

**DECLARATION**

**DIARY NO:            /2023**

All Defects have been duly cured. Whatever has been added/deleted/modified in the petition is the result of curing of defects and nothing else. Except curing the defects, nothing has been done. Paper books are complete in all respects.

Signature: \_\_\_\_\_

Advocate -on-Record/ P.S. SUDHEER

Petitioner (s ) In -person

Date: 02.03.2023

Contact No. 9717931422

SECTION-IIB

IN THE SUPREME COURT OF INDIA  
(CRIMINAL APPELLATE JURISDICTION)

SPECIAL LEAVE PETITION (CRL) NO. \_\_\_\_\_ OF 2023

**IN THE MATTER OF:-**

Razak Mether	Versus	Petitioner
State of Kerala & Anr		Respondents

**INDEX**

SL.NO.	PARTICULARS	Copies	C/F
1.	Office Report on Limitation		NA
2.	Listing Proforma		NA
3.	Synopsis and L/Dates		NA
4.	Impugned Order		NA
5.	SLP with Affidavit		NA
6.	application for exemption from filing certified copy Of the impugned judgment		NA
7.	Annexure-P/1 to P/5		NA
8.	Vakalathnama with MA		NA

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**Dated:- 02.03.2023**  
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**P.S. SUDHEER**  
**Advocate for Petitioner**

**ANNEXURE Y****ADVOCATE'S CHECK LIST (TO BE CERTIFIED BY ADVOCATE-ON-RECORD)**

1.	SLP (CRL) has been filed in Form No. 28 with certificate	Yes
2.	The Petition is as per the provisions of Order XV Rule 1	Yes
3.	The papers of SLP CRL have been arranged as per Order XXI, Rule (3)(1)(f).	Yes
4.	Brief list of dates/events has been filed.	Yes
5.	Paragraphs and pages of paper books have been numbered consecutively and correctly noted in Index.	Yes
6.	Proper and required number of paper books (1+1) have been filed.	Yes
7.	The contents of the petition, applications and accompanying documents are clear, legible and typed in double space on one side of the paper.	Yes
8.	The particulars of the impugned judgment passed by the court(s) below are uniformly written in all the documents.	Yes
9.	In case of appeal by certificate the appeal is accompanied by judgment and decree appealed from and order granting certificate.	NA
10.	If the petition is time barred, application for condonation of delay mentioning the no. of days of delay, with affidavit and court fee has been filed.	NA
11.	The Annexures referred to in the petition are true copies of the documents before the court(s) below and are filed in chronological order as per List of Dates.	Yes
12.	The annexures referred to in the petition are filed and indexed separately and not marked collectively.	Yes
13.	The relevant provisions of the Constitution, statutes, ordinances, rules, regulations, bye laws, orders etc. referred	YES

	to in the impugned judgment / order has been filed as Appendix to the SLP.	
14.	In SLP against the order passed in Second Appeal, copies of the orders passed by the Trial Court and First Appellate Court have been filed.	Yes
15.	The complete listing proforma has been filled in, signed and included in the paper books.	Yes
16.	In a petition (PIL) filed under clause (d) of Rule 12(1) Order XXXVIII, the petitioner has disclosed: (a) His full name, complete postal address, e-mail address, phone number, proof regarding personal identification, occupation and annual income, PAN number and National Unique Identity Card number, if any; (b) The facts constituting the cause of action; (c) The nature of injury caused or likely to be caused to the public; (d) The nature and extent of personal interest, if any, of the petitioner(s); (e) Details regarding any civil, criminal or revenue litigation, involving the petitioner or any of the petitioners, which has or could have a legal nexus with the issue(s) involved in the Public Interest Litigation.	NA NA NA NA NA
17.	If any identical matter is pending/disposed of by the Hon. Supreme Court, the complete particulars of such matters have been given.	NA
18.	The statement in terms of the Order XIX Rule 3(1) of Supreme Court Rules 2013 has been given in the Petition of appeal.	Yes
19.	Whether a Bank Draft of Rs. 50,000/- or 50% of the amount, whichever is less, has been deposited by the person intending	NA

	to appeal, if required to be paid as per the order of the NCDRC, in terms of Section 23 of the Consumer Protection Act, 1986.	
20.	In case of appeals under Armed Forces Tribunal Act, 2007, the petitioner / appellant has moved before the Armed Forces Tribunal for granting certificate for leave to appeal to the Supreme Court.	NA
21.	All the paperbooks to be filed after curing the defects shall be in order.	Yes

I hereby declare that I have personally verified the petition and this contents and it is in conformity with the Supreme Court Rules 2013. I certify that the above requirement of this Check List have been complied with. I further certify that all the documents necessary for the purpose of hearing of the matter have been filed.

Mr. P.S. SUDHEER

CC-1603, Mob: 9873334102

New Delhi  
Date: 02.12.2022

IN THE SUPREME COURT OF INDIA  
SCR ORDER XXII RULE 2 (1)  
CRIMINAL APPELLATE JURISDICTION

(UNDER ARTICLE 136 OF THE CONSTITUTION OF INDIA)

SPECIAL LEAVE PETITION (CRIMINAL) NO. OF 2023

[WITH PRAYER FOR INTERIM RELIEF]

(Arising out of the impugned judgment and final order dated 13.01.2023 passed by the Hon'ble High Court of Kerala at Ernakulam in CrI.M.C. No. 8287 of 2022)

IN THE MATTER OF:-

Razak Mether

Petitioner

Versus

State of Kerala & Anr

Respondents

PAPER BOOK

With

CrI. M.P No. of 2023

**Application for exemption from filing certified copy of the  
impugned judgment**

(FOR INDEX, KINDLY SEE INSIDE)

**ADVOCATE FOR THE PETITIONER: P.S. SUDHEER**

Record of Proceedings

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3.	Listing Performa	A1 – A2	A1 – A2	
4.	Cover Page of Paper Book		A3	
5.	Index of Record of Proceeding		A4	
6.	Limitation Report prepared by the Registry		A5	
7.	Defect List		A6 –	
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13.	<b><u>APPENDIX-II</u></b> Section 138 and 145 of Negotiable Instruments Act. 1881	<b>36-38</b>		



14.	<p><b><u>ANNEXURE P/1:</u></b></p> <p>A copy of the complaint dated 18.09.2021 filed by the Respondent No.2 through his power of attorney holder M. Ummer Farook Manoly in S.T. No. 879 of 2021 before the Learned Special Judicial First Class Magistrate Court,(N.I.Act cases), Kozhikode.</p>	<b>39-46</b>		
15.	<p><b><u>ANNEURE -P/2</u></b></p> <p>A copy of the affidavit dated 18.09.2021 filed by M. Ummer Ferook Manoly, in S.T. No. 879 of 2021 before the Learned Special Judicial First Class Magistrate Court, (N.I.Act cases), Kozhikode</p>	<b>47-50</b>		
16.	<p><b><u>ANNEXURE P/3:</u></b></p> <p>A copy of the Petition dated 29.08.2022 in C.M.P. No. 3534 of 2022 in S.T. No. 879 of 2021 filed by the Petitioner before the Learned Special Judicial First Class Magistrate Court,(N.I.Act cases), Kozhikode</p>	<b>51-54</b>		
17.	<p><b><u>ANNEXURE-P/4</u></b></p> <p>A copy of the order dated 02.11.2022 passed by the Learned Special Judicial First Class Magistrate Court, (N.I.Act cases), Kozhikode</p>	<b>55-58</b>		

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18.	<b><u>ANNEXURE-P/5</u></b> A copy of the Petition in Crl.M.C No. 8287 of 2022 dated 15.11.2022 filed by the Petitioner before the Hon'ble High Court of Kerala at Ernakulam	<b>59-65</b>		
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IN THE SUPREME COURT OF INDIA  
CRIMINAL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (CRIMINAL) NO. OF 2023

**IN THE MATTER OF:-**

Razak Mether

Petitioner

Versus

State of Kerala & Anr

Respondents

**OFFICE REPORT OF LIMITATION**

1. The petition is/are within time.
2. The Petition is barred by time and there is delay of .....days in filing the same against the order dated 13.01.2023 and petition of condonation of days delay has been filed.
3. There is delay of days in re-filing the Petition and petition for condonation of days delay in re-filing has been filed.

**SECTION OFFICER**

New Delhi

Dated:02.03.2023

**PROFORMA FOR FIRST LISTING****SECTION -IIB**

**The case pertains to (Please tick/check the correct box)**

- Central Act: (Title):Cr.P.C., Negotiable Instruments Act
- Article: 482, 138, 145.
- Central Rule: (Title): NA
- Rule No (s): NA
- State Act: (Title):NA
- Section: NA
- State Rule: (Title):NA
- Rule No (s): NA
- Impugned Interim Order: NA
- Impugned Final Order/Decree: (Date): 13.01.2023
- High Court: (Name): IN THE HIGH COURT OF KERALA AT ERNAKULAM.
- Name of Judges: THE HONOURABLE MR. JUSTICE A. BADHARUDEEN.
- Tribunal/Authority: (Name): NA

- 
1. Nature of matter: CRIMINAL
  2. (a) Petitioner/Appellant: RAZAK METHER  
(b) Email ID: pssudheer1@gmail.com  
(c) Mobile Phone No: 9873334102
  3. (a) Respondent:STATE OF KERALA & ANR  
(b) Email ID: NA  
(c) Mobile Phone No.: NA
  4. (a) Main Category Classification: 14  
(b) Sub Classification: 1418

A2

5. Not to be Listed Before: NA
6. (a) Similar disposed off matter with citation, if any,  
& case Details:- No similar disposed off matter.  
(b) Similar pending matter with case details:- No  
similar pending matter.
7. Criminal Matters: YES
  - (a) Whether accused/convict has surrendered:No
  - (b) FIR No.NA and Date:NA
  - (c) Police Station: NA
  - (d) Sentence Awarded: NA
  - (e) Period of Sentence Undergone (Including  
period of detention/ custody undergone): NA
8. Land Acquisition Matters: NA
  - (a) Date of Section 4 Notification: NA
  - (b) Date of Section 6 Notification: NA
  - (c) Date of Section 1 Notification: NA
9. Tax Matters: State the tax effect: NA
10. Special Category (First Petitioner/Appellant Only):  
Senior Citizen/ Years/ SC/ ST/ Woman/ Child/  
Disabled/ Legal Aid Case/ In Custody: NA
11. Vehicle Number (In case of Motor Accident Claim  
matters): NA

**MR. P.S. SUDHEER**  
**EMAIL ID – pssudheer1@gmail.com**

**Date: 02.03.2023**

B

## SYNOPSIS

The present Special Leave Petition is filed against the impugned judgment and final order dated 13.01.2023 passed by the Hon'ble High Court of Kerala at Ernakulam in CrI.M.C. No. 8287 of 2022 whereby the Hon'ble High Court set aside the cognizance taken by the Learned Special Judicial First Class Magistrate Court ,(N.I.Act cases), Kozhikode in S.T. No. 879 of 2021 and ordered to revert back the complaint to the pre-cognizance stage with liberty to the Respondent No.2/complainant to file fresh affidavit under Section 145 of the Negotiable Instruments Act, 1881.

The Petitioner herein is the accused in S.T.No. 879 of 2021 on the files of the Learned Special Judicial First Class Magistrate Court ,(N.I.Act cases), Kozhikode for offence punishable under Section 138 of the Negotiable Instruments Act, 1881.

The issue for the kind consideration of this Hon'ble Court is that, after observing that the cognizance taken on the basis of the affidavit of the Power of Attorney holder is illegal and setting aside the cognizance taken by the Learned Magistrate, whether the Hon'ble

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High Court is justified in passing an order for reverting back the complaint to pre cognizance stage, with liberty to the original complainant/Respondent No. 2 to file an affidavit under Section 145 of the Negotiable Instruments Act, 1881, which resulted in miscarriage of justice and causing great prejudice to the Petitioner/Accused.

