सत्यमेव जयते

GJBK040003732025	**Received on : Dt. 13-01-2025**
	Registered on : Dt. 13-01-2025
	Decided on : Dt. 18-06-2026
	Duration : 1Y -5M -6D

IN THE COURT OF HON'BLE 2ND ADDITIONAL CHIEF JUDICIAL MAGISTRATE, DEESA, Dist. BANASKANTHA

CC. No. 282/2025

Complainant	**Prakashbhai Bhemabhai Mistry**
	Age- 36, Occupation- Business
	Address- Nagfana,
	Ta- Deesa, Dist- Banaskantha

versus

Opponent	**Jamabhai Vihabhai Suthar**
Accused	Age- 40, Occupation- Agriculture

Address- Suthar vas Moti Gharnal
Ta- Deesa Dist- Banaskantha

Offence U/s. 138 of Negotiable Instruments Act, 1881

Ld. Advocate **Mr. V.I. Rathod** on behalf of Complainant
Ld. Advocate **Mr. V.B. Thakor** on behalf of Accused

JUDGMENT

1. Through the present complaint the complainant i.e. Prakashbhai Bhemabhai Mistry (hereinafter referred to as *the complainant*), has called upon this Court to seek judicial intervention in adjudicating the dispute between the complainant himself and Jamabhai Vihabhai Suthar (hereinafter referred to as *the accused*). It is averred on behalf of the complainant that the accused issued one cheque for Rs.1,00,000/- dated 20/11/2024 in view of the payment of the dues bearing cheque No.131277 (hereinafter referred as cheque in question).

2. It is averred on behalf of the complainant that upon presentation of the cheque in question for the first time, it was dishonored with the remark *'Funds Insufficient'* and returned on 10/08/2021. Pursuant thereof, the complainant issued a legal demand notice dt. 22.11.2024, (Ex.CW-12) to the accused, however, the accused did not make any

payments in response thereto, thus obligating the complainant to invoke the jurisdiction of this Court in a form of the present complaint U/S 138 of Negotiable Instruments Act (hereinafter as the NI Act).

3. Brief facts as per the complaint are that the complainant lives at the above mentioned address and does business and the accused belongs to the same community of the complainant. The accused in this case has took sum of Rs.1,00,000/- from the complainant and gave promise to repay it within two months and later when the complainant asked the money the accused gave a cheque having No.131277 dated 20/11/2024 of Rs.1,00,000/- maintained with Bank of Baroda Bhildi branch and gave assurance that when the said cheque is deposited in the bank the said amount will be received by the complainant. Later when the complainant deposited the said cheque at Tamil Nad Mercantile bank Ltd Deesa branch and when the cheque went for clearance the said cheque was returned back with the reason of "Funds Insufficient" on the date of 22/11/2024. So the complainant has sent a notice to the accused on the date of 04/12/2024 through R.P.A.D and the same was received by the accused on the date of 05/12/2024 despite the notice being served the accused has not paid the amount till date. Thus, obligating the complainant to knock the doors of the present court and seek proper remedy as per the law in force.

4. Upon the present complaint being filed and after taking cognizance of the offense under Section 138 NI Act, the court

summoned the accused and thereafter, notice was framed under Section 251 Cr.P.C vide order dt 07.04.2025, to which the accused pleaded not guilty and claimed trial. The complainant was subjected to cross-examination by the accused. After elaborate and sufficient opportunity was granted to both parties to lead evidence and after the complainant's evidence, the accused was examined as per legislative mandate of Section 313 Cr.P.C. All the incriminating evidence and the corresponding documents were put to the accused and he was given a sufficient opportunity to explain himself, in the presence of his counsel, the substance thereof was recorded in Question Answer form. Accused also led DE.

5. The documents relied upon by the complainant are as follows :

Exh-9 The cheque No.131277 of Bank of Baroda Bhildi branch given by the accused.

Exh-10 Pay in slip of the cheque deposited in the bank.

Exh-11 Cheque return memo.

Exh-12 Notice given to the accused.

Exh-13 R.P.A.D of the notice sent to the accused.

Exh-14 Online tracking consignment report of the post office.

Exh-15 Acknowledgment slip of the notice sent on the address of the accused.

6. As per the prevalent law and the practice, the complainant deposed on an affidavit and the same was taken on record as Exhibit-4. In his examination-in- chief i.e. his testimony on an affidavit, the complainant deposed that the accused has taken Rs.1,00,000/- and for which the accused has given a cheque of Rs.1,00,000/- and for which the accused issued the cheque in question. Upon the cheque being dishonored at the bank of the complainant, the complainant contacted the accused and the accused didn't respond properly, thus constraining the complainant to approach the present court.

