

GJBN020086012024



Presented On	Dt.05/09/2024
Registered On	Dt.05/09/2024
Decided On	Dt.10/08/2026
Duration	YY--MM-DD 01---11---05

FORM-A

IN THE COURT OF 5th ADDL. SR. CIVIL JUDGE & A.C.J.M. (Special Negotiable Court) At, Bhavnagar. (Presided Over by J.P.Prajapati) <u>CC/5829/2024</u> Exhibit No. 19	
Complainant	Zala Dharmarajsinh Gajendrasinh Resided at 698/S, Sector-11, Iskon-11, Sidsar Road, Bhavnagar.
Represented By	Ld. Advocate Mr. R. R. Shah
Accused	Deraiya Salimbhai Rafikbhai Resided at Bhuriya Bava nu Nehru, Navapara, Bhavnagar.
Represented By	Ld. Advocate Mr. A. A. Modi

FORM-B

Date of Offence	
Date of FIR	
Date of Charge-sheet/ Complaint	05-09-2024
Date of Framing of Charges/plea	22-01-2026
Date of Commencement of evidence	05-09-2024
Date of which judgment is reserved	18-07-2026
Date of the Judgment	10-08-2026
Sentencing order, if any	Conviction and Compensation.

// Accused Details //

Rank of the Accused	Name of Accused	Date of Arrest	Date of Release on Bail	Offences charged with	Whether Acquitted or convicted	Sentence Imposed	Period of Detention Undergone during Trial
01	Deraiya Salimbhai Rafikbhai	—	—	Section 138 of N. I. Act.	Convicted	3 months	—

FORM-C**LIST OF PROSECUTION/ DEFENCE/ COURT WITNESSES****A. Prosecution:**

RANK	NAME	NATURE OF EVIDENCE
PW1	Deposition of Zala Dharmarajsinh Gajendrasinh (Exh-4)	Affidavit

B. Defence Witnesses, if any:

RANK	NAME	NATURE OF EVIDENCE
DW1	—	—

C. Court Witnesses, if any:

RANK	NAME	NATURE OF EVIDENCE
CW1	—	—

LIST OF PROSECUTION/DEFENCE/COURT EXHIBITS**A. Prosecution :**

Sr. No	Exh.	Description
1.	8	Copy of legal notice dated 27-05-2025
2.	9	Copy of Track consignment report
3.	10	Registered A. D. Receipt
4.	11	Cheque no. 000011 dated 16-07-2024
5.	12	Copy of Return memo dated 17-07-2024
6.	13	Copy of Aadhar card of the complainant

B. Defence:

Sr. No	Exh.	Description
1	—	—

C. Court Exhibits

Sr. No.	Exh.	Description
1	—	—

D. Material Objects:

Sr. No	Material Object Number	Description
1	—	—

JUDGMENT**(Delivered on 10-08-2026)**

1. A Complaint has been filed under Section-200 of The Code of Criminal Procedure, 1973 (here-in-after referred as “The Code”) by Zala Dharmarajsinh Gajendrasinh

(here-in-after referred to as “**the complainant**”) for offence punishable under Section 138 of The Negotiable Instrument Act, 1881 (here-in-after referred to as a “**N. I. Act**”) against Deraiya Salimbhai Rafikbhai (here-in-after referred to as “**the accused**”).

The concise fact of the present case are as under:

(1.1) The complainant and the accused were on friendly terms from a period of time. Various monetary transactions used to take place between the accused and the complainant. The accused requested financial assistance from the complainant for his medical expenses of Rs.50,000/- and the complainant advanced a sum of Rs.50,000/- three years prior to the filing of the present complaint in cash to the accused. The accused assured to repay the said amount within three months and despite the assurance given, the accused did not make the payment as agreed.

(1.2) Towards the legally enforceable debt, the accused issued a cheque no.000011 dated 16-07-2024 for an amount of Rs.50,000/- bearing Account no. 471101001 001543 drawn on Citizen Co-Operative Bank, Service branch, Bhavnagar in favour of the complainant.