It is submitted that the order passed by the Hon'ble High Court allowing the complainant to cure the technical defects in a case filed under Section 138 of Negotiable Instruments Act would amounts to miscarriage of justice, since the offence under section 138 of Negotiable Instruments Act is purely technical and the accused is entitled to get the benefit of any violation on the part of the complainant in following the statutory formalities stipulated for filing the complaint.

It is further submitted that the order passed by the Hon'ble High Court would result in allowing the complainant to fill the lacuna in his case while filing fresh affidavit in terms of the impugned order which is highly prejudicial to the accused who is facing prosecution in a technical offence under Section 138 of the Negotiable Instruments Act.

It is respectfully submitted that in the present case, the complaint is not filed by a person who is competent to file the complaint on behalf of the complainant and the Hon'ble High Court erred in denying the

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benefit of the same to the accused and allowing the Complainant to cure the said defect by directing him to file a fresh affidavit U/s. 145 of Negotiable Instruments Act before the Learned Trial Court. It is submitted that if the technical defects in a complaint are allowed to be cured, it would amount to a wrong precedent and result in denial of justice to the accused persons.

It is submitted that the Hon'ble High Court ought to have appreciated that the dictum laid down by this Hon'ble Court in **Narayanan A.C Vs. State of Maharashtra & Ors ( 2015 (12) SCC 203)** is squarely applicable to the facts and circumstances of the present case and the complaint filed by the Respondent No. 2 is liable to be quashed on the ground that the same has been filed by an incompetent person. It is submitted that in the above decision, this Hon'ble Court quashed the complaint on the following reasons as extracted in Para No. 17 and 18 of the judgment:-

*17."From the bare perusal of the said complaint, it can be seen that except mentioning in the cause title there is no mention of, or a reference to the Power of Attorney in the body of the said complaint nor was it exhibited as part of the said complaint. Further, in the list of evidence there is just a mere mention of the words at serial*



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no.6 viz. "Power of Attorney", however there is no date or any other particulars of the Power of Attorney mentioned in the complaint. Even in the verification statement made by the respondent no.2, there is not even a whisper that she is filing the complaint as the Power of Attorney holder of the complainant. Even the order of issue of process dated 20th February, 1998 does not mention that the Magistrate had perused any Power of Attorney for issuing process.

18. The appellant has stated that his Advocate conducted search and inspection of the papers and proceedings of the criminal complaint and found that no Power of Attorney was found to be a part of that record. This has not been disputed by the respondents. In that view of the matter and in light of decision of the larger Bench, as referred above, we hold that the Magistrate wrongly took cognizance in the matter and the Court below erred in putting the onus on the appellant rather than the complainant. The aforesaid fact has also been overlooked by the High Court while passing the impugned judgment dated 12th August, 2005.

# F

Below is the chart showing the comparison between **Narayanan A.C Vs. State of Maharashtra & Ors ( 2015 (12) SCC 203)** and the case of the petitioner.

<b>Narayanan A.C Vs. State of Maharashtra &amp; Ors ( 2015 (12) SCC 203)</b>	<b>Case of the Petitioner</b>
There was no mention of, or a reference to the power of attorney in the body of the complaint except mentioning in the cause title.	Though in the address portion of the complaint, it is averred that the complainant is being represented by his power of attorney holder, there is no mentioning in the body of the complaint that the complaint is being filed by the power of attorney holder. The affidavit filed by the power of attorney holder is also silent with regard to his personal knowledge regarding the transactions.

The Power of Attorney was not exhibited as part of the complaint	The Power of Attorney was not exhibited in the affidavit and in the list of documents filed along with the complaint.
The power of attorney was mentioned in the list of evidence, but there is no date or any other particulars of Power of Attorney	Nothing is mentioned in the complaint or affidavit of the Power of Attorney holder about the execution of Power of Attorney.
In the verification statement, it was not mentioned that the complaint is being filed through Power of Attorney or the signature in the verification portion was put in capacity of a power of attorney holder	The complaint is verified by the Power of Attorney as if he is the complainant. Nothing mentioned in the verification portion that he is signing/verifying the complainant in capacity of a power of attorney holder.

It is submitted that this Hon'ble Court in Pepsi Foods Ltd Vs. Judicial Magistrate (1998 (5) SCC 749) has held that summoning an accused in a criminal case is a serious matter and that the process of criminal law cannot be set into motion in a mechanical manner. The relevant portion of the dictum laid down by this Hon'ble Court in the above matter is extracted as follows:-

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"28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinize the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused"

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**BRIEF FACTS OF THE CASE**

It is submitted that on 18.09.2021 the Respondent No. 2 filed a complaint against the Petitioner as S.T No. 879 of 2021 through his power of attorney holder namely Ummer Farook Manoly before the Learned Special Judicial First Class Magistrate Court ,(N.I.Act cases), Kozhikode for offences punishable under Section 138 of Negotiable Instruments Act, 1881 with the following allegations:-

1. The Petitioner borrowed an amount of Rs. 30,00,000/- (Rupees Thirty Lakhs Only) from the Respondent No. 2/ complainant for expanding his business and when the complainant demanded the said amount, the Petitioner came to the residence of the complainant and executed an agreement on 02.01.2021 promising to repay the amount within 6 months from the date of the agreement. In addition to it, the Petitioner issued a post dated cheque bearing No. 950111 dated 02.07.2021 for Rs. 50,00,000/- (Rupees Thirty Lakhs Only) drawn on Bank of Baroda, Sreemoola Nagaram, Ernakulam for the discharge of the above liability.

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2. The Respondent No. 2/Complainant presented the above cheque for collection through his banker on 08.07.2021 and the same were dishonoured for want of sufficient funds in the account of the Petitioner. .
3. Respondent No. 2/complainant sent legal notice dated 04.08.2021 demanding the Petitioner to repay the said amount and the Petitioner received the same on 06.08.2021 and did not clear the liability covered by the cheque. . In view of the above, the Respondent No. 2/complainant filed the above mentioned complaint.

**NOTE**

It is submitted that the Respondent No. 2 approached the Petitioner and expressed his willingness to invest in the business of the Petitioner during the year 2016 while they were working together at abroad and accordingly the Respondent No. 2 invested in the business of the Petitioner by fully agreeing to share the profits and loss incurring in the business in equal proportion. It is submitted that the Respondent No. 2 had obtained signed blank paper and cheques from the Petitioner as a security for the amount invested . It is submitted that later on the business of the

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Petitioner went into loss which resulted in closure of the same during the year 2019. It is submitted that though the Petitioner requested the Respondent No. 2 to come for a joint meeting for settling the accounts, the Respondent No. 2 did not turn up and filed the above case by misusing the signed blank cheques and stamp paper entrusted by the Petitioner as a security.

It is submitted that the Learned Special Judicial First Class Magistrate Court ,(N.I.Act cases), Kozhikode, taken on record the above complaint as ST No. 879 of 2021, took cognizance and issued summons to the Petitioner.

It is submitted that the issuance of process against the Petitioner in a complaint filed by the power of attorney holder of the complainant is not maintainable for the following reasons:-

- A. The complaint and cognizance taken on the basis of the complaint and the affidavit are not maintainable and liable to be quashed. The prosecution in the above matter has been initiated on the basis of a complaint filed under Section 142 of

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the Negotiable Instruments Act by the complainant Sarath Kumar through his Power of Attorney holder Mr. Ummer Farook Manoly. Along with the complaint, an affidavit sworn by his power of attorney holder as mandated under Section 145 (1) of the Act, was also filed on behalf of the complainant. Though in the address portion of the complaint, has been averred that the complainant is being represented by his power of attorney holder, there is no mentioning in the body of the complaint that the complaint is being filed by the power of attorney holder which is totally against the dictum laid down by this Hon'ble Court in **Narayanan A.C Vs. State of Maharashtra & Ors ( 2015 (12) SCC 203)**

B. Though the complainant preferred the complaint through his power of attorney holder, there is no mentioning in the complaint that the power of attorney holder has direct knowledge, about the transactions described in the complaint and he has witnessed the transactions. In these circumstances the cognizance taken on the basis of the evidence tendered by the power of attorney holder is not sustainable.



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- C. It is submitted that the complaint is seen verified by the power of attorney holder as if he is the complainant.
- D. It is submitted that the prosecution initiated against the Petitioner on the basis of the complaint filed by the complainant through his power of attorney holder is not maintainable as the complainant has not produced any power of attorney allegedly executed by the complainant. There is no whisper regarding the production of power of attorney in the list of documents attached along with the complaint. It is submitted that there is no mentioning about the power of attorney even in the proof affidavit filed by the power of attorney holder.
- E. Section 142 (1) (a) mandates that a complaint alleging the commission of an offence punishable under Section 138 of Negotiable Instruments Act has to be filed by a payee or holder in due course as the case may be. It is submitted that the name of the payee in the above matter is Mr. Sarath Kumar whereas the complaint is seen filed by Mr. Ummer Farook Manoly" without properly complying the requirements laid down by this Hon'ble Court in **Narayanan A.C Vs. State of Maharashtra & Ors ( 2015 (12) SCC 203)** and hence it

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is submitted that there is clear violation of statutory provisions and the complaint is liable to be dismissed on this ground alone.

It is submitted that the petitioner appeared before the Learned Special Judicial First Class Magistrate Court ,(N.I.Act cases), Kozhikode on 29.08.2022 and filed an application as C.M.P. No. 3534 of 2022 under Section 264 of Cr P.C for acquitting him before conducting the trial. It is submitted that the said application was dismissed by the Learned Special Judicial First Class Magistrate Court ,(N.I.Act cases), Kozhikode as per the order dated 02.11.2022.

It is submitted that thereafter the Petitioner filed CrI.M.C. No. 8287 of 2022 before the Hon'ble High Court of Kerala at Ernakulam challenging the above order of dismissal and with a prayer to quash the complaint in ST No. 879 of 2021 on the files of the Learned Special Judicial First Class Magistrate Court ,(N.I.Act cases), Kozhikode in view of the irregularity in taking the cognizance as mentioned above.

It is submitted that as per the order dated 13.01.2023 passed in CrI.M.C. No. 8287 of 2022, the Hon'ble High Court observed that the cognizance taken in the matter on the basis of the affidavit of the

power of attorney holder is illegal and set aside the same, but allowed the Respondent No. 2/complainant to cure the said defect and ordered to revert back the complaint to the pre cognizance stage with liberty to the original complainant to file an affidavit under Section 145 of the Negotiable Instruments Act.

It is submitted that the order passed by the Hon'ble High Court permitting the Respondent No. 2 to adduce fresh evidence for the purpose of taking cognizance has resulted in miscarriage of justice and caused prejudice to the Petitioner. It is submitted that the Hon'ble High Court ought to have quashed the complaint in the above matter as the same was instituted by an incompetent person.

In view of the above, kind indulgence of this Hon'ble Court is warranted in the above matter.

