

**IN THE COURT OF MS. TISTA SHAH METROPOLITAN
MAGISTRATE(CENTRAL) NI ACT, CENTRAL DISTT.
THC, DELHI.**

CC No. 514074/16

Mr. Gaurav Kajla
S/o Sh.Sukh Pal Singh,
R/o Building No. B-1/26
Flat No. SF-1, DLF
Ankur Vihar, Loni
Ghaziabad-201102.

..... Complainant

Vs.

Sh. Neeraj Sharma,
S/o Devender Sharma,
R/o 48/43, Gali No. 7,
Nai Basti, Anand Parbat,
New Delhi-110005.

..... Accused

Date of Institution	:	30.08.2014
Offence complained of	:	138 N.I. Act
Date of Decision	:	26.06.2020
Decision	:	Convicted.

**COMPLAINT UNDER SECTION 138 NEGOTIABLE INSTRUMENTS
ACT, 1881.**
JUDGMENT

1. The present complaint has been filed by the complainant against the accused under section 138 Negotiable Instruments Act, 1881.

2. The brief facts as alleged by the complainant in the complaint are that the accused had gradually over a period of 2 to 3 years developed friendship with the complainant. In the second week of May 2014, the accused had approached the

complainant requesting him for a friendly loan of Rs. 1,50,000/- on the pretext of dire financial need. The accused had also assured the complainant to repay him the loan amount after a period of two months. The complainant then agreed to extend a sum of Rs 1,00,000/- to the accused which the complainant was carrying with him and gave the same to the accused as a friendly loan. In discharge of his legal liability, the accused gave to the complainant a post dated cheque which is the cheque in question bearing no. 000096 dated 17.07.2014 for a sum of Rs. 1,00,000/-, drawn on Kotak Mahindra Bank with the assurance that the same will be honoured upon its presentation.

3. When the complainant presented the said cheque in the bank, the same was returned unpaid by the banker of the complainant vide cheque returning memo dated 19.07.2014 with the remarks “Funds insufficient”.

4. The complainant thereafter issued a legal demand notice on 02.08.2014 through counsel calling upon the accused to pay the said cheque amount within a period of 15 days from the date of receipt of the notice. The said notice was duly served upon the accused but still the accused failed to pay the aforesaid dishonoured cheque amount. Hence, the present complaint u/s 138 Negotiable Instrument Act 1881 (hereinafter the NI Act) was filed on 30.08.2014.

5. In order to prove his case, the complainant had examined himself as CW-1 by way of affidavit CW-1/1 and relied upon the following documents:

- (a) Original cheque in question bearing no. 000096 dated 17.07.2014 Ex CW1/A.
- (b) Original cheque return memo dated 19.07.2014 Ex. CW-1/B.
- (e) Legal demand notice Ex. CW-1/C.
- (f) Postal receipts dated 02.08.2014 Ex.CW1/D.

(g) Track report of the postal receipt Ex. CW1/E.

6. On finding of a prima-facie case against the accused, the accused was summoned on 05.09.2014 where the accused appeared before the court on 16.10.2014.

7. Thereafter, notice u/s 251 Cr.P.C. was framed against the accused on 13.01.2015 to which he pleaded not guilty and claimed trial. The plea of defence of the accused was recorded where the accused had stated that “The said cheque was issued by me. The cheque was signed by me, rest of the particulars has been filled by some else. The cheque was given by me at the residence of the complainant to the complainant himself.” “I have not received the legal demand notice from the complainant however I reside at the address mentioned in the legal notice.” He further goes on to say that “I have issued the cheque in the month of June or July 2013 the cheque was given by me to one Mr. Sanjay Goswamy at his officer. The cheque was given by me as security for one Mr. Ram Chander.”

8. After the framing of notice the complainant examined himself as CW-1 and also examined witness CW-2 Sh. Anil Handa, Public Relation Inspector (Postal), Civil Lines Post office. No other witnesses were examined by the complainant. Thereafter, complainant evidence was closed and the matter was listed for statement of the accused u/s 313 Cr.P.C.

9. Statement of the accused was recorded u/s 313 Cr.P.C. r/w Section 281 Cr.P.C on 2.01.2016 wherein all the incriminating circumstances appearing in evidence against the accused were put to him to which the accused stated that “the cheque in question belongs to me. It was given by me to Mr. Sanjay Goswami. I am the proprietor of AAR ANN Group. I know the complainant through Mr. Sanjay Goswami. I have never taken any loan from the complainant. The cheque in question was given by me to Mr. Sanjay Goswami in June 2013 for security purpose. I have no financial

transactions with the complainant. I do not remember whether I have received the legal demand notice Ex.CW1/C or not”.