(1.3) Thereafter, the complainant has deposited the said cheque in the bank account of the complainant maintained with H.D.F.C., Bank, Service branch, Bhavnagar on 17-07-2024. However, after being deposited, the aforementioned cheque was returned on dated 17-07-2024, with the endorsement "Funds Insufficient" and the same was informed to the

complainant through a return memo by their bank.

(1.4) Following that, on dated 28-06-2024, the Complainant issued a legal demand notice to the Accused through his learned advocate by Registered Post A. D. and the said legal notice was received by the accused on 30-07-2024. After the notice being served, the accused neither paid the due amount nor has replied to the said notice.

Thus, the Accused has committed the offence punishable under Section-138 of N. I. Act. Therefore, the complainant filed the present complaint along with relevant documents and affidavit of the complainant.

Court Proceeding :

2. (2.1) On the basis of the complaint this took cognizance and issued a process to the accused. Upon service of the summons, the accused appeared before the Court.

(2.2) The complainant has produced written arguments vide Exh.-18.

(2.3) On his appearance, copies of the case papers were furnished to the accused and the sum and substance of the offence under Section 138 of the Act was stated & explained to the accused, to which he has pleaded not guilty and claimed to be tried. The statement of the accused to this effect under section 274 of Bhartiya Nagrik Suraksha Sanhita-2023 (in short BNSS) was recorded vide **Exhibit-14** in the formate guided by the Hon' ble Apex Court in the case of Sanjbaji Tari Vs Kishore S. Borcar { 2025 INCS 1158} under follow:

1	Do you admit that the cheque belongs to your account?	Yes
2	Do you admit that the signature on the cheque is yours?	Yes
3	Did you issue/deliver this cheque to the complainant?	Yes
4	Do you admit that you owed liability to the complainant at the time of issuance?	Yes
5	If you deny liability, state clearly the defence a) Security cheque only;	As a Security
6	Do you wish to compound the case at this stage?	Yes

Defence of Accused and Further Statement:

3. This Court put the incriminating evidence against to accused under Section-351 of BNSS at the initial stage, which all are denied by the accused. He also denied to testimony to himself, but desire to testimony his witness. But then he was failed to do so.

Arguments:

4. Learned Advocate for the Complainant has submitted that, in spite of adequate opportunities given to the accused, he has failed to do cross-examination of complainant, so deposition of complainant is unchallenged. Also the accused was not submit any oral or written submission in his defense and hence statutory presumption under Sec- 139 of the Act is not discharge. So requested to imposed sentence prescribed under such section. Also compensate twice amount of cheque to complainant.

Charge against the Accused:

5. Having paid attention to the facts and circumstances of the case as well as proceeding involved in the case along with the arguments of the either sides, following points arise before this court for the adjudication of this case:

-: POINTS FOR DETERMINATION :-

1. Whether Complainant proved beyond reasonable doubt that, the Accused has issued cheque in pursuance of his legally enforceable debt or liability, which was dishonored due to Funds Insufficient and despite serving the statutory legal notice upon the Accused, he has failed to repay the amount mentioned in the cheque and thereby, the Accused has committed the offence punishable under section 138 of the N. I Act ?
2. What order?

Answers to the above point are as under:

1. In affirmative.
2. As per final order.

:: REASONS ::

6. Complainant filed complainant under Sec.138 of N.I.Act.

So we are referred such section which is follow;

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 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, [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.]

Before going into the merits of the case, it is important to glance over the object of section 138 of the N. I. Act. Such Section deals with the punishment for the

dishonor of the cheque. It provides the legal recourse to handle things of cheque bounce. The main object is to incentivize the trend of the use of cheque and to increase the credibility of cheque transactions by making the offence. It was introduced to enhance the acceptability of the cheque in settlement of liabilities by making the drawer liable for penalties in case of bouncing of cheque due to insufficient funds and other reasons with adequate safeguards to prevent harassment of honest drawer. For attracting penal provisions under this Section, It would be germane to refer herein judgment of Hon'ble Apex Court delivered in the case of Jugesh Sehgal Versus Shamsheer Singh Gogi{2009 (0) AIJEL-SC 44145}, wherein, Para 9 & 10 it has enunciated necessary ingredients 138 of the N. I. Act., which reads as under:

9. It is manifest that to constitute an offence under Section 138 of the Act, the following ingredients are required to be fulfilled:
 - (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;
 - (ii) The cheque should have been issued for the discharge, in whole or in part, of any debt or other liability;
 - (iii) 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;
 - (iv) 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;
 - (v) 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;

(vi) 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;

10. Being cumulative, it is only when all the afore-mentioned ingredients are satisfied that the person who had drawn the cheque can be deemed to have committed an offence under Section 138 of the Act.