Hence this Special Leave Petition

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LIST OF DATES AND EVENTS

2016 & 2019	It is submitted that the Respondent No. 2 approached the Petitioner and expressed his willingness to invest in the business of the Petitioner during the year 2016 while they were working together at abroad and accordingly the Respondent No. 2 invested in the business of the Petitioner by fully agreeing to share the profits and loss incurring in the business in equal proportion. It is submitted that the Respondent No. 2 had obtained signed blank paper and cheques from the Petitioner as a security for the amount invested . It is submitted that later on the business of the Petitioner went into loss which resulted in closure of the same during the year 2019. It is submitted that though the Petitioner requested the Respondent No. 2 to come for a joint meeting for settling the accounts, the Respondent No. 2 did not turn up.
18.09.2021	The Respondent No. 2 misused the blank cheque entrusted by the Petitioner as a security for the

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amount invested in his business and on 18.09.2021 filed a complaint as ST No. 879 of 2021 before the Learned Special Judicial First Class Magistrate Court, (N.I.Act cases), Kozhikode against the Petitioner through his power of attorney holder M. Ummer Farook Manoly for offences punishable under Section 138 of Negotiable Instruments Act with the following allegations:-

1. The Petitioner borrowed an amount of Rs. 30,00,000/- (Rupees Thirty Lakhs Only) from the Respondent No. 2/ complainant for expanding his business and when the complainant demanded the said amount, the Petitioner came to the residence of the complainant and executed an agreement on 02.01.2021 promising to repay the amount within 6 months from the date of the agreement. In addition to it, the Petitioner issued a post dated cheque bearing No. 950111 dated 02.07.2021 for Rs. 50,00,000/- (Rupees Thirty Lakhs Only) drawn on Bank of Baroda, Sreemoola Nagaram, Ernakulam

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for the discharge of the above liability.

2. The Respondent No. 2/Complainant presented the above cheque for collection through his banker on 08.07.2021 and the same were dishonoured for want of sufficient funds in the account of the Petitioner.

3. Respondent No. 2/complainant sent legal notice dated 04.08.2021 demanding the Petitioner to repay the said amount and the Petitioner received the same on 06.08.2021 and did not clear the liability covered by the cheque. In view of the above, the Respondent No. 2/complainant filed the above mentioned complaint.

It is submitted that M. Ummer Farook Manoly, the power of attorney holder of the Respondent No. 2 has also filed an affidavit along with the complaint before the Learned Special Judicial First Class Magistrate Court ,(N.I.Act cases), Kozhikode on the basis of which the Learned trial Court took cognizance and issued summons to the Petitioner.

A copy of the complaint dated 18.09.2021 filed by

	<p>the Respondent No.2 through his power of attorney holder M. Ummer Farook Manoly in S.T. No. 879 of 2021 before the Learned Special Judicial First Class Magistrate Court ,(N.I.Act cases), Kozhikode is produced and marked as <b>Annexure-P/1. (Page Nos. 39 to - 46 )</b></p> <p>A copy of the affidavit dated 18.09.2021 filed by M. Ummer Ferook Manoly, in S.T. No. 879 of 2021 before the Learned Special Judicial First Class Magistrate Court ,(N.I.Act cases), Kozhikode is produced and marked as <b>Annexure-P/2. (Page Nos. 47 to 50 )</b></p>
29.08.2022	<p>It is submitted that the petitioner appeared before the Learned Special Judicial First Class Magistrate Court ,(N.I.Act cases), Kozhikode on 29.08.2022 and filed an application as C.M.P. No. 3534 of 2022 in S.T. No. 879 of 2021 under Section 264 of Cr P.C for acquitting him before conducting the trial in view of the following facts:-</p> <p>A. The complaint and cognizance taken on the basis of the complaint and the affidavit are</p>

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not maintainable and liable to be quashed. The prosecution in the above matter has been initiated on the basis of a complaint filed under Section 142 of the Negotiable Instruments Act by the complainant Sarath Kumar through his Power of Attorney holder Mr. Ummer Farook Manoly. Along with the complaint, an affidavit sworn by his power of attorney holder as mandated under Section 145 (1) of the Act, was also filed on behalf of the complainant. Though in the address portion of the complaint, has been averred that the complainant is being represented by his power of attorney holder, there is no mentioning in the body of the complaint that the complaint is being filed by the power of attorney holder which is totally against the dictum laid down by this Hon'ble Court in **Narayanan A.C Vs. State of Maharashtra & Ors (2015 (12) SCC 203)**

B. Though the complainant preferred the complaint through his power of attorney



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holder, there is no mentioning in the complaint that the power of attorney holder has direct knowledge about the transactions described in the complaint and he has witnessed the transactions. In these circumstances the cognizance taken on the basis of the evidence tendered by the power of attorney holder is not sustainable.

C. It is submitted that the complaint is seen verified by the power of attorney holder as if he is the complainant.

D. It is submitted that the prosecution initiated against the Petitioner on the basis of the complaint filed by the complainant through his power of attorney holder is not maintainable as the complainant has not produced any power of attorney allegedly executed by the complainant. There is no whisper regarding the production of power of attorney in the list of documents attached along with the complaint. It is submitted that there is no mentioning about the power of attorney even

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in the proof affidavit filed by the power of attorney holder.

E. Section 142 (1) (a) mandates that a complaint alleging the commission of an offence punishable under Section 138 of Negotiable Instruments Act has to be filed by a payee or holder in due course as the case may be. It is submitted that the name of the payee in the above matter is Mr. Sarath Kumar whereas the complaint is seen filed by Mr. Ummer Farook Manoly" without properly complying the requirements laid down by this Hon'ble Court in **Narayanan A.C Vs. State of Maharashtra & Ors ( 2015 (12) SCC 203)** and hence it is submitted that there is clear violation of statutory provisions and the complaint is liable to be dismissed on this ground alone.

A copy of the Petition dated 29.08.2022 in C.M.P. No. 3534 of 2022 in S.T. No. 879 of 2021 filed by the Petitioner before the Learned Special Judicial First Class Magistrate Court ,(N.I.Act cases),

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	Kozhikode is produced and marked as <b>Annexure-P/3 (Page Nos 51 to 54 )</b>
02.11.2022	As per the order dated 02.11.2022 passed in C.M.P. No. 3534 of 2022 in S.T.No. 879 of 2021, the Learned Special Judicial First Class Magistrate Court,(N.I.Act cases), Kozhikode, dismissed the above petition filed by the Petitioner. A copy of the order dated 02.11.2022 passed by the Learned Special Judicial First Class Magistrate Court ,(N.I.Act cases), Kozhikode in C.M.P. No. 3534 of 2022 in S.T.No. 879 of 2021 is produced and marked as <b>Annexure- P/4 (Page Nos. 55 to 58 )</b>
15.11.2022	The Petitioner filed CrI.M.C. No. 8287 of 2022 dated 15.11.2022 before the Hon'ble High Court of Kerala at Ernakulam challenging the order passed by the Learned Special Judicial First Class Magistrate Court,(N.I.Act cases), Kozhikode in C.M.P. No. 3534 of 2022 and with a prayer to quash the complaint in ST No. 879 of 2021 in view of the irregularity in taking the cognizance. A copy

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	<p>of the Petition in CrI.M.C No. 8287 of 2022 dated 15.11.2022 filed by the Petitioner before the Hon'ble High Court of Kerala at Ernakulam is produced and marked as <b>Annexure- P/5 (Page Nos. 59 to 65 )</b></p>
13.01.2023	<p>As per the order dated 13.01.2023 passed in CrI.M.C. No. 8287 of 2022, the Hon'ble High Court of Kerala at Ernakulam observed that the cognizance taken in the matter on the basis of the affidavit of the power of attorney holder is illegal and set aside the same, but allowed the Respondent No. 2/complainant to cure the said defect and ordered to revert back the complaint to the pre cognizance stage with liberty to the original complainant to file an affidavit under Section 145 of the Negotiable Instruments Act.</p> <p><b>(Impugned judgment)</b></p> <p><b><u>NOTE</u></b></p> <p>It is submitted that the order passed by the Hon'ble High Court in permitting the Respondent No. 2 to adduce fresh evidence for the purpose of</p>

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	taking cognizance has resulted in miscarriage of justice and caused prejudice to the Petitioner. It is submitted that the Hon'ble High Court ought to have quashed the complaint in the above matter as the same was instituted by an incompetent person.
02.03.2023	Special Leave Petition filed.

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

FRIDAY, THE 13<sup>TH</sup> DAY OF JANUARY 2023 / 23RD POUSHA, 1944

CRL.MC NO. 8287 OF 2022

AGAINST THE ORDER DATED 2.11.2022 IN CMP.NO.3534/2022 IN  
ST 879/2021 OF SPECIAL JUDICIAL MAGISTRATE OF FIRST CLASS  
(N.I ACT CASES), KOZHIKODE

PETITIONER/ACCUSED:

RAZAK METHER,  
AGED 70 YEARS,  
S/O. KUNJUMHAMMED METHER,  
KAKKANATTIL HOUSE, SREEMOOLA NAGARAM,  
ERNAKULAM, PIN - 685580.  
BY ADV RAJIV NAMBISAN

RESPONDENTS/STATE OF KERALA & COMPLAINANT:

- 1 STATE OF KERALA  
REPRESENTED BY PUBLIC PROSECUTOR,  
HIGH COURT OF KERALA, ERNAKULAM - 682031.
- 2 E.SARATH KUMAR,  
S/O VASUDEVAN, BHAGYA, NELLIKKUNNI, VAYALIL,  
N.K.ROAD, NADAKKAVU, KOZHIKODU, REPRESENTED BY  
POWER OF ATTORNEY HOLDER UMMER FAROOK MANOLY,  
S/O.MOIDEENKOYA,BAIJAS, MAJOR SANTHOSH ROAD,  
NADAKKAVU,KOZHIKODE, PIN - 673006.

BY ADVS.

JAGAN ABRAHAM M GEORGW  
JAISON ANTONY(K/000076/2017)  
PUBLIC PROSECUTOR SRI.G.SUDHEER

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON  
13.01.2023, THE COURT ON THE SAME DAY PASSED THE  
FOLLOWING:

**“C.R”**

***A. BADHARUDEEN, J.***

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*CrI.M.C.No.8287 of 2022*

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*Dated this the 13<sup>th</sup> day of January, 2023*

**ORDER**

This petition has been filed under Section 482 of the Code of Criminal Procedure ('Cr.P.C' for short) with prayer to quash Annexure A4 order and further to quash Annexure A1 complaint and all further proceedings initiated against the petitioner in S.T.879/2021 on the file of Special Judicial First Class Magistrate Court (N.I. Act Cases) Kozhikode.

2. Heard the learned counsel for the petitioner as well as the learned counsel for the 2<sup>nd</sup> respondent. The learned Public Prosecutor appearing for the State of Kerala also was heard.

3. The learned counsel for the petitioner argued that the dismissal of Annexure-A3 petition filed by the petitioner by Annexure-A4 order is not justifiable. Therefore, Annexure-A4

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order is liable to be quashed and in consequence thereof Annexure-A1 complaint and further proceedings initiated against the petitioner in S.T.No.879/2021 are liable to be quashed. The specific point argued by the learned counsel for the petitioner is that in the address portion of Annexure-A1 complaint, it has been averred that the complainant was represented by his power of attorney holder, but there is no mention of this fact in the body of the complaint. Further, Annexure-A1 complaint had to be verified by the power of attorney holder as if he was the complainant. According to the learned counsel for the petitioner, thus Annexure-A1 complaint was filed ignoring the statutory mandates as held in the decision reported in [2013 (4) KLT 21 (SC) : 2013 (4) KLJ 279 : AIR 2014 SC 630 : 2013 SAR (Criminal) 1181], *A.C.Narayanan v. State of Maharashtra & anr.* (hereinafter referred to as "A.C Narayanan first case").

4. It is argued further that either in the complaint or in Annexure-A2 affidavit filed along with the complaint, nothing stated as regards to direct knowledge of the power of attorney holder regarding the transaction and he had witnessed the



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transaction. Decision of this Court reported in [2022 (4) KLT 592], *Shibu v. Neelakantan* also has been placed in this regard.

5. Per contra, it is submitted by the learned counsel for the 2<sup>nd</sup> respondent that there is absolutely no truth in the contentions raised by the petitioner herein. It is argued that certain relevant documents produced before the trial court were suppressed. Further point argued is that the complainant himself had filed proof affidavit under Section 145 of the Negotiable Instruments Act, as he proposed to give evidence regarding the transaction led to execution of the cheque. Therefore, Annexure-A1 complaint cannot be quashed and any such contention is a matter of evidence to be decided during trial.

