to the institution of the complaint, except with regard to the defect in notice sent, which as per our earlier discussion holds no merit.

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21. According to the learned counsel for the complainant, since the fact of issuance of cheque has been proved, the presumption under Sec.139 and 118(a) of the Act would come to the rescue of the complainant. The Appellate Court dismissed the complaint without a proper appreciation of facts and law involved in the case. The learned counsel for the accused on the other hand, would contend that complainant did not have any consistent case and the cheque is not issued for valid consideration and hence the presumption under Sec.118(a) and 139 stands rebutted.

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22. The learned counsel for the accused drew our attention to Basalingappa v. Mudibasappa (2019 (2) KHC 451), Krishna Janardhan Bhat v. Dattatraya G.Hegde (2008 (1) KHC 410), John K. Abraham v. Simon C.Abraham and Another (2013 (4) KHC 853), APS Forex Services Pvt. Ltd v. Shakti International Fashion Linkers and Others (2020 (1) KHC 957) and ANSS Rajashekar v. Augustus Jeba Ananth (2019 (2) KHC 155) to stress on the aspect of presumption to be drawn by the Court under Secs 118(a) and 139 of the Act and burden of proof on rebuttal of the presumption.

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23. To ascertain the rival contentions, it would be necessary to ascertain the dictum of the precedents and analyze the complaint as also the evidence led. But before that a preliminary objection raised by the accused of violation of Section 9 of the Foreign Exchange Regulation Act, 1973 (FERA, for short), which was in force during the relevant time; which found favour with the appellate court, has to be dealt with. The Court below found that the consideration alleged is of amounts paid in foreign

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currency at Riyadh and Pw1 having not received permission from the RBI to transfer funds to India from a foreign country, the transaction would be in violation of the FERA Act. We cannot agree.

24. Section 9 prohibits a resident in India from making payments to any person resident outside India and from receiving any payment by order or on behalf of such non-resident, otherwise than through an authorised dealer in foreign exchange. Even when the receipt is through an authorised dealer if there is no corresponding inward remittance, then the same is deemed to be a payment otherwise than through an authorised dealer. Here, both the complainant and accused at the time of passing of alleged consideration was in Riyad. The cheque issued by the accused is in a non-resident account, in which remittances can only be from a foreign country and the Bank is an authorised dealer in foreign exchange. If the cheque was honoured, the payment would have been in Indian currency by the authorised dealer, the Bank, for which there would definitely have been corresponding

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inward remittance in the non-resident account.

25. **Triveni Kodkani & Ors. v. Air India Ltd. & Ors. [2020 (3) KHC 50 SC : 2020 3 KHC 50]** and **Forasol v. O.N.G.C. (AIR 1984 SC 241)** held that a sum of money expressed in a foreign currency can legitimately be claimed by the plaintiff in a suit in India after converting the same to equivalent value of Indian currency either on the exchange rate prevailing on the date when it became due or that on the date of institution of suit. In the event of the claim having been made in foreign currency the rate applicable would be as on the date of judgment. The contention of the accused with regard to the bar under Section 9 of FERA cannot be accepted.

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26. Ext.P3 is the copy of the lawyer notice sent by the complainant to the accused in which the specific allegation is that an amount of Rs.30,00,000/- is due from the accused to the complainant in the business transaction between them. In the complaint also the specific allegation is that the complainant and accused had several business transaction between them and the

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accused owes an amount of Rs.30,00,000/- to the complainant as a result of those transactions. Towards repayment of that, accused issued Ext.P1 cheque.

27. In chief-examination itself the complainant shifted his stand and stated that accused availed a loan of Rs.30,00,000/- from the complainant. The complainant would state that the money was advanced to the accused for conducting his business and that the money advanced belonged to himself and three other persons. He shifted his stance in cross-examination too.

28. Accused on the other hand, stoutly denied any business transaction as also any loan availed. It was asserted that the execution of the cheque was not in discharge of any liability due from him to the complainant. It is his specific case as brought out during cross-examination of the complainant and also his evidence as Dw1 that while accused and himself were in Riyad, accused requested financial assistance in connection with the construction of his house. The accused gave a blank cheque as Ext.P1 so as to enable the complainant to withdraw the amount

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required through the brother of the accused. It is also his contention that the complainant was only a driver initially (1986) in Riyad with a salary of 650 Riyal. Subsequently he had served as a shop-in-charge and his salary was 1250 Riyal. He never had a job with salary of 2500 Riyal.

29. It is admitted by Pw1 that he was in Riyad from 1986 to 1997. Accused had gone to Riyad in 1981 and had been continuing there even at the time of trial, which is not disputed. It is his specific case that the complainant has no capacity to advance an amount of Rs.30,00,000/- to him. Pw1 admitted that initially, in 1986 his salary was 650 Riyal and that when he returned in the year 1997, his salary was 2500 Riyal. He further admitted that while working in Riyad, he was in a very cordial relationship with the accused. He also admitted that in the year 1993 while he came to India he demanded some money from accused. But he denied that accused gave him a cheque as financial assistance.