10. Thereafter, the matter was listed for defence evidence. In his defence, the accused examined himself as defence witness DW-1 and Sh. O.P.Kathuria, G.M., Admin, Magic Auto Pvt. Ltd as defence witness DW-2 . Thereafter, defence evidence was closed and the matter was fixed for final arguments.

11. Ld.Counsel for the accused has relied upon the following judgments as follows:

- (a) Chander Kanta & Anr. Vs. M/s Agro Industries & Ors decided on 20-11-2017.
- (b) Vijay vs. Laxman & Anr, Criminal appeal no 261 of 2013
- (c) Krishna Janardhan Bhat vs. Dattatraya G.Hegde ,Appeal (crl.) 518 of 2006
- (d) Rajendraprasad vs. Mr. Santosh Kumar Parasmal, Criminal Revision Application No. 256 of 2007
- (e) Vinay Parulekar vs. Pramod Meshram 2008 (2) MhLj 115.
- (f) K.O.Chacko vs. Kurian P.V. & Ors , 2006 (3) KLJ 29

12. The submissions made by the Ld. Counsel for the complainant and the accused have been heard and the record of the case has been thoroughly perused.

13. Before proceeding to the merits of the case, it is important to lay down the basic provision of law with respect to section 138 of the Negotiable Instruments Act, 1881 which is as follows:

Section 138 of Negotiable Instruments Act, 1881 makes dishonour of cheques an offence. It provides that “*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 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”.

14. In order to ascertain whether the accused has committed an offence u/s 138 NI Act, the following ingredients constituting the offence have to be proved:

- (a) The drawer of the cheque should have issued the cheque for the discharge, in whole or in part of a legally enforceable debt or other liability.
- (b) The cheque 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.
- (c) The drawer of such cheque fails to make the payment of the said amount of money within fifteen days of the receipt of the notice from the payee or the holder in due course demanding the payment of the said amount of money.

It is only when all the above mentioned ingredients are satisfied that the person who has drawn the cheque can be said to have committed an offence u/s 138 NI Act.

15. Coming to the first ingredient of the offence, which is that the drawer of the cheque should have issued the cheque for the discharge, in whole or in part of a legally enforceable debt or other liability, it is stated by the complainant that the complainant had extended a loan of Rs. 1,00,000/- to the accused who had issued the cheque in question as a post dated cheque to the complainant for the discharge of his legally recoverable liability, however, upon presentation, the cheque in question had got dishonoured.

16. Upon analyzing the statements of the accused recorded u/s 251 Cr.P.C, Section 313 Cr.P.C. and in his testimony as defence witness DW-1, what comes out is that the accused has admitted the cheque to be issued by him after signing upon the same.

The cheque in question in the present case has been drawn from the account of a proprietorship firm namely 'Aar Ann Group' where as per the statement of the accused recorded under section 313 CrPC, it has himself been stated by the accused that he was the proprietor of the said firm. In the eyes of law since a proprietorship firm has no separate legal existence apart from the proprietor of the firm where the firm name can simply be said to be another name of the proprietor, therefore it can be fairly stated that the cheque in question has been drawn from the account of the accused.

17. Considering the above factual position, it is important to reproduce Sec.118(a) and Sec.139 of the N.I. Act here.

Section 118(a) of the Act provides that until the contrary is proved, it shall be presumed that "that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration."

Further, **Section 139** of the Act lays down that "it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature

referred to in section 138 for the discharge, in whole or in part, of any debt or other liability.”

18. In the case of **K.N. Beena Vs. Muniyappan AIR 2001 SC 2000**, it was established as follows “ In complaint u/s 138 the court has to presume that the cheque had been issued for a debt or liability. This presumption is rebuttable, however, the burden of proving that the cheque has not been issued to the complainant by the accused for the discharge of debt or liability, lies on the accused”.

19. In view of the above stated law, the admission of the accused of his signatures on the cheque in question, the factum of issuance of the cheque and in view of the fact that the cheque in question has been drawn from the account of the accused, a statutory presumption is bound to be raised in favour of the complainant that the cheque in question was issued by the accused for the discharge of a legally recoverable debt or liability.

20. Once the statutory presumption has been raised in favour of the complainant, the burden of proof now lies upon the accused to rebut the statutory presumption as per the reverse onus of proof that now shifts upon the accused.

