GJVD020108032019

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IN THE COURT OF 22nd ADDI. SENIOR CIVIL JUDGE AND A.C.J.M., VADODARA, AT VADODARA.

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Criminal Case No.8905 of 2019

Exh.44

Complainant:-	**Age**	**Occu.**

Shri Ram Transport Finance Co. Ltd.,
Office at: 2nd Floor, Imperial Heights,
Nr. Akshar Chowk, OP Road,
Vadodara.
Through it's authorized officer:
Mr.Harpalsinh Hitendrasinh Gohel

Versus

Accused:-	**Age**	**Occu.**

Rekhaben Kasim Dav
Add: 302, Kamal Kunj Flats,
Bh. Petrol Pump,
Fatehgunj, Vadodara 390002.

Offence : **U/s. 138 of The Negotiable Instrument Act, 1881.**

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Advocates :- Ld. Advocate Mr. J.N.Dave, for the complainant.
Ld. Advocate Mr. A.A.Shaikh, for the accused.

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:: J U D G M E N T ::

(1) The accused is facing trial for commission of the offence punishable under Section 138 of the Negotiable Instruments Act. Brief the facts of the complaint are that, the complainant Shri Ram Transport Finance Co. Ltd., is a finance company having its local office at the address mentioned above and deals in the finance business by way of lending money through executing loan agreement with its potential customers. The signatory of the present complaint is serving as employee & authorized POA holder and filed present complaint for and on behalf of the complainant.

1.1) That the present accused has approached and taken loan from complainant by executing loan bearing loan agreement No.BARO304120003, which is to be repaid, along with interest, as per terms and conditions of above mentioned loan agreement, which were agreed and accepted by accused.

1.2) That for the payment of loan outstanding amount of the above said loan, accused has issued cheque bearing cheque no.000033 for Rs.6,17,553/- of Bank of Baroda, M.S.University Branch, Vadodara, on 06.07.2018 in favour of the complainant. The complainant deposited above mentioned cheque as issued by the accused in favour of the complainant for realization of it’s amount, the said cheque was dishonored by the bank with the endorsement of “Funds Insufficient” on dtd.10.07.2018.

1.3) Afterwards, the cheque was dishonored, the complainant issued a legal demand notice under Sec.138 of Negotiable Instrument Act, to the accused through his Ld. Advocate on 08.08.2018 by R.P.A.D. Despite of the receipt of said notice was duly endorsed upon the accused on 09.08.2018. But the accused did not comply with the notice and failed to make payment of the said dishonored cheque within 15 days. The complainant has not received the amount of cheque from the accused till today even after sending the notice to the accused. Hence the complainant has filed the present complainant against the accused for cheating with his and dishonoring of the said cheque.

(2) Upon filing of the complaint, the verification of the complainant was recorded on oath under Section 200 of Criminal Procedure Code and thereafter, the present criminal complaint was ordered to be registered and summons was issued upon the accused under Section 204 of Criminal Procedure Code. The said summons was duly served to the accused and the accused was appeared before the Court with his ld. advocate and his plea was recorded vide Exh.06 on 23.05.2019. Accused pleaded not guilty and claimed trial, wherein the accused was denied the facts as mentioned by the complainant in the complaint. After recording of the plea, the accused side had given adequate opportunity to further proceed the case & make compromise with the bank but he fails. Afterwards, the matter was pending for cross-examination, but the accused side had not taken any cross-examination. Therefore, right of cross-examination of the complainant from the accused side has been closed and the matter was kept pending for recording of further statement of the accused.

(3) To prove guilt of the accused, the complainant has produced following oral as well as documentary evidence on record.

Oral Evidence

Sr. No.	Exh. No.	Particulars
1	37	Deposition of complainant namely: Amit Parmar - Present authorized person/ Legal manager as per the Board resolution of the complainant company in form of affidavit.