6. While appreciating the rival contentions, it is relevant to refer the settled principles in *A.C Narayanan first case*. Following are the legal principles settled by the Apex Court in the above case.

*“(i) Filing of complaint under Section 138 of NI Act through power of attorney is perfectly legal and competent.*

*(ii) The Power of Attorney holder can depose*

*and verify on oath before the Court in order to prove the contents of the complaint. However, the power of attorney holder must have witnessed the transaction as an agent of the payee/holder in due course or possess due knowledge regarding the said transactions.*

*(iii) It is required by the complainant to make specific assertion as to the knowledge of the power of attorney holder in the said transaction explicitly in the complaint and the power of attorney holder who has no knowledge regarding the transactions cannot be examined as a witness in the case.*

*(iv) In the light of Section 145 of NI Act, it is open to the Magistrate to rely upon the verification in the form of affidavit filed by the complainant in support of the complaint under Section 138 of the NI Act and the Magistrate is neither mandatorily obliged to call upon the complainant to remain present before the Court, nor to examine the complainant of his witness upon oath for taking the decision whether or not to issue process on the complaint under Section 138 of the NI Act.*

*(v) The functions under the general power of attorney cannot be delegated to another person without specific clause permitting the same in the power of attorney. Nevertheless, the general power of attorney itself can be cancelled and be given to another person."*

7. It is true that after laying the above principles by the 3

Bench of the Apex Court, the case was again considered by another 2 Bench of the Apex Court. The second judgment in *Narayanan A.C & anr. v. State of Maharashtra & Ors.* is one reported in [2015 (1) KHC 456 : AIR 2015 SC 1198 : 2015 (12) SCC 203] (hereinafter referred to as 'Narayanan A.C second case'). In the said decision, the Apex Court quashed the complaint against the appellant/accused on the following reasons as extracted in para.17 and 18 of the judgment. The same are as under:

*"17. From the bare perusal of the said complaint, it can be seen that except mentioning in the cause title there is no mention of, or a reference to the Power of Attorney in the body of the said complaint nor was it exhibited as part of the said complaint. Further, in the list of evidence there is just a mere mention of the words at serial no.6 viz. "Power of Attorney", however there is no date or any other particulars of the Power of Attorney mentioned in the complaint. Even in the verification statement made by the respondent no.2, there is not even a whisper that she is filing the complaint as the Power of Attorney holder of the complainant. Even the order of issue of process dated 20<sup>th</sup> February, 1998 does not mention that the Magistrate had perused any Power of Attorney for issuing process.*

18. *The appellant has stated that his Advocate conducted search and inspection of the papers and proceedings of the criminal complaint and found that no Power of Attorney was found to be a part of that record. This has not been disputed by the respondents. In that view of the matter and in light of decision of the larger Bench, as referred above, we hold that the Magistrate wrongly took cognizance in the matter and the Court below erred in putting the onus on the appellant rather than the complainant. The aforesaid fact has also been overlooked by the High Court while passing the impugned judgment dated 12<sup>th</sup> August, 2005."*

8. It is true that in *Shibu v. Neelakantan's* case (*supra*), this Court held that *thus the law is settled on the point that a complaint alleging commission of offence under Section 138 of the Negotiable Instruments Act can be presented through the power of attorney holder and the power of attorney holder can depose and verify on oath before the court in order to prove the contents of the complaint. However, the power of attorney holder must have witnessed the transaction as an agent of the payee or holder in due course or possess due knowledge regarding the said transaction. It is required by the complainant to make specific assertion as to the knowledge of the power of attorney holder in*

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*the said transaction explicitly in the complaint and the power of attorney holder who had no knowledge regarding the transactions cannot be examined as a witness in the case.*

9. Now it is necessary to consider the merits of the contentions raised by the learned counsel for the petitioner at par with the contention raised by the 2<sup>nd</sup> respondent to ascertain as to whether the present complaint is liable to be quashed. On perusal of the complaint, in the cause title it has been stated that complainant is E.Sarath Kumar, S/o.Vasudevan, represented by his power of attorney holder Ummar Farook Manoly. The averments in the complaint refer “complainant” and “accused”, after detailing the transaction which led to execution of cheque for Rs.30 lakh dated 02.07.2021. No doubt, the complaint was filed by the power of attorney holder and he put signature in the place of the complainant. But in the list of documents, there is no mention as regards to production of power of attorney. In this matter, as I have already pointed out, the 2<sup>nd</sup> respondent filed Crl.M.A.No.2/2022 and produced Annexure-R2(a), viz. an agreement in between the complainant and the accused and

Annexure-R2(b), copy of the proof affidavit dated 06.08.2022 filed by the complainant. For the purpose of deciding the matter in controversy, I am inclined to accept these documents by allowing Crl.M.A.No.2/2022.

10. Annexure-A4 in this case is the order in CMP.No.3534/2022 dated 02.11.2022. CMP.No.3534/2022 is a petition filed by the petitioner herein under Section 264 Cr.P.C seeking acquittal of the accused before trial. In this context, it is to be noted that the Magistrate took cognizance in this matter and registered the case as S.T.879/2021 with intention to follow the procedure of summary trial. Section 264 of Cr.P.C deals with judgment in cases tried summarily and it has been provided that in every case tried summarily in which the accused does not plead guilty, the Magistrate shall record the substance of the evidence and a judgment containing a brief statement of the reasons for the finding. In fact, Section 264 does not provide for acquittal of the accused before trial. Therefore, the petition was found to be defective at the very inception. However, a perusal of the order is necessary to look into the way in which the complaint was filed.

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In the order, the learned Magistrate observed while dismissing the petition as not maintainable under Section 264 of Cr.P.C that, in this matter the power of attorney in original was produced along with the complaint at the time of its filing itself. The learned counsel for the petitioner placed a latest 3 Bench decision of the Apex Court reported in [2021 (3) KLT 10 (SC)], ***In Re: Expeditious Trial of Cases under Section 138 of N.I Act 1881*** and pointed out the necessity of Section 202 inquiry. In para.24 of the above judgment, the Apex Court held as under:

*"1) The High Courts are requested to issue practice directions to the Magistrates to record reasons before converting that of complaints under Section 138 of the Act from summary trial to summons trial.*

*2) Inquiry shall be conducted on receipt of complaints under Section 138 of the Act to arrive at sufficient grounds to proceed against the accused, when such accused resides beyond the territorial jurisdiction of the court.*

*3) For the conduct of inquiry under Section 202 of the Code, evidence of witnesses on behalf of the complainant shall be permitted to be taken on affidavit. In suitable cases, the Magistrate can restrict the inquiry to examination of documents without insisting for examination of witnesses.*

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xxxx xxxx xxxx"

11. Going by the ratio, in cases of an inquiry conducted under Section 202 of Cr.P.C, evidence of witnesses on behalf of the complainant shall be permitted to be taken on affidavit. It was held that in a suitable case, the Magistrate can restrict the inquiry to examination of documents without insisting for examination of witnesses also. It is true that as per the ratio in *A.C Narayanan first case*, the complaint filed under Section 138 of the Negotiable Instruments Act through power of attorney holder is perfectly legal and competent. But the power of attorney holder could depose and verify on oath before the court in order to prove the contents of the complaint, only when the power of attorney holder must have witnessed the transaction as an agent of the payee/holder in due course or possess due knowledge regarding the said transactions and also it is required by the complainant to make specific assertion as to the knowledge of the power of attorney holder in the said transaction explicitly in the complaint and the power of attorney holder, who has no knowledge regarding the transactions. If the above stipulations are not



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satisfied, the power of attorney could not depose and verify on oath before the court.

12. In the case on hand, the court below took cognizance of the matter acting on the affidavit filed by the power of attorney holder under Section 145 of the N.I Act. But it could be noticed that there is no averment in the complaint that the power of attorney had witnessed transactions as an agent of payee in due course or possess due knowledge regarding the said transaction and also there is no specific assertion as to the knowledge of the power of attorney holder in the said transaction explicitly in the complaint. In fact, the power of attorney holder, who filed the complaint in the present case, could not depose and verify on oath before the court since the affidavit under Section 145 of the N.I Act was filed by the power of attorney holder without the requisites as herein above narrated.

13. In view of the above, the cognizance taken by the Magistrate acting on the affidavit of the power of attorney holder is found to be illegal and the same shall stand set aside. Accordingly, the complaint is reverted back to the pre-cognizance

stage, with liberty to the original complainant to file an affidavit under Section 145 of the N.I Act in his capacity and on such filing the learned Magistrate shall consider fresh cognizance in accordance with law.

The Crl.M.C stands allowed as indicated above.

*Sd/-*

**(A. BADHARUDEEN, JUDGE)**

*rtr/*

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APPENDIX OF CRL.MC 8287/2022PETITIONER'S ANNEXURES

- Annexure A 1 CERTIFIED COPY OF COMPLAINT DATED 18.9.2021. FILED BY 2ND RESPONDENT - S.T.879/2021, BEFORE JFMC-VII, KOZHIKODE.
- Annexure A2 TRUE COPY OF AFFIDAVIT FILED BY P.A.HOLDER (COMPLAINANT) IN S.T.879/2021, BEFORE JFMC-VII, KOZHIKODE. DATED ON: 18.9.2021.
- Annexure A3 TRUE COPY OF C.M.P.NO. 3534/2022 FILED ON 29.8.2022.
- Annexure A4 CERTIFIED COPY OF ORDER IN C.M.P. NO: 3534/2022 DATED 2.11.2022.

RESPONDENTS' ANNEXURES

- Annexure -R(2) (a) TRUE COPY OF THE AGREEMENT DATED 02-01-2021 EXECUTED AND SIGNED BETWEEN THE COMPLAINANT AND THE ACCUSED.
- Annexure -R(2) (b) TRUE COPY OF THE PROOF AFFIDAVIT DATED 06-08-2022 SIGNED AND EXECUTED BY THE COMPLAINANT HIMSELF UNDER SECTION 145 OF NI ACT AS HIS EVIDENCE IN S.T.NO.879/2021 BEFORE THE HON'BLE JUDICIAL FIRST CLASS MAGISTRATE COURT-VII.

IN THE SUPREME COURT OF INDIA  
SCR ORDER XXII RULE 2 (1)  
CRIMINAL APPELLATE JURISDICTION  
(UNDER ARTICLE 136 OF THE CONSTITUTION OF INDIA)  
SPECIAL LEAVE PETITION (CRIMINAL) NO.                      OF 2023  
[WITH PRAYER FOR INTERIM RELIEF]

(Arising out of the impugned judgment and final order dated 13.01.2023 passed by the Hon'ble High Court of Kerala at Ernakulam in CrI.M.C. No. 8287 of 2022)

**POSITION OF THE PARTIES**

	<b>Between:</b>	<b>In the Trial Court</b>	<b>In the High Court</b>	<b>In this Court</b>
	Razak Mether, aged 70 Years S/o.Kunjumammed Mether Kakkanattil House Sreemoola Nagaram Ernakulam, Pin 685580, Kerala State	Accused	Petitioner	Petitioner
	<b><u>AND</u></b>			
1.	State of Kerala, Represented by the Secretary, Home Department, Secretariat, Trivandrum, Kerala	Not a party	Respondent No.1	Contesting Respondent No.1
2.	E.Sarath Kumar S/o. Vasudevan, Bhagya, Nellikkunni Vayalil, N.K.Road, Nadakkavu, Kozhikode,	Complainant	Respondent No.2	Contesting Respondent No.2

represented by Power of Attorney holder Ummer Farook Manoly, S/o. Moideenkoya, Baijas, Major Santhosh Road, Naakkavu, Kozhikode, Pin-673006, Kerala State			
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To

The Hon'ble Chief Justice of India  
And his companion Justices of the  
Hon'ble Supreme Court of India

Humble petition of the

Petitioner above named.