30. Complainant stated that the money was advanced to facilitate a visa business carried on by the accused. He

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thus resiled from the specific contention that there existed business transactions between them. It had been initially deposed that all records in connection with the business is kept by the accused and he has no document at all in connection with that business. That would lead to an inference as suggested during cross-examination of the complainant that actually Pw1 was not having any business transaction with Dw1 and that is why he was not having any records in connection with the same. The nature of business of the accused is said to be purchase of visa from Arab Nationals, who alone can sponsor foreign nationals, which, for a minor profit would be given to seekers of jobs in Gulf countries. But he could not state any of such visa transaction of the accused or himself with a third party. The prevarication of the complainant would probabilise the defence version that there was no joint business conducted by them.

31. On further cross-examination, PW1 would state that he advanced 1¼ lakhs Riyal to the accused in the year 1993, 75000 Riyal in the year 1995 and 1¼ lakhs Riyal again

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was advanced in the year 1997. But admittedly there is no document to prove the above transactions. It is very curious in this context to note that accused admits during cross-examination that in the year 1993 he requested money from the accused while coming down to India. This runs contrary to the claim that the complainant advanced an amount of 1¼ lakhs Riyal to the accused in the year 1993. Even if his entire salary during this period till 1993 at the rate of 650 is calculated, it would only come to 54,600 Riyal ! It has come out in evidence that after five years he has taken his wife also abroad, who was not employed. So it is quite unbelievable that such a person could advance an amount of 1.25 lakhs Riyal to the accused in the year 1993. During cross-examination the complainant again gave a different version that the money advanced to the accused was sourced from his sister-in-law's husband and also from his nephew and he has no document to prove the advance of the amount by those persons. He was particularly insistent that 1.25 lakhs Riyal advanced in 1993 belongs to himself; which we find

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to be highly improbable.

32. Further, during cross-examination, complainant admitted that in the year 1993 he started construction of a new house at Ramanattukara which was completed only in the year 1998. The complainant also admits that he requested money from the accused in the year 1993 while coming to India. This would probabilise the case of the accused that the complainant was in need of money for construction of house and on his request the cheque was handed over. It has come out from the evidence of Pw1 that, himself and accused were on very cordial terms. So the evidence of the accused that he gave Ext.P1 to the complainant in the year 1993 when he requested money; directing to make clearance through his brother, appears to be a quite probable version. The accused, with an income of 650 Riyal, who was engaged in the construction of a house and in need of money, cannot be believed to have advanced an amount to the tune of 1.25 lakhs Riyal in 1993; especially when it is also admitted that he sought financial assistance from the accused at the same time.

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Though it is claimed that the total consideration was sourced from his sister-in-law's husband and nephew, there is no document or any other material to substantiate that contention. They were also not examined. As has been rightly contended by the learned counsel for the accused, it is unbelievable that complainant has the capacity to advance 1.25 lakhs Riyal + 75 Riyal + 1.25 lakhs Riyal to the accused in the year 1993, 1995 and 1997 respectively, as claimed by him. Hence the source of money is also not proved.

33. At the instance of the accused, DW2-the Manager of SBI, Ramanattukara was examined. Ext.D1 series letters were issued from the Bank, Ext.D2 is his specimen signature and Ext.D3 is the letter of the accused to the Branch Manager of SBI, Ramanattukara intimating the change of his signature. Ext.D4 is the certified extract of the account of the accused kept in the Bank during July 1986 to October 1994. Ext.D4 would go to show that cheque Nos.623381 and 623382 were drawn by the accused in August 1986 and September 1994 respectively

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and that account was closed on 22.3.1995 and it is also stated to have been reopened. Ext. P1 cheque (No.623387) is in the same series of the above two cheque leaves. Ext.D6 series is a certified extract of cheque issue register kept in the Bank.

34. As per Ext.D6 cheque Nos. 826001 to 826025 had been issued on 21.6.1995, cheque Nos. 804821 to 804840 had been issued on 11.8.1999 and cheque Nos.804701 to 804720 had been issued on 19.8.1999. DW2 deposed that cheque Nos. 623381 to 623400 had been issued on 28.9.1995. But that evidence of DW2 is in conflict with Ext.D4 which would show that cheque No.623381 has been drawn by the accused in the month of August, 1986 and cheque No.623382 has been drawn by him in September 1994. It appears that DW2's evidence that cheque book Nos.623381 to 623400 had been issued on 28.9.1995 is an inadvertent mistake. Ext.D6 is for the period starting from 4.8.1999 upto 28.8.1999. That would probabilise the defence case that Ext.P1 cheque bearing number 623387 was issued to the complainant in the year