21. The defence of the accused has been stated by him in his examination in chief as defence witness DW-1 wherein it has been stated by him that the complainant alongwith his brother Mr. Sanjeev Kajla had met the accused in the year 2013 for purchasing a car. The seller of the car was a person named as Mr. Ram Chander who was the neighbor of the accused. The vehicle which was a Swift Dezire car was sold for a total sum of Rs. 3,40,000/- and when the said vehicle was purchased an agreement was executed by the complainant. Since eight or nine EMIs were remaining to be paid when the said vehicle was sold by Mr. Ram Chander, the cheque in question was handed over to the complainant as a security. It is stated that the cheque in question

was given only as a security cheque and not for the purpose of discharge of any legal liability owed to the complainant. It is also stated that since all the EMIs had been paid and the complainant and his brother had already obtained an NOC from Mr. Ram Chander, the accused had no legal liability to pay to the complainant.

22. On account of a statutory presumption raised in favour of the complainant, the onus now falls upon the accused to prove his defence and the presumption cannot be rebutted simply by placing reliance on oral averments. It is necessary for the accused to substantiate the defence taken by him either by bringing forth relevant evidence as proof or by pointing out to such inconsistencies or contradictions in the case of the complainant which would overthrow the complainant's case and make the defence of the accused probable.

23. In support of the defence taken by him, the accused has examined himself as defence witness DW-1. The accused has in his examination in chief relied upon certain service records stating the same to be obtained from the service centre of Maruti. The same were placed on record as Mark D1 (Colly 3 Pages).

It is trite law that a photocopy cannot be relied upon as evidence for the proof of any relevant fact unless either the same has been admitted by the party against whom the document is sought to be relied upon or the conditions for proving a secondary evidence have been fulfilled. Accordingly, the said document Mark D1 cannot be relied upon at this stage since the said document is a photocopy and has neither been admitted by the complainant nor the requirements of producing a secondary evidence have been fulfilled.

24. Reliance has also been placed by the accused upon the testimony of defence witness DW-2 Mr. O.P.Kathuria. The said witness has placed on record a document Ex. DW-2/A, which is stated by him to be the service record of the vehicle bearing number DL13CB1616. It is stated by the said witness that on 11.07.2011 when the vehicle had come for a general check-up, the same was in the name of Mr. Ram

Chander. He further goes on to testify that on 11.11.2013, Mr. Sanjeev Kajla was the owner of the said vehicle and that as per the history and records he was the owner of the vehicle till 31.05.2015. In his cross examination, it was also stated by him that as per the records, the name of the registered owner of the vehicle was changed on 11.11.2013 from Mr. Ram Chander to Mr. Sanjeev Kajla.

25. A perusal of the document placed on record as Ex.DW2/A and the testimony of witness DW-2 reveal only a single fact which is that Mr. Sanjeev Kajla was the registered owner of a car bearing no. DL-13CB-1616 since his name is displayed in the column of customer information in the document Ex.DW2/A which is the vehicle history of the above mentioned vehicle. As per the statement of the witness DW2, the details of the registered owner are mentioned in the column of customer information. It is quite apparent from a perusal of the testimony of DW2 and the document Ex DW2/A that the cheque in question nowhere finds any picture either in the vehicle history or in the evidence of witness DW-2. Although the complainant has admitted in his cross examination that Mr Sanjeev Kajla was his brother yet there is no evidence showing any link or connection to the cheque in question being given by the accused as a security for the purchase of the vehicle by the complainant or his brother. Moreover the complainant has in his cross examination as witness CW1 categorically refused to both knowing any person by the name of Mr Ram Chander and entering into any transaction of sale and purchase of vehicle with him. Thus no connection can be deduced from the testimony and the records presented by defence witness DW2 and the present cheque in question.

26. The accused has stated in his evidence as DW1 that since all the EMI's had been paid and an NOC had been obtained from Mr Ram Chander, he was not liable to pay any amount to the complainant. If that were so, the accused would have asked the complainant to return the cheque back to him or would have taken some action against the complainant in the event of the complainant refusing to do so but in the present

case there is not even a single averment of the accused stating that he had asked the complainant for return of his cheque back, let alone taking of any action against the complainant, which makes the defence of the accused all the more improbable.

27. The accused has also relied upon another document which is Ex.CW1/D-1 and it is stated that the same is an agreement executed by the complainant himself with respect to the purchase of the vehicle. The said document Ex.CW1/D-1 was put to the complainant CW1 in his cross examination and the complainant had denied its execution.

28. It is important to first see here whether the said document Ex.CW1/D-1 can be relied upon as evidence in order to prove the defence of the accused.