7. In his cross-examination before the Court the complainant admitted that he has studied B.Com and lives at Nagfana, Deesa and is working as commission agent in the market and has enterprise named Jay Goga Enterprise of commission agent and has one accountant at his firm and maintains the account book of the firm and has stated that the goods which is given in commission to the farmers he record all the goods in the account book and give amount to the farmers when needed by them and has stated that the records all the credit and debit account of his firm and also stated that he files income tax return. The complainant has admitted that the accused is from the same community of his and he knows the brother of the accused as well as his father very well and has stated that that he has done transaction with the brother of the accused prior and has stated that Bharatbhai has taken money from him and later has paid it

and the same is not recorded in the account book. The complainant has admitted that Bharatbhai used to sell his farm goods at his firm through the commission.. The complainant has stated that Bharatbhai has given him Rs.20,000/- and later clarifies that the sum was given for the earlier transaction done between him. The complainant has in his further cross examination plainly denied all the suggestions of the defense counsel.

8. Coming on to the final arguments, it is argued on behalf of the complainant that the accused owes a sum of Rs.1,00,000/- towards the complainant and is deliberately avoiding the payment. The LA of the complainant has mainly in his arguments reiterated the averments of the complaint and the examination in chief of the witness, hence, to avoid the repetition, the same has not been reproduced. The complainant then further referred to the written arguments of the accused and submitted that the defense has in their entire defense, not mentioned or clarified that how the cheque in question landed in the hands of the complainant.

9. It is also submitted that the original cheque vide Exhibit 9 has been submitted with the original seal and sign of the bank and also original return memo has been submitted which is on record vide Exhibit 11 and the same has been duly verified by the Bank manager of the Bank of Baroda where accused maintains his account.

10. It is further argued that the notice as required under Section 138 has been served and the acknowledgment receipt is on record. Lastly, the complainant argued that the defence has miserably failed to dislodge and disprove the presumption lying in favour of the complainant as per Section 139 r/w 118 of N. I. Act as the accused has not led any defence evidence. Lastly, it is contended that the complainant has successfully proved the case against the accused, thus, laying the ground for the conviction of the accused.

11. The defense has in his final arguments the accused has denied the complete case of the complainant and submitted that the transactions were exclusively between the complainant and the accused's brother; no transaction occurred between the complainant and the accused. It is also argued that the complainant failed to adduce any books of entry or books of account to substantiate the claim. The alleged amount was received by Bharatbhai, and the cheque in question was not filled by the accused. Furthermore, it is argued that the complainant admitted during cross-examination that the details in Exhibit-9 and Exhibit-8 were filled by the same person. Finally, there is a fundamental contradiction between the alleged time of advancing the money and the date inscribed on the cheque.

12. It is finally submitted that the accused owes no liability towards the complainant and no amount has ever been taken by the accused from the complainant. Finally, Ld.

Counsel for the accused submitted that the present case is a fit case for the acquittal of the accused.

13. I have heard the final arguments of both the sides and have also perused the record carefully.

14. Before proceeding to the further adjudicatory discussion on merits, I deem it appropriate to record the introductory discussion on theory, the relevant laws and the nuances thereof.

15. An offence under section 138 of N.I. Act is deemed to have been committed when 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 the bank. To launch prosecution under the said section all the statutory requirements must be fulfilled. Section 138 NI Act is reproduced hereunder:

> *"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 extended to two years), or with fine which may extend to twice the amount of the cheque, or with both."

16. <u>In Krishna Janardhan Bhat v. Dattatraya G. Hegde, 2008 (4) SCC 54:2008 (1) SCR 60</u>5; it was observed that "Complaint under section 138 must contain the following ingredients:

(*i) that there is a legally enforceable debt;*

(ii) that the cheque was drawn from account of bank for discharge in whole of part of any debt or other liability which pre-supposes a legally enforceable debt;

(iii) cheque so issued had been returned due to insufficiency of funds(etc.)."

17. At this stage, in order to take my adjudicatory disposition further, I deem it appropriate to take on record the legislative mandate in form of section 118 NI Act and section 139 NI Act, the same are reproduced hereinunder:

<u>Section 118 Presumptions as to negotiable instruments</u>. *—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, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;

(b)xxxx

<u>Section 139 Presumption in favour of holder:</u> *It shall be presumed, unless contrary disproved that the*

holder of the cheque received the cheque for the discharge, in whole or in part of any debt or other liability.