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1993 while he requested financial help from the accused while coming to India. DW1 categorically deposed that though he demanded the cheque back, complainant did not return it stating that it went missing. He also categorically stated that the complainant returned from Gulf in the year 1997 abandoning his job. DW1 also came down to India for a visit in June 1997 and then the complainant again demanded money. But he did not advance any amount and asked for the return of the cheque and there was a wordy altercation. Then accused threatened to misuse the old cheque. It is hence stop payment to the Bank was issued on 3.7.1997. That is proved by Ext.D7 dtd. 3.7.1997, a letter issued by the accused to the Bank requesting stop payment with respect to Ext.P1 cheque. Presentation of the cheque by the accused admittedly is on 2.7.1997, the date on which the cheque was given as alleged by the complainant. The facts brought out during cross-examination of PW1 is corroborated with the evidence of Dws 1 and 2 to a great extent.

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35. This is a case in which accused denied the very execution of the cheque itself. Though attempt was made by the accused to contend that the signature in Ext.P1 is not that of his, it has come out from the evidence adduced from the defence side itself that in between 1993 and 1997 he had three types of signatures and among them one tallies with that in Ext.P1. Accused also admitted that there is no difference in signature of Ext.P1 and P5 (acknowledgment cards). So the signature in Ext.P1 is that of accused himself. But as discussed in the previous paragraphs the complainant did not have any consistent case as revealed from the notice, the complaint and also the evidence led before Court. Basalingappa held that when there is contradiction in the complaint, examination in chief and cross-examination of the complainant then it is fatal to the prosecution and unless there is a satisfactory explanation it would enable the court to conclude, presumption under Sec.139 having been rebutted. John K Abraham found that serious lacuna in the evidence of complainant strikes at the root of a complaint. Krishna Janardhan Bhatt held

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that in order to rebut the presumption under Sec.139 the accused need not examine himself and he may discharge the burden on the basis of the materials already brought on record.

36. ANSS Rajasekhar found that when evidence elicited from complainant during cross-examination creates serious doubt about the existence of debt and about the transaction and the complainant fails to establish the source of funds the presumption under Section 139 is rebutted and the defence case stands probabilised. APS Forex Services Pvt. Ltd held that whenever the accused questioned the financial capacity of the complainant in support of his probable defence, despite the presumption under Sec.139, onus shifts again on the complainant to prove his financial capacity. Here we have already discussed in detail the failure of the complainant to prove the source of money alleged to have been advanced.

37. Facts, circumstances and evidence adduced probabilise the version of the defence that in the year 1993 the accused issued cheque as a financial assistance. We have

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no hesitation to find that though execution of P1 cheque is proved the accused has successfully rebutted the presumption and it has been established that there was no valid consideration for issuance of the cheque.

38. The accused having succeeded in rebutting the presumption, the burden shifts to the complainant to prove the consideration. In the case at hand apart from producing Ext.P1 cheque, complainant did not produce any document or other evidence to prove consideration. Source of fund though alleged to be his nephew and brother in law of his wife ,they were not examined. There is no material produced to prove the alleged business transaction between himself and the accused in Riyad or the business of accused for which he asserted to have advanced loan. In short this is a case in which the accused rebutted the presumption available under Section 139 of the Act and the complainant miserably failed to prove the consideration for Ext.P1 cheque. The learned Addl. Sessions Judge rightly acquitted the accused.

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39. The learned counsel for the complainant would also

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contend that, in spite of receiving the notice demanding the amount, no reply has been sent by the accused which is a strong circumstance making probable the case of the complainant. DW1 though stated that a lawyer notice was sent and copy was attempted to be marked during his evidence, it was not seen marked. Even otherwise, the failure to send reply cannot be a circumstance to prove the case of the complainant or demolish the case of the defence. The Apex Court in **John K. Abraham** deprecated the High Court's findings based solely on the fact of failure of the accused to send any reply to the lawyer notice issued by the complainant. It was held that based on that single circumstance, the presumption under Sections 118 and 139 of the N.I. Act cannot be easily drawn against the accused.

40. The reference is answered as follows:

The dictum laid down in **Divakaran v. State of Kerala [2016 (4) KLT 233]** that non disclosure of the nature of the transaction between the parties in the notice is fatal and that the suppression of the

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particulars of the transaction in the complaint is sufficient to order acquittal is held to be not good law. The law laid down in **Surendra Das B. v. State of Kerala and Anr. [2019 (3) KHC 105]** is held to be the correct law.

41. Criminal Appeal No. 41/2005 is found to be devoid of any merit as per the separate reasoning herein above and hence stands dismissed.

Sd/-

K. VINOD CHANDRAN
JUDGE

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M.R.ANITHA

JUDGE

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