At the very outset, since Ex.CW1/D-1 is a photocopy of a document and has not been admitted by the complainant, the same cannot be taken into consideration as an evidence at this stage. It is also to be observed that the accused was given an opportunity to furnish the original of the document Ex.CW1/D-1 in court and his cross examination was deferred only upon that point but still the accused had failed to produce the original of Ex.CW1/D-1 in court. Going further, the accused has himself in his cross examination as defence witness DW-1 stated that it is correct that the agreement Ex.CW1/D-1 is incomplete and it does not bear the signature of the other party or of any other witness. Thus no reliance can be placed upon Ex CW1/D1 for proving the case of the accused.

29. The accused has not assigned any clear reasons for issuing the cheque in question in his statement under Section 251 CrPc and 313 CrPc. His defence surrounding the reason for issuance of the cheque in question is revealed only from a holistic reading of the cross examination of the complainant CW1 and from his testimony as DW1. A bare reading of his defence also makes it difficult to comprehend the terms and conditions of giving of the cheque as security. In order to prove his

defence, it was incumbent upon the accused to prove that the cheque in question was given not for the purpose of discharge of any friendly loan given by the complainant but for the purpose of the transaction of the vehicle bearing number DL-13CB-1616. The accused could have proved the same either by proving any agreement or contract between the parties having like terms and conditions or by examining independent witnesses to prove the transaction. The accused has not even examined Mr Ram Chander as a witness which was of primary importance since it has been stated by the accused that the cheque was given as security for the EMI's which could not be paid to Mr Ram Chander. To the contrary, the accused has led such evidence which is not relevant for deciding the dispute in question surrounding the purpose for which the cheque in question was given.

30. In the opinion of the court, merely because the vehicle bearing number DL13CB1616 stood in the name of Mr. Sanjeev Kajla, who is the brother of the complainant, it cannot be assumed that the cheque in question was given as security for the purchase of the said vehicle. Assuming so, would be far fetched and does not seem probable to the mind of a reasonable person.

31. Going by the above discussion, the accused has failed to prove his defence that the cheque in question was given as a security for purchase of a vehicle and that he did not owe any liability to the complainant.

32. It is also important to discuss the defence stated by the accused in his notice u/s 251 Cr.P.C and to see if there are any contradictions in the statement of the accused u/s 251 Cr.P.C and in his later statement u/s 313 Cr.P.C and in his testimony as witness DW-1 which would furthermore make the version of the accused improbable.

33. The accused has in his statement u/s 251 Cr.P.C only stated his defence to the extent of giving the cheque in question as a security for one Mr. Ram Chander. No

further reasons have been assigned for giving of the cheque as security.

The very statement of the accused u/s 251 Cr.P.C bears a contradiction where it was initially stated by the accused that “the cheque was given by me at the residence of the complainant to the complainant himself”. While it was stated by him later on in the same notice u/s 251 Cr.P.C that “the cheque was given by me to one Mr. Sanjay Goswami at his officer”.

The accused has further on his statement u/s 313 Cr.P.C stated that the cheque was given by him to Mr. Sanjay Goswami while in his evidence as defence witness DW-1, it is stated by him that he had handed over the cheque to the complainant Mr. Gaurav Kajla as security. Thus there are a number of contradictions in the statement of the accused with respect to the person to whom the cheque in question was given by the accused , where at every stage of the trial the accused had stated a different person to whom he had given the cheque.

34. Another contradiction that is apparent from a perusal of the statements of the accused taken at the various stages of the trial is the time period when the cheque is stated to be given. It is stated by the accused in his notice u/s 251 Cr.P.C that the cheque was issued in the month of June or July 2013 while in the cross examination of the complainant CW-1, a suggestion has been put to the complainant to the effect that the cheque was given to him in May 2013. Going further in his statement u/s 313 Cr.P.C, the accused has stated that the cheque in question was given in June 2013, which also points out the varying statements made by the accused as far as the time period when the cheque was given, is concerned.

35. At the arguments stage, it was argued by Ld.Counsel for the accused that the complainant CW-1 has in his cross examination categorically stated that his brother does not have a car bearing number DL13CB1616 which points out to the incredibility of the complainant.

The evidence furnished by the accused does point out that vehicle bearing

number DL13CB1616 was in the name of the brother of the complainant Mr. Sanjeev Kajla and the complainant has denied the same in his cross examination as CW-1, be that as it may it cannot be stated that the complainant's evidence is incredible. The fact that the brother of the complainant was the owner of the vehicle bearing number DL13CB1616 is immaterial for deciding the dispute in question, which is cornered around the legal liability of the accused and the cheque in question.

36. It is also argued that the complainant has not furnished any record with respect to either the advance of the money to the accused or the source of the generation of the money by the complainant.