**MOST RESPECTFULLY SHOWETH:**

1. The present Special Leave Petition is filed against the impugned judgment and final order dated 13.01.2023 passed by the Hon'ble High Court of Kerala at Ernakulam in CrI.M.C. No. 8287 of 2022 whereby the Hon'ble High Court set aside the cognizance taken by the Learned Special Judicial First Class Magistrate Court ,(N.I.Act cases), Kozhikode in S.T. No. 879 of 2021 and ordered to revert back the complaint to the pre-cognizance stage with liberty to the Respondent No.2/complainant to file fresh affidavit under Section 145 of the Negotiable Instruments Act, 1881

2. **QUESTIONS OF LAW:**

The following questions of law arise for the kind consideration of this Hon'ble Court;

- a. Whether the order passed by the Hon'ble High Court allowing the complainant to cure the technical defects in a case filed under Section 138 of Negotiable Instruments Act would amount to miscarriage of justice, since the offence under section 138 of Negotiable Instruments Act is purely technical one and the accused is entitled to get the benefit of any violation on the part of the complainant in following the statutory formalities.?
- b. Whether the Hon'ble High Court erred in not quashing the complaint even after observing that the cognizance taken on the basis of the affidavit of the Power of Attorney holder is illegal and allowing the complainant to file fresh affidavit ?.
- c. Whether the order passed by the Hon'ble High Court directing the complainant to file fresh affidavit amounts to permitting the complainant to fill the lacuna in his case while filing fresh affidavit which is highly prejudicial to the accused who is facing prosecution in a technical offence under Section 138 of the Negotiable Instruments Act.

- d. Whether the Hon'ble High Court erred in not appreciating that the dictum laid down by this Hon'ble Court in **Narayanan A.C Vs. State of Maharashtra & Ors ( 2015 (12) SCC 203)** is squarely applicable to the facts and circumstances of the present case and the complaint filed by the Respondent No. 2 is liable to be quashed on the ground that the same has been filed by an incompetent person.
- e. Whether the Hon'ble erred in not appreciating the dictum laid down by this Hon'ble Court in **Pepsi Foods Ltd Vs. Judicial Magistrate (1998 (5) SCC 749 )** while rejecting the prayer of the Petitioner for quashing the complaint.?

3. **DECLARATION INTERMS OF RULE- 2(2):**

The Petitioner states that no other petition seeking leave to appeal has been filed by him against the impugned judgment and order dated 13.01.2023 passed by the Hon'ble High Court of Kerala at Ernakulam in CrI.M.C. No. 8287 of 2022.

**4. DECLARATION IN TERMS OF RULE- 4:**

The Annexure P/1 to P/5 produced along with the Special Leave Petition are true copies of the pleadings /documents which formed part of the records of the case in the court below against whose order the leave to appeal is sought for in this petition.

**5. GROUND:**

A. Because the order passed by the Hon'ble High Court allowing the complainant to cure the technical defects in a case filed under Section 138 of Negotiable Instruments Act would amount to miscarriage of justice, since the offence under section 138 of Negotiable Instruments Act is purely technical one and the accused is entitled to get the benefit of any violation on the part of the complainant in following the statutory formalities stipulated for filing the complaint.

B. It is further submitted that the order passed by the Hon'ble High Court is having an effect of allowing the complainant to fill the lacuna in his case while filing fresh affidavit in terms of the impugned order which is highly prejudicial to the



accused who is facing prosecution in a technical offence under Section 138 of the Negotiable Instruments Act.

C. Because the Hon'ble High Court erred in not appreciating that the complaint in the above matter is not filed by a person who is competent to file the complaint on behalf of the complainant and the Hon'ble High Court erred in denying the benefit of the same to the accused and allowing the Complainant to cure the said defect by directing him to file a fresh affidavit U/s. 145 of Negotiable Instruments Act before the Learned Trial Court. It is submitted that if the technical defects in a complaint are allowed to be cured, it would amount to a wrong precedent and results in denial of justice to the accused persons.

D. Because the Hon'ble High Court erred in not appreciating that the dictum laid down by this Hon'ble Court in **Narayanan A.C Vs. State of Maharashtra & Ors ( 2015 (12) SCC 203)** is squarely applicable to the facts and circumstances of the present case and the complaint filed by the Respondent No. 2 is liable to be quashed on the ground that the same has been filed by an incompetent person. It is submitted that in the said decision, this Hon'ble Court quashed the complaint on the

following reasons as extracted in Para No. 17 and 18 of the judgment:-

17. "From the bare perusal of the said complaint, it can be seen that except mentioning in the cause title there is no mention of, or a reference to the Power of Attorney in the body of the said complaint nor was it exhibited as part of the said complaint.

Further, in the list of evidence there is just a mere mention of the words at serial no.6 viz. "Power of Attorney", however there is no date or any other particulars of the Power of Attorney mentioned in the complaint. Even in the verification statement made by the respondent no.2, there is not even a whisper that she is filing the complaint as the Power of Attorney holder of the complainant. Even the order of issue of process dated 20th February, 1998 does not mention that the Magistrate had perused any Power of Attorney for issuing process.

18. The appellant has stated that his Advocate conducted search and inspection of the papers and proceedings of the criminal complaint and found that no Power of Attorney was found to be a part of that record. This has not been disputed by the respondents. In that view of the matter and in light of decision of the larger Bench, as referred above, we hold that the Magistrate wrongly took cognizance in the matter and the Court below erred in putting the onus on the appellant rather than the complainant. The aforesaid fact has also been overlooked by the High Court while passing the impugned judgment dated 12th August, 2005.

Below is the chart showing the comparison between **Narayanan A.C Vs. State of Maharashtra & Ors ( 2015 (12) SCC 203)** and the case of the petitioner.

<b>Narayanan A.C Vs. State of Maharashtra &amp; Ors ( 2015 (12) SCC 203)</b>	<b>Case of the Petitioner</b>
There was no mention of, or a reference to the power of attorney in the body of the complaint except mentioning in the cause title.	Though in the address portion of the complaint, it is averred that the complainant is being represented by his power of attorney holder, there is no mentioning in the body of the complaint that the complaint is being filed by the power of attorney holder. The affidavit filed by the power of attorney holder is also silent with regard to his personal knowledge regarding the transactions.
The Power of Attorney was not exhibited as part of the complaint	The Power of Attorney was not exhibited in the affidavit and in the list of documents filed along with the complaint.
The power of attorney was mentioned in the list of evidence, but there is no date or any other particulars of Power of Attorney	Nothing is mentioned in the complaint or affidavit of the Power of Attorney holder about the execution of Power of Attorney.
In the verification statement, it was not mentioned that the complaint is being filed through Power of Attorney or the signature in the verification portion was put in capacity of a power of attorney holder	The complaint is verified by the Power of Attorney as if he is the complainant. Nothing mentioned in the verification portion that he is signing/verifying the complainant in capacity of a power of attorney holder.

E. Because the prosecution in the above matter has been initiated on the basis of a complaint filed under Section 142 of the Negotiable Instruments Act by the complainant Sarath Kumar through his Power of Attorney holder Mr. Ummer Farook Manoly. Along with the complaint, an affidavit sworn by his power of attorney holder as mandated under Section 145 (1) of the Act, was also filed on behalf of the complainant. Though in the address portion of the complaint, has been averred that the complainant is being represented by his power of attorney holder, there is no mentioning in the body of the complaint that the complaint is being filed by the power of attorney holder which is totally against the dictum laid down by this Hon'ble Court in **Narayanan A.C Vs. State of Maharashtra & Ors ( 2015 (12) SCC 203)** and in view of the above irregularities, the Hon'ble High Court ought to have quashed the complaint in the above matter.

F. Because though the complainant preferred the complaint through his power of attorney holder, there is no mentioning in the complaint that the power of attorney holder has direct knowledge, about the transactions described in the complaint and he has witnessed the transactions. In these

circumstances the cognizance taken on the basis of the evidence tendered by the power of attorney holder is not sustainable and hence the complaint ought to have been quashed .

G. Because the complaint is seen verified by the power of attorney holder as if he is the complainant and the prosecution initiated against the Petitioner on the basis of the complaint filed by the complainant through his power of attorney holder is not maintainable as the complainant has not produced any power of attorney allegedly executed by the complainant. There is no whisper regarding the production of power of attorney in the list of documents attached along with the complaint. It is submitted that there is no mentioning about the power of attorney even in the proof affidavit filed by the power of attorney holder and hence the Hon'ble High Court erred in not quashing the complaint in the above matter.

H. Because Section 142 (1) (a) mandates that a complaint alleging the commission of an offence punishable under Section 138 of Negotiable Instruments Act has to be filed by a payee or holder in due course as the case may be. It is

submitted that the name of the payee in the above matter is Mr. Sarath Kumar whereas the complaint is seen filed by Mr. Ummer Farook Manoly" without properly complying the requirements laid down by this Hon'ble Court in **Narayanan A.C Vs. State of Maharashtra & Ors ( 2015 (12) SCC 203)** and hence the Hon'ble High Court ought to have seen that there is clear violation of statutory provisions and quash the complaint.

- I. Because this Hon'ble Court in Pepsi Foods Ltd Vs. Judicial Magistrate ( 1998 (5) SCC 749) has held that summoning an accused in a criminal case is a serious matter and that the process of criminal law cannot be set into motion in a mechanical manner. The relevant portion of the dictum laid down by this Hon'ble Court in the above matter is extracted as follows:-

*"28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must*

*reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinize the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused"*

#### **6. GROUNDS FOR INTERIM RELIEF**

- a) It is submitted that the order passed by the Hon'ble High Court allowing the complainant to cure the technical defects in a case filed under Section 138 of Negotiable Instruments Act would amount to miscarriage of justice, since the offence under section 138 of Negotiable Instruments Act is purely technical



and the accused is entitled to get the benefit of any violation on the part of the complainant in following the statutory formalities stipulated for filing the complaint.

- b) It is further submitted that the order passed by the Hon'ble High Court amounts to allowing the complainant to fill the lacuna in his case while filing fresh affidavit in terms of the impugned order which is highly prejudicial to the accused who is facing prosecution in a technical offence under Section 138 of the Negotiable Instruments Act.
- c) It is submitted that the Petitioner has got prima facie good case and balance of convenience is also in his favour. The Petitioner has fair chance of success before this Hon'ble Court.
- d) It is submitted that the continuation of the proceedings against the Petitioner in S.T. No. 879 of 2021 before the Learned Special Judicial First Class Magistrate Court ,(N.I.Act cases), Kozhikode. would be an abuse of process of law and therefore it is just and necessary that this Hon'ble Court may be pleased to stay the operation of the impugned order and continuation of the proceedings in S.T. No. 879 of 2021 before the Learned

Special Judicial First Class Magistrate Court ,(N.I.Act cases),  
Kozhikode during the pendency of the Special Leave Petition.

**7. MAIN PRAYER:**

It is therefore, most respectfully prayed that this Hon'ble Court may graciously be pleased to:-

- a) Grant Special Leave to Appeal under Article 136 of the Constitution of India against the impugned judgment and final order dated 13.01.2023 passed by the Hon'ble High Court of Kerala at Ernakulam in Crl. M.C No.8287 Of 2022 ; and
- b) Pass any other order or further orders may deem fit and proper in the circumstances of the case.

**8. PRAYER FOR INTERIM RELIEF:**

It is therefore, most respectfully prayed that this Hon'ble Court may be pleased to:-

- a) Pass an ad-interim ex-parte order staying the operation of impugned final Judgment and Order dated 13.01.2023 passed by the Hon'ble High Court of Kerala at Ernakulam in Cri.M.C.No. 8287 of and
- b) Pass an ad-interim ex-parte order staying the further proceedings in S.T. 879 of 2021 on the file of the Learned Special Judicial First Class Magistrate Court ,(N.I.Act cases), Kozhikode, till the disposal of the above Special Leave Petition, in the interest of justice, and
- c) Pass such other order or orders as deem fit and proper in the facts and circumstances of the case.