18. Section 118 of the NI Act *inter alia* provides that it shall be presumed, until the contrary is proved, that every negotiable instrument was made or drawn for consideration. Section 139 of the NI Act stipulates that unless the contrary is proved, it shall be presumed that the holder of the cheque received the cheque, for the discharge of, whole or part of any debt or liability. The said presumptions are rebuttable in nature.

19. In Kumar Exports Vs. Sharma Carpets, (2009) 2 SCC 513, the Hon'ble Supreme Court, in this regard held as under:

"The accused in a trial under Section 138 of the Act has two options. He can either show that consideration and debt did not exist or that under the particular circumstances of the case the non-existence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the Court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the Court may either believe that the

consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. Apart from adducing direct evidence to prove that the note in question was not supported by consideration or that he had not incurred any debt or liability, the accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on the complainant. The accused may also rely upon presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arising under Sections 118 and 139 of the Act."

20. In M. S. Narayana Menon Vs. State of Kerala, (2006) 6 SCC 39, the Apex Court dealing with the statutory presumption under Sections 118(a) and 139 of the N. I. A *inter alia* held as under:-

"29. In terms of Section 4 of the Evidence Act whenever it is provided by the Act that the Court shall presume a fact, it shall regard such fact as proved unless and until it is disproved. The words "proved" and "dis-proved" have been defined in Section 3 of the Evidence Act (the interpretation clause)......

30. Applying the said definitions of "proved" or "disproved" to the principle behind Section 118(a) of the Act, the Court shall presume a negotiable instrument to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon.

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32 The standard of proof evidently is preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from the materials on record but *also by reference to the circumstances upon which he relies.*

XXX XXX XXX

*Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the Court in support of the defence that the Court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the 'prudent man'.***”**

21. A closer look at the phraseology used U/S 139 of N. I. Act reveals that though the legislature has provided a protection to the drawee of the cheque or the holder in due course of the cheque, as the case may be, in the form of presumption U/S 139 of N. I. Act, the said presumption is rebuttable in nature and the same can be done by leading cogent evidence on the behalf of the defence.

22. At this juncture, I deem it appropriate to record the observation made by Hon'ble Delhi High Court in a case titled as V.S. Yadav VS. Reena 172 (2010) DLT 561, commented upon the obligation of the accused while setting up a defence to:

“5. It must be borne in mind that the statement of the accused under Section 281 Cr. P.C or under Section 313 Cr. P.C. is not the evidence of the accused and it cannot be read as part of evidence. The accused has an option to examine himself as a witness. Where the accused does not examine himself as a witness, his statement under Section 281 Cr. P.C. or 313 Cr. P.C. cannot be read as evidence of the accused and it has to be looked into only as an explanation of the incriminating circumstance and not as evidence. There is no presumption of law that explanation given by the accused was truthful.”

In the said case, the Hon'ble High Court further observed:

> *"7. ….... Mere pleading not guilty and stating that the cheques were issued as security, would not given amount to rebutting the presumption raised under Section 139 of N. I. Act. If mere statement under Section 313 Cr. P.C. or under Section 281 Cr. P.C. of accused of pleading not guilty was sufficient to rebut the entire evidence produced by the complainant/prosecution, then every accused has to be acquitted. But, it is not the law. In order to rebut the presumption under Section 139 of N. I. Act, the accused, by cogent evidence, has to prove the circumstance under which cheques were issued. It was for the accused to prove if no loan was taken why he did not write a letter to the complainant for return of the cheque. Unless the accused had proved that he acted like a normal businessman/prudent person entering into a contract he could not have rebutted the presumption under Section 139 N. I. Act. If no loan was given, but cheques were retained, he immediately would have protested and asked the cheques to be returned and if still cheques were not returned, he would have served a notice as complainant. Nothing was proved in this case".*

23. Coming to the present case, the accused in his statement stated that the cheque in question has not been given by the accused to the complainant, rather it was given by his brother Bharatbhai to the complainant for the amount taken by him.

24. In order to rebut the presumption under Section 139 of N. I. Act r/w Section 118 N. I. Act, the accused, by cogent evidence, was obligated to prove the circumstance under which the cheque in question was issued. It was for the accused to prove that if the cheque was not given by him to

the complainant but by his brother, then how the cheque in question of his account landed in the hands of the complainant. The accused was also necessitated to mention that when did he get the knowledge of the possession of the cheque in question in the hands of the complainant and why did he not write a letter to the complainant for return of the cheque(s) or why did he not issue a notice to the complainant for return of the purported retention of the cheque so as to cause consequent delivery of the cheque to the accused or why did he not file the police complaint for the alleged offence of forgery or intimated the bank for stop payment. Unless the accused had proved that he acted like a prudent person protecting his interests, he could not have rebutted the presumption under Section 139 N. I. Act. If the cheque in question either landed in the hands of the complainant, then why did not he take any step. Nothing was proved in this case, thus this court is compelled to doubt the defence put forth by the accused.