Documentary Evidence

Sr. No.	Exh. No.	Particulars	Date
1	07 & 37	Power of Attorney	-
2	8	Original Cheque No.000033	06.07.2018
3	9	Original Return memo	10.07.2018

4	10	Copy of Legal notice sent to opponent	08.08.2018
5	11	Original RPAD Slip	08.08.2018
6	12	Original Acknowledgment slip.	09.08.2018
7	13 & 40	Coy of statement of account of accused	-
8	42	Closing pursis.	27.09.2024

(4) After the submission of not producing any further evidence by the complainant, the accused has not appeared before the Court for given his further statement. The accused has not adduced any oral evidence in support of his defence. Further statement under Section 313 Cr.P.C. was not recorded, as the accused remained absconding. It is ordered to dispense with the recording of further statement. Although, the cross-examination of the complainant taken by the accused side is considered as his defense and as the accused is not remaining present, so the right of the cross-examination from accused side has been also closed, further no evidences are adduced by the accused.

4.1) Further the Ld. Advocate for the complainant in his arguments wherein complainant has proved his case beyond reasonable doubt. It is proved that the accused was availed Loan from the complainant company. Accused had given the subject cheque to repay the loan amount to the complainant. The complainant has proved that the accused had issued the alleged cheque to discharge his legal dues. It has been proved that the cheque was dishonored. Service of legal notice has been proved. The accused was liable to make the payment within stipulated time, however, he did not make the same despite service of legal notice. Further more, the accused side has not challenged the documents which are produced by the complainant vide Exh. Nos.37, 07 to 13 & 40. Therefore, the complainant had requested to punish the accused to pay the maximum compensation as i.e. twice hefty cost & imprisonment of two years as laid in Provision of Sec. 138 of N.I. Act. Whereas the accused has given adequate opportunity to make their arguments but he failed and his right of arguments also closed.

(5) <u>Issues:-</u>

For the adjudication of the present complaint, following issues are necessary to determine:

1. Whether the complainant proves that the accused has issued cheque No.000033 for Rs.6,17,553/- of "Bank of Baroda" M.S. University Branch in favour of the complainant, towards legal dues of amount and upon presenting the said cheque in complainant's bank for encashment, the same was returned back unpaid with an endorsement of the bank "Funds Insufficient"?

2. Whether the complainant proves beyond doubt that the accused has failed to make payment of amount of Electronic funds to the complainant inspite of demand notice served duly thereby has committed an offence under Section 138 of N. I. Act?

3. What order ?

(5.1) My answers to the above points are as under:

1. In Affirmative
2. In Affirmative
3. As per final order

(6) <u>Reasons For The Decision Of Issue No. 1 And 2:</u>

The evidence lead by the complainant is duly considered and the same are discussed herein below,but before moving to that it is required to consider for offence u/s 138 NI Act the **necessary ingredients** to be proved by the complainant are : **a)** legal liability / debt towards the complainant and the accused issued a cheque in discharge of the said legal liability/debt. **b)** that the accused was maintaining a bank account for the cheque issued by him. **c)** that the cheque was presented by the complainant within its validity period and the said cheque was dishonored on its presentation. **d)** that the complainant issued legal demand notice within 30 days from the date of dishonor of the cheque and the accused failed to pay within 15 days of receipt of legal demand notice. If the above ingredients are proved then an offence punishable u/s 138 NI Act is committed.

6.1) *Further it is necessary to consider the ratio laid down i*n case of ***M/s. Kusum Ingots & Alloys Ltd. Vs. M/s. Pennar Peterson Securities Ltd. And Ors.*** **Etc. AIR 2000 SC 954 Hon'ble Supreme Court has held as under:**

On a reading of the provisions of Section 138 NI Act it is clear that the ingredients which are to be satisfied for making out a case under the provision are :

(i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account for the discharge of any debt or other liability;

(ii) that 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;

(iii) that cheque is returned by the bank unpaid. either because of the amount of money standing to the credit of the 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 the bank;

(iv) the payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(v) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice;

If the aforementioned ingredients are satisfied then the person who has drawn the cheque shall be deemed to have committed an offence. In the explanation to the section clarification is made that the phrase "debt or other liability" means a legally enforceable debt or other liability.

6.2) Further it is necessary to refer the ratio laid down in ***The Hon'ble Apex Court in Basalingappa vs. Mudibasappa (2019) 5 SCC 418 has held as under:***

"23. We having noticed the ratio laid down by this Court in the above cases on Section 118(a) and 139, we now summarise the principles enumerated by this Court in the following manner:

(i). Once the execution of cheque is admitted Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.