Within this context, perusal the evidence produced by complainant;

7. (7.1) The complaint (PW-1) has deposed in the form of affidavit vide Exh-4 in support of his complaint and he has categorically referred, identified and proved all documents and corroborated the pleadings of complaint, but the all facts are identically same as his complaint, So do not reiterate again.

(7.2) Complainant also submitted his documentary evidence vide Exh-8-13.

(7.2.1) Per use **Exh-8**, Copy of legal notice. It is appeared that, complainant issued notice to accused through his Ld. Advocate on dated 27-07-2024 and demanded the cheque amount.

(7.2.2) Per use **Exh-9**, Copy of Track consignment report showing that the notice has been received by the accused.

(7.2.3) Per use **Exh-10**, Registered A. D. Receipt

(7.2.4) Per use **Exh-11**, Cheque No. 000011 dated 16-07-2024 issued in the name of the complainant for the amount of Rs.50,000/- It is also signed by the account holder.

(7.2.5) Per use **Exh-12**, Copy of return memo dated 17-07-2024. It is appeared that cheque no. 000011 is dishonored due to "Funds Insufficient" reason.

(7.2.6) Per use **Exh-13**, Copy of Aadhar card of the

complainant.

(7.2.7) Thenafter complainant filed this complaint on dated 05-09-2024 within prescribed time period.

(7.3) Cogitating the evidence emerged on record and looking to the documentary evidence adduced by the Complainant,

*It transpires that the Cheque No. 000011 dated 16-07-2024 of Rs.50,000/-, was drawn on the name of complainant. Also its signed by the accused.(Exh-11)

*Further, upon presentation of the said cheque in the bank account of the complainant maintained with H.D.F.C. Bank, Service Branch, Bhavnagar on 17-07-2024 the same has been dishonored with endorsement of "Funds Insufficient" which emerges from the bank return memo dated 17-07-2024.

*Upon returning the cheque unpaid, the Complainant had given statutory notice to the Accused vide Exhibit-8 and the same was sent to the Accused through RPAD and the same was received by the accused. Despite service of the said legal notice, the accused failed to make payment of the cheque amount within the stipulated time period nor has he replied to the said legal notice.

Looking to the said documentary evidence it is revealed that the Accused issue cheque in the favour of Complainant to discharge his liabilities, which was dishonored. Then Complainant had issued notice to the Accused within the prescribed period of limitation as provided in Section 138(b) of N. I. Act and demanded cheque amount. The said notice has been sent by

registered post. Thus the complainant full fill all the ingredients such section.

8. (8.1) Considering the evidence on record, it is established that the complainant has filed the present complaint in compliance with the mandatory provisions of Sec-138 of N.I.Act. It is well settled principal under the N.I.act that, if complainant compliance the mandatory requirement, it would be apposite to quote legal presumptions in terms of Section Section 118 and 139 of the N. I. Act, which are follow;

[A] Sec-118:Presumptions as to negotiable instruments of consideration.-

Until the contrary is proved, the following presumptions shall be made:-

(a) **of Consideration** - 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;

(b) **as to date** - that every negotiable instrument bearing s date was made or drawn on such date ;

(c) **as to time of acceptance** -- that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;

(d) **as to time of transfer** -- that every transfer of a negotiable instrument was made before its maturity;

(e) **as to order of endorsements** -- that the endorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;

(f) **as to stamps** -- that a lost promissory note, bill of exchange or cheque was duly stamped;

(g) **that holder is a holder in due course** -- that the holder of a negotiable instrument is a holder in due course; provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him.

[B] 139. 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, or any debt or other liability.