25. As per the case of the complainant the accused took a friendly loan of Rs.1,00,000/- and in lieu of that the cheque in question was given by the accused. The defense has neither alleged that the instant cheque was stolen by the complainant nor provide any detail stating how the cheque in question of the accused bank account, landed in the hands of the complainant. Rather took the defense that the cheque was given by his brother to the complainant. The defense has himself given a suggestion to the defense counsel that the

amount in question was taken by the brother of the accused Bharatbhai and the said suggestion was admitted by the complainant. But he voluntarily stated that the accused accompanied his brother at that time. Hence, from the cross examination itself, no probable defense has been raised. It is also worthy to mention here that the accused has not placed on record any notice/complaint/FIR, which would have been sent/registered in order to secure the return of the alleged misuse cheque from the complainant. It cannot be forgotten that as per Section 118 N. I. Act, until contrary is proved, it shall be assumed that every negotiable instrument is transferred for consideration. Since the cheque in question is of the accused bank account, it was expected out of him that he shall, by deployment of cogent evidence, undo the burden of presumption U/S 118 N. I. Act r/w Section 139 N. I. Act. No such endeavor has been made by the accused. In view thereof, thus this court is constrained to look at the defence of the accused with a suspicious eye.

26. The defense has further took the defense that the complainant has failed to adduce the account books and the ITR returns to show the transaction in question and hence, the cheque cannot be said to have been issued for legally enforceable debt.

27. Now in the instant defense, the defense conflates the provisions of the Income Tax Act, 1961, with the Negotiable Instruments Act, 1881. Any failure on the part of the complainant to reflect a friendly loan in their books of

accounts or ITR may attract scrutiny or penal consequences from the Income Tax authorities. However, an omission in tax filings does not render the underlying contract void *ab initio*, nor does it wash away the liability of the accused. A tax default does not transform a "legally enforceable debt" into an unenforceable one under Section 138 of the NI Act.

28. Moreover, Hon,ble Apex court in the case of *Rohitbhai Jivanlal Patel v. State of Gujarat & Anr., (2019) 18 SCC 106*, where similar defense raised by the accused and the Trial Court had acquitted the accused on the exact grounds being argued here that the complainant failed to produce documentary evidence, account books, or ITR to prove the source of funds and the loan. The Hon'ble Gujarat High Court reversed this acquittal, and the Hon'ble Supreme Court upheld the High Court's conviction.

The Hon'ble Supreme Court categorically rejected the defense regarding the lack of documentary evidence and account books, observed that:

> *"The observations of the Trial Court that there was no documentary evidence to show the source of funds with the respondent to advance the loan, or that the respondent did not record the transaction in the form of receipt of even kachcha notes... would have been relevant if the matter was to be examined with reference to the onus on the complainant to prove his case beyond reasonable doubt. These considerations and observations do not stand in conformity with the presumption existing in favour of the complainant by virtue of Sections 118 and 139 of the NI Act. Needless to reiterate that the result of such presumption is that existence of a legally enforceable debt is to be presumed in favour of the complainant.* ***When such a presumption is drawn, the factors relating to the want of documentary evidence in the form of***

> ***receipts or accounts or want of evidence as regards source of funds were not of relevant consideration while examining if the accused has been able to rebut the presumption or not.***"*

Furthermore, endorsing the specific view taken by the Gujarat High Court regarding the non-disclosure of the transaction in the Income Tax Returns, the Supreme Court noted with approval the High Court's reasoning. The principle affirmed is that:

> *"The High Court observed that* ***if the transaction in question was not reflected in the accounts and income-tax returns, that would at best hold the assessee or lender liable for action under the income-tax laws but, if the complainant succeeds in showing the lending of amount, the existence of legally enforceable debt cannot be denied.****" (Reference: Para 10 of Rohitbhai Jivanlal Patel outlining the Gujarat HC rationale upheld by the SC).*

29. Therefore, the accused cannot piggyback on the complainant's alleged omissions under the Income Tax Act to evade their own liability under the Negotiable Instruments Act. Since the accused has failed to bring on record any cogent, independent evidence to prove that the loan was *never* disbursed, the mere absence of the transaction in the complainant's ITR and account books fails to rebut the strict statutory presumption under Section 139 of the NI Act. The defense is legally untenable and ought to be discarded.