The burden was upon the accused to rebut the statutory presumption raised in favour of the complainant as per section 118 and section 139 of the NI Act and the burden of the accused cannot be thrust upon the complainant by bringing forth such an argument that the complainant has himself not placed on record any documentary evidence to prove his case. It was only in a circumstance where the accused would have been able to discharge his burden of proof and rebut the statutory presumption taken in favour of the complainant, that the burden would have been shifted upon the complainant. In the instant case the accused has failed to discharge his initial onus of proof either by establishment of his own defence or by creating a doubt in the mind of the court upon the complainant's case and hence the accused has failed to rebut the presumption taken in favour of the complainant.

Besides this, the complainant CW-1 has himself stated in his cross examination that the source of Rs. 1,00,000/- given to the accused was income from his practice. It is also stated that the loan was advanced by way of cash lying at the house of the complainant. There is nothing on record that would lead the court to entertain a doubt upon the financial capacity of the complainant.

37. It has also been stated by Ld. Counsel for accused that the complainant has not disclosed the loan amount in his Income Tax Returns and thus, as per the provisions

of the Income Tax Act, due to non-disclosure of the loan amount in the ITRs, the case of the complainant has failed.

As far as the contention of the Ld. Counsel for the accused is concerned, it is seen that it has been stated by the complainant CW-1 in his cross-examination that the loan in question has not been mentioned in the ITR. Non-mentioning in the ITR of any advances given may entail consequences under the Income Tax Act but the same does not affect the case of the complainant. The liability of the accused under section 138 of the N.I.Act cannot be done away with simply because the complainant did not mention the loan amount in his ITR.

38. Considering the overall facts and circumstances, the accused has failed to discharge the burden of proof that was placed upon him for showing that the cheque in question was not issued for the discharge of a legally recoverable debt or liability that was owed to the complainant. The accused has therefore, failed to rebut the presumption taken in favour of the complainant. To the contrary, the complainant has been able to successfully prove that the cheque in question was issued by the accused for the discharge of a legally recoverable debt that was owed by the accused to the complainant. Hence, the complainant has been able to successfully prove the first ingredient of the offence u/s 138 NI Act.

39. The second ingredient of the offence is that the cheque 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.

40. The cheque in question upon presentation in the bank was dishonoured on 19.07.2014. A perusal of Ex.CW1/B shows that the cheque in question, on being presented in the bank was returned dishonoured due to “Funds insufficient”.

41. Thus, in the opinion of the court, the second ingredient of the offence is also met in the present case.

42. As far as the third ingredient of the offence is concerned, which is that the drawer of such cheque fails to make the payment of the cheque amount within fifteen days of the receipt of the notice from the payee or the holder in due course demanding the payment of the said amount of money, the postal receipts as well as the track report of the receipt of the legal notice, which is Ex. CW1/D and Ex. CW1/E are present on record.

43. The accused has denied receipt of the legal demand notice from the complainant in his statement under Section 251 Cr.P.C and the same is also evident from the suggestions put to the complainant in his cross examination by the Ld counsel for the accused as well as his testimony as defence witness DW1 yet in his statement u/s 313 Cr.P.C, it has been stated by the accused that “I do not remember whether I had received legal demand notice Ex.CW1/C or not”.

The complainant has also examined Sh Anil Handa, the Public Relation Inspector (Postal), Civil Lines Post office as complainant witness CW2, who relying upon the document exhibited in court as Ex.CW2/A which is the delivery slip of the registration department had testified that the article bearing number RD 340869795IN dated 02.08.2014 had been delivered to the addressee Mr. Neeraj Sharma.

The article bearing the above mentioned number is the legal demand notice issued by the complainant to the accused which is evident from a perusal of Ex.CW1/D which is the postal receipt of the legal demand notice issued to the accused by the complainant. Thus, the complainant has successfully proved that the legal demand notice was duly delivered to the addressee who is the accused in the present case namely Mr. Neeraj Sharma.

44. Despite delivery of the legal notice, the accused had failed to make the payment

to the complainant that he was liable to pay, within 15 days from the date of receipt of notice.

45. Hence, the third ingredient of the offence u/s 138 N. I. Act has also been proved by the complainant.

46. Having considered the entire evidence, this court is of opinion that the complainant has successfully proved all the essential ingredients of Sec.138 N.I. Act. Accordingly, the **accused Neeraj Sharma** is held guilty for committing the offence punishable u/s 138 N.I. Act. **He is hereby convicted for the offence u/s 138 N.I. Act.**

Let he be heard on the point of sentence separately.

Announced by way of proceedings conducted through video conferencing.

Dated 26.06.2020

(Tista Shah)
MM-06/NI Act/Central District
Tis Hazari Court/Delhi.