Thus, the combined effect of Section 118 and Section 139 of N I Act raises a presumption in favour of the holder of

the cheque that he has received the same for discharge, in whole or in part of any debt or other liability. Also Hon'ble Apex Court in the case of **Hiten P.Dalal v. Bratindranath Banerjee {AIR 2001 SC 3897}** held that:

“.....In the case of a discretionary presumption the presumption if drawn may be rebutted by an explanation which "might reasonably be true and which is consistent with the innocence" of the accused. On the other hand in the case of a mandatory presumption "the burden resting on the accused person in such a case would not be as light as it is where a presumption is raised under S.114 of the Evidence Act and cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one. The words 'unless the contrary is proved' which occur in this provision make it clear that the presumption has to be rebutted by 'proof' and not by a bare explanation which is merely plausible. A fact is said to be proved when its existence is directly established or when upon the material before it the Court finds its existence to be so probable that a reasonable man would act on the supposition that it exists. Unless, therefore, the explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted....."

So, presumption u/sec 139 cannot be rebuttal unless the contrary proved. At this juncture, it would be apposite to refer the decision of Hon'ble Apex Court in the Case of **RANGAPPA Versus SHRI MOHAN, {2010 (0) AIJEL-SC 48349}** it was held that the presumption mandated by Section 139 of the Act of 1881 includes the presumption as regards existence of a legally enforceable debt or liability. This presumption has been held to be in the nature of a reverse onus clause that has been included in furtherance of the legislative object of improving the credibility of the negotiable instruments. At the same time, it has been clarified that the said presumption is rebuttable and it would be open for the accused to raise a defence wherein the existence of a legally enforceable

debt or liability can be contested. It is thus clear that once the execution of the cheque/ instrument is admitted, the initial presumption under Section-139 of the Act of 1881 favours the complainant that there exists a legally enforceable debt or liability. It has further been held that the consideration attached to a cheque is a matter of presumption and the Complainant is not required to prove it beyond reasonable doubt. The question that naturally arises is as to what is the standard of proof that the law requires and which the accused is expected to discharge in order to rebut the presumptions. The standard of proof for rebutting the presumption is that of preponderance of probabilities. To rebut the presumption, it is open for the Accused to 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. The said presumption can also be rebutted by the Accused from the admission made by the Complainant in his Cross-examination, which creates doubt on the prosecution story. It is also well settled that it is not necessary for the Accused to come in the witness box in support of his defence in all cases. It is also well settled that Section 139 of N.I.Act imposed an evidentiary burden and not a persuasive burden. So, it can legitimately be said that where presumption stood rebutted or not would depend upon the facts and circumstances of each case. Furthermore, it is also well

settled that if the Accused is not able to rebut the said presumption raised against him, he can be convicted only on the basis of such presumption and if the Accused is able to rebut presumption, then the onus is again shifted to the Complainant to prove his case beyond all reasonable doubt.

(8.2) Now, in present case, the accused did not took cross-examination of complainant. So, Evidence led by complainant are unchallenged. Contrary he is admitted his cheque as well as his signature in his statement. He also admitted his debt, but to take a defense that cheque issued for the security. Eventhough, we consider that cheque issued as a security, In the case of Goaplast (P) Ltd. Vs Chico Ursula D' Souza{ (2003) 3 SCC 232} Hon'ble Supreme Court held that; A post dated cheque is a well recognized mode of payment. So the accused does not rebut the presumption against him and hence as per ratio laid down by Hon'ble Apex Court that presumption of Sec-118 and 139 are not rebuttal as assumption and hence not discharge.

9. In view of what has been observed here-in-above, this Court comes to a conclusion that the complainant has succeed in proving that in order to discharge his liability the accused issued the disputed cheque, which was dishonoured and despite serving the statutory legal notice upon the accused, he has failed to repay the amount and thereby the accused has committed the offence punishable under section 138 of the N. I. Act. Hence the complainant proves the issue no.1 beyond reasonable

doubt and for that answer of issue no.1 is in the affirmative.