**FOR THIS ACT OF KINDNESS THE HUMBLE PETITIONER WILL AS IN DUTY BOUND EVER PRAY.**

FILED BY:

**P.S. SUDHEER**

ADVOCATE FOR THE PETITIONER

NEW DELHI  
DRAWN ON:19.02.2023  
FILED ON: 02.03.2023

31

IN THE SUPREME COURT OF INDIA  
CRIMINAL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (CRIMINAL) NO. OF 2023

**IN THE MATTER OF:-**

**IN THE MATTER OF:-**

Razak Mether

Petitioner

Versus

State of Kerala & Anr

Respondents

**CERTIFICATE**

Certified that the Special Leave Petition is confined only to the pleadings before the Court whose order is challenged and the other documents relied upon in those proceedings. No additional facts, documents or grounds have been taken therein or relied upon in the Special Leave Petition. It is further certified that the copies of the documents/annexures attached to the Special Leave Petition are necessary to answer the question of law raised in the petition or to make out grounds urged in the Special Leave Petition for consideration of this Hon'ble Court. This certificate is given on the basis of the instructions given by the petitioner whose affidavit is filed in support of the Special Leave Petition.

FILED BY:

**P.S. SUDHEER**  
ADVOCATE FOR THE PETITIONER

New Delhi.

Filed on:02.03.2023

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IN THE SUPREME COURT OF INDIA  
CRIMINAL APPELLATE JURISDICTION  
SPECIAL LEAVE PETITION (CRIMINAL) No. OF 2023

**IN THE MATTER OF:**

Razak Mether

Petitioner

Versus

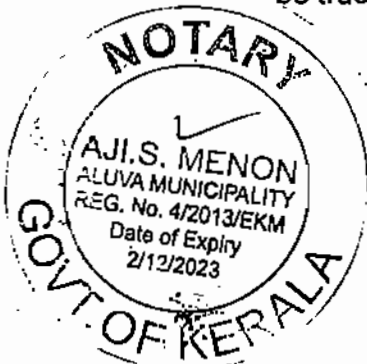
State of Kerala & Anr

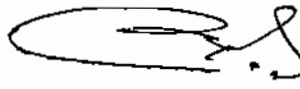
Respondents


**AFFIDAVIT**

I, Razak Mether, aged 31 years, S/o. Kunju Muhammed Master, Kakkanattil House, Sremoolam Nagaram, Emakulam, 685 580, Kerala State, do hereby solemnly affirm and states as follows:-

1. That I am the Petitioner in the above Special Leave Petition and I am fully conversant with the facts and circumstances of the case and as such I am competent to swear this affidavit.
2. I have read and understood the contents of the Special Leave Petition at pages 15 to 33 and Synopsis and List of Dates at pages B to Y, and I say that the contents thereof are true and correct to the best of my knowledge and the legal submissions are based on the advice received from my counsel which I believe to be true.



  
RAZAK METHER

  
20/02/2023  
AJI S. MENON  
ADVOCATE & NOTARY  
ROLL No. K/2717/1999  
ALUVA-683 101  
Ph : 9995228248

- 3. That I have read and understood the contents of Interlocutory Applications and I say that the contents thereof are true and correct to the best of my knowledge.
- 4. That the Annexures filed with the Special Leave Petition are true and correct copies of the originals.
- 5. That I have not filed any other Special Leave Petition in this Hon'ble Court against the impugned judgment and order.

DEPONENT

I, the above named deponent do hereby verify that the contents made in Para Nos.1 to 5 of the above affidavit are true and correct to the best of my knowledge and belief. Nothing material has been concealed there from.

Verified by me on this the 20<sup>th</sup> day of February 2023.

DEPONENT



Solemnly affirmed and signed before me by the deponent on this the 20<sup>th</sup> day of February 2023 in my office at Aluva.

*[Handwritten Signature]*  
 20/02/2023  
 AJI S. MENON  
 ADVOCATE & NOTARY  
 ROLL No. K/2717/1999  
 ALUVA-683 101  
 Ph : 9995228248

**Section 482 in The Code Of Criminal Procedure, 1973**

482. Saving of inherent powers of High Court. Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

**Section 482 in The Code Of Criminal Procedure, 1973**

482. Saving of inherent powers of High Court. Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

TRUE COPY



**Section 138 in The Negotiable Instruments Act, 1881**

<sup>18</sup> [ 138 Dishonour of cheque for insufficiency, etc., of funds in the account. —Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for <sup>19</sup> [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both: Provided that nothing contained in this section shall apply unless—

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque,<sup>20</sup> [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.— For the purposes of this section, “debt or other liability” means a legally enforceable debt or other liability.]

### **Section 145 in The Negotiable Instruments Act, 1881**

145. Evidence on affidavit.—

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any enquiry, trial or other proceeding under the said Code.

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein

//True copy//

BEFORE THE HON'BLE SPECIAL JUDICIAL FIRST CLASS  
MAGISTRATE (N.I.ACT CASES), KOZHIKODE

S.T. No. 879 of 2021

E.Sarath Kumar, S/o. Vasudevan

Aged 53 years, 'Bhagya'Nellikuni Vayalil

N.K.Road, Nadakkavu, Kozhikode

Rep. by P.A.Holder

Ummer Farook Manoly

S/o. P.K.Moideen Koya, aged 55 years

Bijas, Major Santhosh Road,

Nadakkavu, Katcheri Amsom and Desom

Kozhikode Taluk

(Nadakkavu Police Station Limit)

Complainant

Razak Mathar, aged 70 years

S/o. Kunhu Muhammed Mether

Kakkanattil House, Sreemolanagaram

Thekkumbahagom, Ernakulam

685 550, (Kalady polic station limit)

Accused

COMPLAINT FILED UNDER SECTION 190 (1) ( C) OF THE CODE OF CRIMINAL PROCEDURE AND SECTION 142 OF THE NEGOTIABLE INSTRUMENTS ACT.

1. The address for service of all notices and other processes to the complainant is as shown above
2. The address for service of all notices and other process to the accused is as shown above

The complainant begs to submit as follows:-

1. The complainant is residing in the above shown address and well acquainted with the accused and close associative for last several years. While so the accused had borrowed an amount of Rs. 30,00,000/- (Rupees Thirty Lakh) from the complainant for expanding the business of the accused. Being well known to each other and also close association between the parties, accused had persuaded the complainant to lend him the above amounts and promised that he shall repay the said amount as and when demanded back. Thereafter the complainant demanded back the money from the accused which he had borrowed from the

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complainant. At last the complainant contacted the accused and he came to the residence of the complainant and executed an agreement on 02.01.2021 in the presence of the witnesses promising to pay the amount within 6 months from the date of the said agreement and also in discharge of the above said liability he had signed, executed and issued a cheque of Bank of Baroda, Sreemoolanagaram, Ernakulam, bearing No. 950111 for Rs. 30,00,000/- (Rupees Thirty Lakh) dated 2/7/2021. While issuing the above said cheque accused had promised the complainant that he is still maintaining an account with said Bank and the above cheque shall be honoured on presenting the same.

2. Upon believing the assurance of the accused. The complainant presented the cheque through CSB Bank, Kozhikode Bazar Branch on 8/7/2021. But the same was returned unpaid by the Complainant's banker for insufficiency of funds with remarks/reasons stating "Funds insufficient" and the complainant received the said information regarding dishonor of the cheque from the Bank on 12/7/2021. The original cheque No. 950111 dated 2/7/2021 issued by the accused is produced along with the complaint. The original of the intimation received from the complainant's bank dated

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12.07.2021 is also produced along with the complaint. The above said cheque was signed delivered and issued in the presence of the complainant and Mr. Ummer Farook, the power of attorney of the complainant and also in the presence of NJD Antony, the second witness in the above said agreement dated 2.1.2021

3. The accused has purposefully cheated the complainant and have signed, executed and issued the cheques with predetermined malafide intentions. The said act has been carried out with the full knowledge that the above said cheque issued to the complainant will be dishonoured.
4. The complainant after receipt of intimation from his bank caused to issue a lawyer notice dated 4.08.2021 to the accused demanding him to pay the amount covered by the cheque within a period of 15 days. The true copy of the said lawyer notice dated 4.08.2021 and the original postal receipt are produced along with the complaint. In spite of receiving the above notice on 6.8.2021, the accused has neither paid the amount even after the lapse of 15 days nor sent a reply to the notice.

5. The above act of the accused is deliberate and intentional, so as to cheat the complainant and the same constitute offence under section 138 of the Negotiable Instruments Act and Section 420 of the Indian Penal Code.
6. The complainant is having sufficient documents and witnesses to prove the case. The documents produced along with the complaint may be considered into complainant's evidence and witnesses shown in the witness list may permit to be examined on complainant side.
7. The cause of action of the above case arose on 8.7.2021, the date on which the cheque was presented and dishonoured by the bank and on 12.7.2021 the date on which the intimation was received by the complainant and on 4.8.2021 the date on which the complainant issued a notice to the accused intimating the dishonor of the cheque referred above and on 6.8.2021 the date on which the notice was received by the accused and thereafter from Kozhikode Bazar, where the complainant's bank is situated through which the cheque was sent for collection which is situated within the local limits of Kozhikode Town Police Station well within the jurisdiction of this Honourable Court.



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8. It is therefore most humbly prayed that this Hon'ble Court may be pleased to admit the complaint on to file, take cognizance of the offence, issue summons to the accused and witnesses, conduct trial and punish the accused accordingly and direct the accused to pay compensation to the complainant under Section 357 of the Criminal Procedure Code.

Dated this the 18<sup>th</sup> day of September 2021

Sd/-

Complainant

**LIST OF WITNESS**

1. The Branch Manager, Bank of Baroda, Sreemoola Nagaram, Ernakulam
2. The Branch Manager, CSB Bank, Kozhikode Bazar Branch, Kozhikode

Dated this the 18<sup>th</sup> day of September 2021

Sd/-

Complainant

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**VERIFICATION**

I, Mr. M. Ummer Farook Manoly, S/o. P.K. Moideenkoya, residing at Bijas, Major Santhosh Road, Nadakkavu. P.O., Katcheri amsom and desom of Kozhikode Taluk, do hereby declare that all the facts stated above are true to my and complainant's knowledge information and belief and we believe them to be true.

Dated this the 18<sup>th</sup> day of September 2021

Sd/-

Complainant

**LIST OF DOCUMENTS**

Sl. No.	Date	Description of document	Purpose
1.	2.7.2021	Original cheque bearing No. 950111 dated 2.07.2021 of Rs. 30,00,000/- (Rupees Thirty Lakhs Only) drawn on Bank of Baroda, Sreemoola Nagaram, Ernaulam, through account No. 92710100003432 maintained by the accused	To prove Complainant's case
2.	2.01.2021	True copy of the agreement entered between complainant and accused	To prove Complainant's case

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3.	12.07.2021	Original memo from the CSB bank, Kozhikode Bazar	To prove Complainant's case
4.	4.8.2021	True copy of the lawyer notice issued to the accused with original postal receipt	To prove Complainant's case
5.	6.8.2021	Acknowledgment card	To prove Complainant's case

Dated this the 18<sup>th</sup> day of September 2021

Sd/-

Complainant

//True copy//

ANNEXURE-P/2BEFORE THE HON'BLE SPECIAL JUDICIAL FIRST CLASS  
MAGISTRATE (N.I.ACT CASES), KOZHIKODE

S.T. No. 879 of 2021

E.Sarath Kumar rep. by P.A.Holder

M. Ummer Farook

Complainant

Razak Mether

Accused

Affidavit

I, M. Ummer Farook Manoly, S/o. P.K. Moideen Koya, residing at Bijas, Major Santhosh Road, Nadakkavu, P.O.Katcheri amsom and desom of Kozhikode Taluk, do hereby solemnly affirm and state as follows:-

1. I am the power of attorney holder of the complainant in the above case. I am fully conversant with the facts and circumstances of the case and am competent to swear this affidavit.
2. Complainant is residing in the above shown address and well acquainted with the accused and close associative for last several years. While so the accused had borrowed an amount of Rs. 30,00,000/- (Rupees Thirty Lakh) from the complainant for expanding the business of the accused. Being well known to each other and also close association between the parties, accused had persuaded the complainant to lend him the above amounts and

promised that he shall repay the said amount as and when demanded back. Thereafter the complainant demanded back the money from the accused which he had borrowed from the complainant. At last the complainant contacted the accused and he came to the residence of the complainant and executed an agreement on 02.01.2021 in the presence of the witnesses promising to pay the amount within 6 months from the date of the said agreement and also in discharge of the above said liability he had signed, executed and issued a cheque of Bank of Baroda, Sreemoolanagaram, Ernakulam, bearing No. 950111 for Rs. 30,00,000/- (Rupees Thirty Lakh) dated 2/7/2021. While issuing the above said cheque accused had promised the complainant that he is still maintaining an account with said Bank and the above cheque shall be honoured on presenting the same.