(ii). The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.

(iii). To rebut the presumption, it is open for the accused to rely on evidence led by him or the accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely.

(iv). That it is not necessary for the accused to come in the witness box in support of his defence. Section 139 imposed an evidentiary burden and not a persuasive burden.

(v). It is not necessary for the accused to come in the witness box to support his defence."

(7) **Evidences and Defence regarding the above ingredients:**

legal liability / debt towards the complainant and the accused issued a cheque in discharge of the said legal debt.:

7.1) The complainant in his deposition on affidavit at Ex.4, in which, the complainant has reiterated the facts stated in the complaint, therefore, the same are not reproduced here-in-below and the complainant has produced some relevant documents in support of his affidavit viz (1) Original cheque issued by the accused at Exh.08 (2) Bank return memo at Exh.09 (3) Original legal demand notice at Exh.10 (4) RPAD receipt issued by Postal department at Exh.11 (5) Copy of proof of service of notice served to the accused at Exh.12 (6) Copy of bank account statement of accused at Exh.13 & 40. So far as the legal transaction between the complainant and the accused is concerned, the complainant has stated that the accused availed loan from the complainant so the complainant released a loan amount to the accused. Afterwards, the accused was failed to repay the loan amount to the complainant therefore, the complainant deposit the said cheque which was issued by the accused vide cheque no.000033 on 06.07.2018, the said cheque was returned with an endorsement of 'Insufficient Funds'. Now, at this juncture, it is necessary to look into Sec. 139 of the Negotiable Instrument Act, 1881, which provides for presumption in favour of holder: 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.

7.2) To rebut the presumption in favour of the complainant, the accused has & his Ld. Advocate have not remained present for further proceeding of the case and had not taken any objection against the complaint, so right of cross-examination and arguments have been also closed from the accused side. Furthermore, the accused side has not brought on record any rebuttal evidence to show that the said electronic funds was not transferred by him for clearing his legal dues. Therefore, it is not enough to built-up a reasonable and probable defense, in a circumstances that the accused is not at all challenging the paying capacity of the complainant. Therefore, merely confronting some questions to the complainant or witness is not enough to believe the defense evidence.

7.3) It is pertinent to note here that, the accused has to try to put up his case by bearing fact that the complainant has misused his cheque which was not transferred by him for discharge of his legal liability. But nothing is brought on the record as to when he issued cheque in question to the complainant for the purpose of loan payment. It is also not the case of the accused that which amount he has to pay to the complainant. Looking to the record of the case, the legal debt is owed by the accused is crystallized, as the accused signed Loan Agreement hence, the complainant is liable to receive the amount, the accused had issued the cheque of Rs.6,17,553/- on dated 06.07.2018 to the complainant. Further the accused has not produced any oral as well as documentary evidence, which proves the fact that this is not a legal debt.

7.4) As discussed above, I am of the view that the complainant had succeeded and proving the legal debt on accused and the accused has not at all denied his signature on the cheque, on the contrary he has admitted the legal debt owed by him. Further more, looking to the entire record from which, it transpires that the said cheque was issued by the accused for clearing his legal dues of the complainant and the said cheque was dishonored with an endorsement “Insufficient Funds”. Therefore, in view of the above discussion, this court is of the opinion that the complainant has succeeded in proving the fact that the cheque in question was issued by the accused in discharge of a legal liability towards the complainant.

(8) Accused is maintaining a bank account for the cheques issued by him.

So far as this ingredient is concerned, no dispute is raised by the accused, rather it is admitted that the cheque was issued by the accused and also not denied his signature on the cheque. Further, considering the facts of the case on hand, it appears that, the accused is having an account of “Bank of Baroda” M.S.University Branch, Vadodara because the accused side has not raised any objection that it is not having such above mentioned account in his name. Therefore, this ingredient is satisfied on the record.

(9) The said cheques were presented by the complainant within its validity period and it was dishonored on its presentation.