30. Now as discussed above that in order to rebut the presumption under Section 139 of N. I. Act r/w Section 118 N. I. Act, the accused, by cogent evidence, was obligated to prove till the level of preponderance of probabilities. On the aspects relating to preponderance of probabilities, the

accused has to bring on record such facts and such circumstances which may lead the Court to conclude either that the consideration did not exist or that its non- existence was so probable that a prudent man would, under the circumstances of the case, act upon the plea that the consideration did not exist. After such presumption, the onus shifted to the accused and unless the accused had discharged the onus by bringing on record such facts and circumstances as to show the preponderance of probabilities tilting in his favour, any doubt on the complainant's case could not have been raised for want of documentary evidence proving the transaction with accused. The aspect relevant for consideration had been as to whether the accused has brought on record such facts/material/circumstances which could be of a reasonably probable defence. Now where the the defense has not touch the basic and root of the entire transaction i.e. the cheque in question and mere ignorance of the fact that how the cheque in question landed in the hands of the accused, will not dislodge the presumption and in view of the same, the defense taken is not considered to be probable in nature.

31. **It is once again pertinent to mention here that entire scheme of the N. I. Act is to ensure respect to a Negotiable Instrument (in particular a cheque) and it is in furtherance of this general scheme that a presumption is laid in favour of the complainant or the holder in due course U/S 139 r/w Section 118 N. I. Act. However, the presumption U/S**

139 r/w Section 118 N. I. The Act shall operate in favour of the complainant only upon the discharge of basic burden i.e. there was a legally enforceable debt in favour of the complainant and against the accused. It has been held in a plethora of judgments of Hon'ble Supreme Court and Hon'ble Delhi High Court the requirement on the part of the accused to prove is that of 'preponderance of probabilities'. Reliance is placed on the judgment of Hon'ble Delhi High Court in M/S. Miracle Infoweb Pvt. Ltd. vs State & Anr. (Decided on 7 November, 2013, by HMJ J.R. Midha).

32. As has already been discussed hereinabove, the defence of the accused is not plausible enough to dislodge the presumption under section 139 r/w 118 lying in the favour of the complainant, even by the standards of preponderance of probability.

33. To conclude, all the mandatory requirements as postulated under section 138 of the NI Act are found to be proved on behalf of the complainant. In view of the entire discussion, hereinabove, the facts and the circumstances of the present case, this court is of the considered opinion that the case of the complainant has been proved beyond the shadows of reasonable doubt.

34. Accordingly, the accused is hereby convicted for the offence U/S 138 Negotiable Instruments Act.

35. Let the accused be heard on the point of sentence. Let the copy of the judgment be given to the accused free of cost.

Announced in open court

Place : Deesa **(R.K. TANWAR)**
Date : 18/06/2026 **2nd Additional Senior Civil Judge**
Banaskantha at Deesa
UIC- GJ01335

ORDER ON SENTENCE:

Arguments on sentences advanced by Ld. Counsel for the convict. Ld. Counsel has argued that the accused is a poor person and the responsibility of his family is on his shoulder and it his first offence. Therefore, it is prayed to consider a lenient view.

The Ld. Counsel of the complainant has pleaded to award the maximum sentence.

Considering the totality of facts and circumstances of the case and also considering the arguments advanced by both the parties and the criminal history of the accused, the convict is awarded simple imprisonment for twelve months as per the legislative mandate u/s 138 N.I. Act and is sentenced to pay an amount of Rs.1,00,000/- (Rupees One Lacs) as fine to be paid as a compensation to the complainant. The same shall be paid within next 60 days and in default of the payment, convict shall undergo simple imprisonment for 3 months, in compliance with the judgment of Hon'ble Supreme Court in case titled as Vijayan vs. Sadanandan K & Anr.,IV (2009) SLT 141.

Any period of detention undergone by the accused during the trial of the instant case shall be set off against the sentence of imprisonment as per Section 468 of the BNSS.

As the accused has failed to remain present before this court, sentence warrant be issued against the accused and the same

be sent to the Superintendent of Police (S.P.),Banaskantha, for its execution. Since nothing remains pending, let the file be consigned to the record room.

Matter is disposed of.

Place : Deesa **(R.K. TANWAR)**
Date : 18/06/2026 **2nd Additional Senior Civil Judge**
Banaskantha at Deesa
UIC- GJ01335