3. Upon believing the assurance of the accused. The complainant presented the cheque through CSB Bank, Kozhikode Bazar Branch on 8/7/2021. But the same was returned unpaid by the Complainant's banker for insufficiency of funds with remarks/reasons stating "Funds insufficient" and the complainant received the said information regarding dishonor of the cheque from the Bank on 12/7/2021. The original cheque No. 950111 dated 2/7/2021 issued

by the accused is produced along with the complaint. The original of the intimation received from the complainant's bank dated 12.07.2021 is also produced along with the complaint. The above said cheque was signed delivered and issued in the presence of the complainant and Mr. Ummer Farook, the power of attorney of the complainant and also in the presence of NJD Antony, the second witness in the above said agreement dated 2.1.2021

4. The accused has purposefully cheated the complainant and have signed, executed and issued the cheques with predetermined malafide intentions. The said act has been carried out with the full knowledge that the above said cheque issued to the complainant will be dishonoured.
5. The complainant after receipt of intimation from his bank caused to issue a lawyer notice dated 4.08.2021 to the accused demanding him to pay the amount covered by the cheque within a period of 15 days. The true copy of the said lawyer notice dated 4.08.2021 and the original postal receipt are produced along with the complaint. In spite of receiving the above notice on 6.8.2021, the accused has neither paid the amount even after the lapse of 15 days nor sent a reply to the notice.

9. The above act of the accused is deliberate and intentional, so as to cheat the complainant and the same constitute offence under section 138 of the Negotiable Instruments Act and Section 420 of the Indian Penal Code. I have sufficient documents and witness to prove the case. The documents produced along with this complaint may be considered as a part of this affidavit.

Therefore it is humbly prayed that this Honourable court may be pleased to admit this complain on file.

All the facts stated above are true and correct to the best of our knowledge, information and belief.

Dated this the 18<sup>th</sup> day of September 2021

Sd/-

Complainant

Solemnly affirmed and signed before me by the literate deponent personally known to me on this the 18<sup>th</sup> day of September 2021

Sd/-

Muhammed Iqbal  
Advocate  
K/389/91

//True copy//

BEFORE THE HON'BLE SPECIAL JUDICIAL FIRST CLASS  
MAGISTRATE (N.I.ACT CASES), KOZHIKODE

C.M.P. NO. 3534 OF 2022

IN

S.T. No. 879 of 2021

Razak Mathar, aged 70 years

Kakkanattil House, Sreemolanagaram

Emakulam District

Petitioner/Accused

.Sarath Kumar,

'Bhagya', Nadakkavu, Kozhikode

Represented . by his

Power of Attorney Holder

Ummer Farook Manoly

Nadakkavu, Kozhikode

Respondent/Complainant

**PETITION FILED BY THE PETITIONER UNDER SECTION 264 OF  
CODE OF CRIMINAL PROCEDURE.**

1. I am the Petitioner herein, the accused in the above case and am conversant with the facts of the case. The prosecution is initiated



against me on the basis of a complaint filed under section 142 of N.I.Act by the complainant Sarath Kumar through his Power of Attorney Holder one Mr. Ummer Farook Manoly. Along with the complaint an affidavit also filed by the complainant sworn by his Power of Attorney Holder as mandated under section 145 (1) of the Act

2. The complaint and the cognizance taken on the basis of the complaint and the affidavit are not maintainable. The complaint was not verified by the complainant but the Power of Attorney Holder as it was filed by himself. Likewise except in the cause title, nowhere in the complaint, it is averred that the complaint was being filed by the complainant through his duly appointed Power Holder. It is also seen absent in the in the complaint that the power holder has direct knowledge of the transaction between the original complainant and the accused in order to make the power holder eligible to be a witness of the complainant.
3. Section 142 (1) (a) undoubtedly mandates that a complaint alleging the commission of an offence punishable under section 138 of the Act has to be filed by a payee or holder in due course as the case may be. Here as per the documents relied on by the complainant, the payee of the cheque is one Mr. "Sarath Kumar", but the

complaint is filed and verified by one Mr. "Ummer Farook Manoly".

This is clear violation of the statutory provision and on that ground alone the complaint must fail.

4. Though in cause title it is stated that the original complainant is represented by duly appointed Power of Attorney Holder no such Power of Attorney empowering Mr. Ummer Farook Manoly, is seen produced before the court in order to get power holder to represent the payee of the cheque.
5. Section 200 of Cr.P.C prescribes that in order to take cognizance by a Magistrate of an offence based on a complaint, the complainant and his witness who are present should be examined on oath, Likewise Section 202 of Cr.P.C, further warns that such an inquiry is mandatory if the accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction. In the case in hand since the accused is residing in an area beyond the jurisdiction of this Hon'ble Court an inquiry under Section 202 Cr.P.C is necessary but unfortunately, the inquiry so conducted by this court is not in compliance with Section 200 and 202 of Cr.P.C. Under these circumstances a successful prosecution is not possible in this case and all the further proceedings that are taken on the basis of the present complaint is nothing but a farce. The

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evidence tendered by the complainant is not sufficient either to take cognizance of the offence or to convict the accused.

So it is most humbly prayed that this Hon'ble Court maybe pleased to find me not guilty of the offence alleged against me and acquit me from the offence alleged and for that this petition may kindly be allowed.

Dated this the 29<sup>th</sup> day of August 2022

Petitioner/Accused: Razak Mathar Sd/-

Advocate : Rajiv Nambisan Sd/-

All the facts stated above are true to the best of my knowledge, information and belief.

Petitioner/Accused: Razak Mathar Sd/-

//True copy//

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ANNEXURE. P/4

IN THE COURT OF SPECIAL JUDICIAL FIRST CLASS MAGISTRATE  
(N.I. ACT CASES), KOZHIKODE

Present :-Sri. Majeed. K  
Special Judicial First Class Magistrate

Dated this the 02<sup>nd</sup> day of November 2022

S.T. No. 879/2021

Razak Methar.  
S/o. Kunju Muhammed Methar,  
Kakkanattil House, Sreemoolam Nagaram, : Petitioner/Accused  
Ernakulam – 685 580  
(Kalady Police Station Limit)  
(Rep. by Adv. Rajiv Nambisan)

E. Sarath Kumar,  
S/o. Vasudevan, "Bhagya", Nellikunni Vayalil,  
N.K. Road, Nadakkavu, Kozhikode.  
Rep. by his Power of Attorney Holder, Ummer : Respondent/Complainant  
Farook Manoly.  
(Nadakkavu Police Station Limit)

This petition coming for hearing dismiss proceedings, the court delivered the following:-

O R D E R

The petition is filed by the accused to acquit him before conducting the trial  
u/s. 264 of Cr.P.C.

2. The averment in the petition in brief is as follows:-

The petitioner contended that the prosecution initiated against him on the basis  
of complaint filed by the complainant Sarath Kumar through his Power of Attorney

Holder Mr. Ummer Farook Manoly is not sustainable as said Ummer Farook Monoly has not produced original of the Power of Attorney, said to be executed by Sarath Kumar, the original complainant. Further contended that the cognizance taken by this court on the basis of said complaint is not legal, as the complaint was not verified by the complainant but by the Power of Attorney Holder. Likewise the petitioner stated that except the cause title and no where it is averred that the complaint was filed by the complainant's Power of Attorney. It is also stated in the petition that, since the accused is residing out of the Jurisdiction of this court an enquiry is to be conducted by the court before issuing summons u/s. 204 Cr. P.C. For these reasons, the accused stated that he is entitled to be acquitted and due to lack of evidence cognizance taken by the court is bad in law. He prays for the finding that accused is not guilty of the offence alleged against him and prays for acquittal. To substantiate his contention the learned counsel for the accused placed rulings reported in 2013 KHC 885(SC), 2014 KHC 285 (SC) and 2015 KHC 456 (SC).

The complainant filed a counter contenting that the petition is filed on experimental basis with an intention to prolong the trial of case, the complaint is filed through Power of Attorney Holder duly executed by the original complaint and the said Power of Attorney is produced before court on 18.09.2017 itself with the petition to receive the Power of Attorney in this case. It is further stated that the petition is filed u/s 246 of Cr. P.C. as it is not a provision to acquit the accused before the conclusion of trial. It is further stated in the counter that the learned Magistrate have taken cognizance against the accused as early as on 22<sup>nd</sup> October 2021 and the present petition is filed on 29.08.2022. Till date the petitioner not preferred any

revision against the order passed by this court in C.M.P. No. 3314/2021, per contra only for experimental basis the petition is filed, hence prays for the dismissal of the petition.

3. Heard both sides.

4. The following points are arise for consideration:-

I. Is the petitioner/accused is entitled to get the relief claimed for?

II. What shall be the order to be passed?

Point No. I & II :-

The petition is filed to acquit the accused by invoking provision u/s. 264 of Cr. P.C. as the charge against the accused is not maintainable in the eye of law.

Sec. 264 says that in every case tried summarily, in which the accused does not pleaded guilty, the inagistrate shall record the substance of the evidence and a judgement containing a brief statement of reasons for findings. Sec. 264 is an enabling provision, which emproving the Magistrate to dispose of a case tried summary after recording substance of the evidence. In this case the learned counsel for the accused submits that he prays for an acquittal of the accused before recording the evidence. His contention is that the complainant was not produced original Power of Attorney at the time of filing the complaint and it is stated that copy of the power of Attorney is not furnished to the accused. On going through the case file, it is see that the complaint is filed along with the Power of Attorney on the day of filing the complainant itself. That is on 18.09.2021 when the complaint is filed by the complainant. The two Judgement relied on by the learned counsel reported in 2013

KHC 885 (SC) and 2015 KHC 125 (SC) held that the complainant filed without producing the original Power of Attorney is not sustainable and it is liable to be dismissed. In this case the complainant is filed along with the original Power of Attorney, the said contention will not stand.

In this case the complainant has produced the original Power of Attorney at the time of filing the complaint itself and my learned predecessor has taken cognizance holding that the complainant has authority and competent to file complaint through Power of Attorney. Hence by the for going discussions, I am of the view that the petition is filed only on the experimental basis to protract the proceedings and there by with an intention to cause hardship to the complainant. In the results the petition is dismissed.

(Dictated to Confidential Assistant, transcribed and typed by her and corrected and pronounced by me in open Court, this the 02<sup>nd</sup> day of November, 2022).