Looking to the documentary evidence of the complainant, at Exh-08 original cheque is produced, which was issued on 06.07.2018. The Bank Return Memo is produced at Exh-09, which states that the cheque in question was returned on 10.07.2018 respectively, with a reason for return noted is 'Insufficient Funds'. The complainant has also stated the same in his deposition. Furthermore, as discussed above, the said disputed cheque was presented by complainant in his bank which was also dishonored with an endorsement 'Insufficient Funds'. If the complainant had not presented the said cheque in his bank within 3 months from the date of the cheque than the bank would not have accepted. Thus, these documents sufficiently proves the above requirement of presentation of cheque in question within its validity period and the same was dishonored on its presentation.

(10) Issuance of demand notice within 30 days of dishonor of the cheques and failure to pay within 15 days of receipt of the said demand notice.

Looking to the bank return memo, the cheque was dishonored on 10.07.2018 and the demand notice was sent through R.P.A.D. on 08.08.2018, Postal receipt issued by the Postal Department is produced at Exh-12 to prove the service of the said demand notice to the accused. That, by this it appears that the demand notice was sent within 30 days of dishonor of cheque to the accused. Moreover, in the present case, the accused had not filed any reply against the demand notice and he has not raised any objection that the notice was not duly executed to him. Moreover, it has not taken any objection that the address mentioned in the demand notice is not correct and he was not residing there at the time of notice was sent. That, it is also the case of the complainant that though the accused has received the demand notice has also stated that despite service of the legal notice the accused did not make any payment towards the discharge of his legal debt/liability.

In accordance with the case of **C.C. Alavi Haji Vs. Palapetty Muhammed reported in 2007 (0) AIJEL-SC 39299 Hon'ble Supreme Court of India has held that**,

"Sec. 138 proviso (b) (c) – Evidence Act, 1872- S. 114- dishonour of cheque- service of notice in terms of clause (b) of proviso to S. 138 of the Act, 1881- absence of any averments in complainant to the effect that accused had a role to play in the matter of non- receipt of legal notice or that he deliberately avoided service of notice whether such complaint could be entertained- ...."

"Evidence Act, 1872- S. 114, Illustration (f)- General Clauses Act- S. 27- communications sent by post – presumption raised under S. 27 of the G.C. Act is a far stronger presumption than one raised under S. 114 of the Act, 1872- while S. 114 refers to a general presumption S. 27 refer to a specific presumption – S. 27 gives to a presumption that service of notice has been effected when it is sent to the correct address by registered post."

In accordance the ratio laid down the Hon'ble apex Court in the above Judgment, in this case, it is proved that the demand notice was issued to the correct address of the accused within 30 days. After that the accused did not make any payment to the complainant within 15 days of receipt of the said demand notice.

(11) <u>Defence without taking further statement and cross-examination:</u>

The accused intentionally remained absent as well as has evaded the services of the processes/warrants issued by this court. Subsequently, order below Exh-1, this court has also dispensed the recording of further statement u/s. 313 of the Cr.P.C. In the non appearance of accused, adverse inference has to be drawn against him. As such the complainant has proved the alleged guilty of the accused beyond doubt. At the same time, the accused has accepted the existence of legal / contractual debt by paying the amount to the complainant. Hence, the accused is liable for conviction.

Since the accused is very well aware about the pendency of the present complaint, he himself choose to remain absent and ready to face the judicial outcome of the present case. In this situation, the accused failed to prove that he act like a prudent, reasonable person and in absence of the same, his defense brought up by the cross-examination cannot be considered as proved.

Thus, the documentary as well as oral evidence lead by the complainant confirms the facts that cheque bearing no.000033 was issued by the accused and same was returned due to 'Insufficient Funds'. Hence, as per the discussion above, I answer the issue no. 1 and 2 in affirmation.

(12) F<u>or issue no. 3</u>:

I have given my conscious thought and deep consideration to the evidence and material on record. As per my opinion, the offence is well proved against the accused person and hence, the accused person is liable to be convicted as per the above reasons. Further, in the present case, there is no reason which lead this court to conclude that the accused is falsely implicated by the complainant. In such a situation, keeping the seriousness of the offence in mind as well as keeping the object of the Negotiable Instrument Act in consideration, I hold that the complaint against the accused person is duly proved and the accused person is liable to be convicted under Section 138 of the Negotiable Instrument Act.

The matter is kept for hearing on the point of quantum of sentence.

Order announced in open Court today on 27th February, 2025.

Date: 27.02.2025
Vadodara.