10. (10.1) Now, Sec 138 of N.I. Act provided 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. Hon'ble Apex Court in the case of **R. Vijayan vs. Baby & Anr.**, {2012 (1) SCC 260} in para no.18 held that,

“18. Having reached that stage,As the provisions of Chapter XVII of the Act strongly lean towards grant of reimbursement of the loss by way of compensation, the Courts should, **unless there are special circumstances**, in all cases of conviction, uniformly exercise the power to levy fine upto twice the cheque amount (keeping in view the cheque amount and the simple interest thereon at 9% per annum as the reasonable quantum of loss) and direct payment of such amount as compensation. Direction to pay compensation by way of restitution in regard to the loss on account of dishonour of the cheque should be practical and realistic, which would mean not only the payment of the cheque amount but interest thereon at a reasonable rate. Uniformity and consistency in deciding similar cases by different Courts, not only increase the credibility of cheque as a negotiable instrument, but also the credibility of Courts of justice.

In present case, it is a case of complainant that he gave amount to accused only on the basis of friendship, he have not to levy interest. So consideration this aspect there is reason to do not award levy fine upto twice of the cheque amount.

(10.2) Now, Sec-143 of NI mandate that proceeding under such section in summaryl. Also Sec-285(2) of BNSS mandate that Court cannot imposed sentence more then three month in case of convection.

Considering above all aspect, this court on the opinion that to award three month simple imprisonment to accused & he is also liable to deposit cheque amount as

a fine and complainant will be compensate whole amount is just & proper.

(10.3) It is pertinent to note here that the present case is a cheque return case and in cheque bounce cases it is common practice for the accused to remain absent with the intention of not proceeding with the case. Now considering the case on hand it is revealed that, the accused did not appear before this court even though he is very well knowing the proceeding of this case. It is pertinent to note here that the present case has been duly updated on CIS modules with the stage of the case and there is a system to deliver the message to the learned advocate for the proceeding of the case. Further the accused also can search his case on online mode and acquire the information of his case status. Hence It is presumed that the accused is well within the knowledge of the proceeding. Today also the accused remained absent. In the case of SHARAD JETHALAL SAVLA Versus STATE OF GUJARAT {CRI. MISC.APP.(FOR DIRECTION) NO.9862 of 2015, Date: 14/11/2016} Hon'ble High Court of Gujarat held in para no.22 & 25

22. So far as the first question is concerned as regards the pronouncement of the judgment and order of conviction and sentence in the absence of the applicant accused, I am of the view that no illegality could be said to have been committed by the trial Court.
25. However, the judgment that the learned Magistrate may pronounce in the absence of the accused by itself will not vitiate the judgment. Subsection (7) of Section 353 of the Cr. P. C. clearly lays down that no judgment delivered by any criminal court shall be deemed to be invalid by reason only of the absence of any party.

Considering above all aspect this court passed following order in interest of justice;

:: Final Order ::

1. The Accused **Deraiya Salimbhai Rafikbhai** Resided at Bhuriya Bava nu Nehru, Navapara, Bhavnagar stands convicted in connection with the offence punishable under Section 138 of N. I. Act, and the accused is hereby ordered to suffer simple imprisonment of three (3) months.
2. The accused is also hereby ordered to deposit cheque amount in the court as a fine and complainant is compensated whole amount under section 395(1) of BNSS. In default of payment of the same accused to further suffer simple imprisonment of twenty (20) days.
3. As the Accused is not present at the time of pronouncement of this order, it is to be directed to issue a non bailable warrant and sent to the Superintendent of Police, Bhavnagar for its execution as provided in Section 458(2) of BNSS
4. It is directed that the concerned police officer will submit a monthly report to this court for steps taken by him for execution of the warrant till it is executed.
5. In view of the judgment of Hon'ble Apex Court in the case of **Rajesh Ponadda Versus Satyanarayan Srirangam** reported in 2019 (0) AIJEL-SC 64706, the accused is not entitled to get free copy of this judgment, hence it is not ordered to give free copy of this judgment to the accused.
6. Copy of such judgment send to the jurisdictional Income Tax Department for taken necessary action.
7. Earlier bail bond given by the accused is canceled.

Judgment signed and pronounced in open Court today on 10th August, 2026.

Date: 10-08-2026

(**Jitendrakumar Prabhudas Prajapati**)

Place: Bhavnagar

5th Additional Chief Judicial Magistrate,
(Special Nego. Court)-Bhavnagar.

Code No. GJ01121

aastha