Special Judicial First Class Magistrate  
(N.I. Act Cases), Kozhikode

TRUE COPY

BEFORE THE HONOURABLE HIGH COURT OF KERALA AT  
ERNAKULAM

Criminal Miscellaneous Case No. 8287 of 2022

(ST. No. 879 of 2021 of Special Judicial First Class Magistrate Court  
(N.I.Act Cases ), Kozhikode)

Petitioner :	Razak Mether, S/o. Kunhumammed Mether Kakkanattil House Sreemoolanagaram Ernakulam District Pin-685 580
Vs	
Respondent	<ol style="list-style-type: none"><li>1. State of Kerala, represented by Public Prosecutor, High Court of Kerala. Ernakulam 682 031</li><li>2. E.Sarath Kumar S/o. Vasudevan, Bhagya, Mellikkunni, Vayalil, N.K.Road, Nadakkavu, Kozhikkode, Represented by his power of attorney holder Ummer Farook Manoly, S/o. Moideenkoya Baijas, Major SanthoshRoad, Nadakkavu, Kozhikkode</li></ol>

All notices and processes to the petitioner may be served on the address of his counsel Rajiv Nambisan, Roll No. 33, Infant Jesus Church Building No. 3, opp. High Court of Kerala, Ernakulam and to the Respondents on their given address:-



**MEMORANDUM OF CRIMINAL MISCELLANEOUS CASE FILED UNDER SECTION 482 OF CODE OF CRIMINAL PROCEDURE BY ADVOCATE RAJIV NAMBISAN FOR AND ON BEHALF OF THE PETITIONER**

1. The petitioner herein is the sole accused in ST. No. 879 of 2021 on the file of Special Judicial First Class magistrate Court (NI Act Cases, ) Kozhikode in which the indictment is under section 138 of N.I.Act
2. The gravamen of the case of the second Respondent (ie. The complainant before the lower court) is that the petitioner after borrowing 30 lakhs Rupees from him issued a cheque for the like amount drawn on Bank of Baroda, Sreemoolanagaram Branch. The cheque when presented in Catholic Cyrian Bank, Kozhikode Branch for encashment on its due date, it was dishonoured due to insufficiency of fund in the account of the accused to honour it. Though a statutory notice as contemplated under section 138 (b) of N.I.Act was issued to the accused, he has failed to make payment within the period stipulated in the notice even after the receipt and hence the accused has committed the offence.
3. Thereafter the complainant preferred a complaint under section 142 of N.I.Act before the lower Court through his duly appointed power

of attorney. A certified copy of the complaint dtd. 18.09. 2021 is produced herewith and marked as Annexure-A-1. Along with Annexure A 1 complaint, an affidavit also filed in lieu of the inquiry to be conducted u/s. 202 Cr.PC. A true copy of the affidavit filed dated 18.092021 is produced herewith and marked as Annexure A 2

4. The Court below issued process to the accused invoking Section 204 of Cr. PC and the accused in obedience of the summons addressed to him, appeared before the court. Lower Court after recording the plea of the accused posted the case for evience. On 06.08.2022 the complainant filed roof affidavit in lieu of chief examination.
5. Thereafter the petitioner/accused preferred a petition before the trial court as Crl. M.P. 3534/ 2022 U/s. 264 Cr.P.C praying the court to acquit him since there is no legal evidence tendered by the complainant against him and further on the ground that the cognizance taken upon Annexure A 1 complaint is illegal. A copy of Crl.M.P. 3534/2022 is produced herewith and marked as Annexure A 3. Then the court below after hearing both sides, dismissed the petition on 02.11.2022 on the ground that Annexure-A 3 is filed on experimental basis to protract the proceedings. A certified copy of

the order dated 2.11.2022 is produced herewith and marked as Ammexure-A4.

6. The circumstances that led the petitioner to prefer Annexure A 3 petition is that, though the complainant preferred Annexure A 1 complaint through his power of attorney holder, there is no mentioning in the complaint that the power of attorney holder has direct knowledge, about the transaction described in the complaint. Likewise though in the address portion of the complaint, it is stated that he is being represented by his Power of Attorney holder, nowhere in the complaint is it stated that the complaint is being filed by the complainant through his power of attorney holder. Further the complaint is verified by the power of attorney holder as if he is the complainant. In the list of documents attached along with A 1 complaint, there is no whisper regarding the production of the power of attorney executed by the complainant. Even in the proof affidavit, there is no mentioning of the power of attorney. As per settled legal position those are all mandatory requirements to take cognizance and also for a successful prosecution.
7. Nothing on record to show that the power of attorney was produced along with the complaint and the court below while issuing process had acted upon it. But unfortunately, the court below did not

appreciate the contentions raised in A 3 petition, but dismissed it finding that the complainant had already produced the power of attorney in original at the time of filing the complaint. Since it is an erroneous finding and the court failed to appreciate all the contentions raised in A 3 petition, the petitioner is preferring this Criminal Miscellaneous case on the following and among other,

### GROUNDS

- I. The finding of the court below is against law, facts and circumstances of the case.
- II. Though the address portion of the complaint, it is averred that he is being represented by his power of attorney holder, there is no mentioning in the body of the complaint, that Annexure A 1 complaint is being filed by the power of attorney holder. Likewise Annexure A 1 complaint is verified by the power of attorney holder as if he is the complainant. This is totally against the principles laid down by the Apex Court in A.C.Narayanan's case reported in 2013 SAR 1181 and reiterated in another decision reported in 2015 (1) KHC 456. Likewise, the production of power

of attorney along with the complaint is not mentioned in the list of documents annexed in A 1 complaint.

- III. Neither in Annexure A 1 complaint nor in Annexure- A 2 affidavit, the complainant has a case that his power of attorney holder has direct knowledge regarding the transactions and he has witnessed the transaction. Under these circumstances the cognizance taken on the basis of the evidence tendered by the power of attorney by way of affidavit is bad in the eyes of law. A decision of the Hon'ble High Court of Kerala reported in 2022 (2) KLT 592 also reiterates this point relying of A.C.Narayanan's case.
- IV. But, learned Magistrate has failed to interpret the above referred decisions in its correct perspective and dismissed A 3 petition finding that Power of Attorney was produced along with the complaint and so the cognizance taken by the court is perfectly legal.
- V. Even in the proof affidavit filed by the complainant in lieu of chief examination there is no mentioning of the production of power of attorney before the court and no request to mark it as an exhibit in his evidence.

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Under these circumstances the order of dismissal of Annexure A 3 petition by Annexure A 4 is unjustifiable and the interference of this Hon'ble Court is highly necessary for the ends of justice. Hence this Criminal Miscellaneous Case is filed to quash Annexure A 4 order and further to quash Annexure A 1 complaint and all further proceedings initiated against the petitioner in S T 879/2021 on the file of Special Judicial First Class magistrate Court (N.I. Act Cases ) Kozhikode.

Dated this the 15<sup>th</sup> day of November 2022

Sd/-

**COUNSEL FOR THE PETITIONER: RAJIV NAMBIAN**

*//True copy//*

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IN THE SUPREME COURT OF INDIA  
CRIMINAL APPELLATE JURISDICTION  
CRL. M.P. No. of 2023

In  
SPECIAL LEAVE PETITION (CRIMINAL) NO. OF 2023

IN THE MATTER OF:-

Razak Mether

Petitioner

Versus

State of Kerala & Anr

Respondents

**APPLICATION FOR EXEMPTION FROM FILING CERTIFIED COPY  
OF THE IMPUGNED JUDGMENT**

To

The Hon'ble Chief Justice of India  
And his companion Justices of the  
Hon'ble Supreme Court of India

Humble Application of the  
Petitioner above named.

**MOST RESPECTFULLY SHOWETH:**

1. The present Special Leave Petition is filed against the impugned judgment and final order dated 13.01.2023 passed by the Hon'ble High Court of Kerala at Ernakulam in CrI.M.C. No. 8287 of 2022 whereby the Hon'ble High Court set aside the cognizance taken by the Learned Special Judicial First Class Magistrate Court ,(N.I.Act cases), Kozhikode in S.T. No. 879 of 2021 and ordered to revert back the complaint to the pre-cognizance stage with liberty to

the Respondent No.2/complainant to file fresh affidavit under Section 145 of the Negotiable Instruments Act, 1881

2. That the facts of the case have been fully set out in the Special Leave Petition. That the contents stated in the Special Leave Petition are not repeated here for the sake of brevity, which may kindly be referred and relied from the records of the Special Leave Petition.
3. That the impugned judgment and final order in the above matter was passed by the Hon'ble High Court on 13.01.2023. To obtain the certified copy of the impugned Judgment, it will take some time, and the delay in filing Special Leave Petition will badly affect the Petitioner.
4. That since the matter is very urgent in nature and delay in obtaining the certified copy of the impugned order will cause much hardship to the Petitioner, the present Special Leave Petition is being filed with the copy of the respective original downloaded from the website of the Hon'ble High Court of Kerala at Ernakulam
5. It is submitted that in view of the above, this Hon'ble Court may have kind indulgence to exempt the Petitioner from filing the certified copy of the impugned judgment and final order dated



13.01.2023 passed by the Hon'ble High of Kerala at Ernakulam in CrI.M.C.No. 8287 of 2022, in the interest of justice, otherwise the Petitioner will be put to irreparable loss, injury and hardships.

**PRAYER**

In the facts and circumstances stated above and in the interest of justice it is most respectfully prayed that this Hon'ble Court may graciously be pleased to: -

- a) Exempt the Petitioner from filing the certified copy of the impugned Judgment and final order dated 13.01.2023 passed by the Hon'ble High Court of Kerala at Ernakulam in CrI.M.C No. 8287 of 2022 , in the interest of justice, and
- b) Pass any other order/orders as this Hon'ble Court deems fit in the facts and circumstances of the case and in the interest of justice.

**AND FOR WHICH ACT OF KINDNESS THE PETITIONER SHALL DUTY BOUND EVER PRAY.**

FILED BY:

P.S.SUDHEER  
ADVOCATE FOR THE PETITIONER

FILED ON: 02.03.2023

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IN THE SUPREME COURT OF INDIA  
CRIMINAL APPELLATE JURISDICTION  
SPECIAL LEAVE PETITION (CRIMINAL) No. OF 2023  
**IN THE MATTER OF:**

Razak Methar

Petitioner

Versus

State of Kerala & Anr

Respondents


**VAKALATNAMA**

I, Razak Methar, aged ~~71~~ years, S/o. Kunju Muhammed Master, Kakkanattil House, Sremoolam Nagaram, Emakulam, 685 580, Kerala State, Petitioner(s) Plaintiff(s) Defendants/Opposite Party/ Respondent No. /Appellant(s) in the above Petition / Suit / Reference / Appeal do hereby appoint and retain

**ADVOCATE ON RECORD**, Supreme Court of India, to act and appear for me/us in the above Petition/Suit/Reference/Appeal and on my/our behalf to conduct and prosecute (or defend) the same and all proceedings that may be taken in respect of any application connected with the same or any decree of order passed therein, including proceedings in taxation and application for Review, to file and obtain return of documents and to deposit and receive money on my/our behalf in the said Petition/Suit/Reference/Appeal and in applications for Review and to represent me/us and to take all necessary steps on my/our behalf in the above matter. /We agree to ratify all acts done by the aforesaid Advocate in pursuance of this authority.

Dated this the <sup>2<sup>nd</sup></sup> day of February 2023

Identified, Accepted, Certified & Satisfied.

Signed ... Rajiv Nambisan (K/737/87)  
Advocate 

Address for service of the said Advocate is:

  
Signature  
Petitioner

(RAZAK METHAR)

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**MEMO OF APPEARANCE**

The Registrar  
Supreme Court of India  
New Delhi – 1

Sir,

Please enter my appearance for the Petitioner(s)/ Appellant(s)/  
Respondent(s) in the above-mentioned petition/case/appeal/matter.

Date. 02.03.2023

Yours faithfully,



Rajiv Nambaisam  
Advocate K/737/87