(B. K. Raval)
22nd Additional Chief Judicial Magistrate,
Vadodara.
Judge Code: GJ01255

Hearing on sentence

Looking to the case facts on hand, the adequate opportunity has been given to the accused but the accused & his Ld. Advocate has not remained present in the case since long time to proceed further and not done any oral arguments before the Court against the quantum of sentence.

Whereas the complainant side Ld. Advocate submitted that, accused had not paid the amount within 15 days from the service of demand notice. The cheque was issued in the year 2018, the complainant is entitled for interest of Rs.6,17,553/- from the accused person. It is further submitted that the case has been proved against the accused beyond reasonable doubt and the accused have committed offence under Section 138 of N.I.Act. Therefore, requested to punish the accused person according to law.

Considering all the averments, despite knowing all facts about the case, today the accused is knowingly and intentionally remained absent in the case for lingering the matter and avoid the Court proceedings. Taking these things into consideration, this Court has power to pass the judgment of conviction even in the absence of the accused lies with the court hence, to prove this point consider the following judgments **(1.)** ***In case of Sharad Jethabhai Sawala Vs. State of Gujarat reported in G.L.R. 2017 (3) 2353 &*** **(2.)** ***In case of Ishwar Hirabhai Chunara Vs. State of Gujarat reported in Sp. Criminal Application No. 19862/2015 dtd. 14.11.2016 are held that, 'the verdict was pronounced in the absence of the accused and the accused was found guilty'.***

On perusing the record of this case, the accused had issued the cheque for Rs.6,17,553/- on 06.07.2018 in favour of the complainant bank as the accused availed Vehicle loan from the complainant bank and the complainant bank released a loan amount to the accused on monthly installments. Hence the accused was failed to repay the loan amount to the complainant and the said cheque which was issued by the accused for clearing his legal dues in favour of the complainant bank was dishonored and also the accused assured the complainant that accused would maintain adequate balance in the said bank of accused and the amount in respect of the monthly installments would be duly credited to the bank account of the complainant as per the schedule. In this situation, The Hon'ble Supreme Court in ***R. Vijayan Vs Baby and Anr. (AIR 2012 SC 528)*** has held that, unless there are special circumstances, in all cases of conviction, uniformly exercise the power to levy fine upto twice the loan amount (keeping in view the said amount and the simple interest thereon at 9% per annum as the reasonable quantum of loss) and direct payment of such amount as compensation. Therefore, considering the facts of this case and going through the judgment of Hon'ble Supreme Court in R Vijyan Supra, if amount mentioned in the mandate is paid by accused during the trial then complainant is also entitled for reasonable quantum of loss and for that compensation can be awarded. As in this case cheque was issued in the year 2018, therefore, this Court decides if fine of Rs.12,35,106/- is imposed and from that compensation of Rs.6,17,553/- be awarded to complainant then it will serve the justice. Accordingly, the accused person is held guilty and convicted for the offence punishable under section 138 of the NI Act under Sec. 255(2) of the Cr.P.C. Hence, following order is passed:

- : Order :-

1. In view of section 255(2) of Criminal Procedure Code, the **Accused – Rekhaben Kasim Dav, Add:** 302, Kamal Kunj Flats, Bh.Petrol Pump Fatehgunj, Vadodara 390002, shall pay a fine of Rs.12,35,106/- (Rupees Twelve Lakh Thirty Five Thousand On Hundred Six Only) with sentenced to suffer simple imprisonment for a period of One Year. It is

hereby ordered to deposit the fine in Court with in two month from this order, if default of payment of fine, accused suffer simple imprisonment for Two months.

2. In view of section 357 (1) of the Criminal Procedure Code, the compensation of Rs.6,17,553/- (Rupees Six Lakh Seventeen Thousand Five Hundred Fifty Three only only) be paid to the complainant out of the recovered fine after the period of appeal.

3. Since the accused is absconding, warrant be issued for execution of this order.

4. Copy of this judgment be furnished to the accused free of cost.

Signed and Pronounced in open Court, today on this 27th day of February, 2025 at Vadodara.

Date: 27.02.2025
Vadodara.

(B. K. Raval)
22nd Additional Chief Judicial Magistrate,
Vadodara.
Judge Code: GJ01255

Stella