

GJJM010037732024  CR A/426/2024	 सत्यमेव जयते	<i>Filed on</i>	:	09/10/2024		
		<i>Registered on</i>	:	09/10/2024		
		<i>Decided on</i>	:	07/08/2026		
		<i>Duration</i>	:	<i>Years</i>	<i>Months</i>	<i>Days</i>
				01	09	30

IN THE HON'BLE COURT OF 3rd ADDL. SESSIONS JUDGE

Dist. : Jamnagar

Exh :- 30

Criminal Appeal No. 426/2024	
<i>Appellant (Original Accused)</i>	BHARATBHAI VELJIBHAI JADEJA Proprietor of Mahadev Marketing Age : 43 Years, Occupation : Service, Resi. : Himatnagar Street No.5, Behind Dental Hospital, Jamnagar.
<i>Versus</i>	
<i>Respondents (Respondent No.2 - Original Complainant)</i>	1 STATE OF GUJARAT <i>Through</i> : Ld. A.P.P., Jamnagar
	2 NILESHBHAI HEMATBHAI PARMAR Age : 38 Years, Occupation : Private Service, Resi. : 'Shiv Krupa' Juna Kumbhar Vado, Nagnath Gate, Opp. to Champakunj, Dist.-Jamnagar.

APPEARANCE :-

Ld. Advocate for the Appellant	<i>Mr. D. N. Bheda</i>
Ld. A.P.P. for Respondent No. 1 - The State	<i>Mr. D. A. Jivrajani</i>
Ld. Advocate for Respondent No. 2 / Orig.Complainant	<i>Mr. D. H. Parmar</i>

APPEAL UNDER SECTION 415 OF BHARATIYA NAGARIK SURAKSHA SANHITA (U/S 374(3) OF CODE OF CRIMINAL PROCEDURE AGAINST CONVICTION FOR OFFENCE PUNISHABLE UNDER SECTION 138 OF NEGOTIABLE INSTRUMENTS ACT, 1881, VIDE JUDGMENT AND ORDER DATED 10/09/2024 OF CRIMINAL CASE No.520/2020 PASSED BY LD. 7th ADDL.CHIEF JUDICIAL MAGISTRATE, AT JAMNAGAR.

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

[1]. The present Appellant is the Original Accused and the Respondent No.2 is the Original Complainant and they will be referred here-in-after by their original status as Accused and Complainant for the sake of brevity. The Respondent No. 1 is the State.

[2]. The Criminal Case No. 520/2020 was filed against the present Appellant / Original Accused for the offence punishable under Section 138 of Negotiable Instruments Act, 1881, in the trial Court, by the Respondent No. 2. After conclusion of the trial, the Ld. 7th Addl. Chief Judicial Magistrate, Jamnagar, was pleased to pronounce the Judgment and Order dated 10/09/2024 in Criminal Case No. 520/2020 and was pleased to record the conviction of the Accused under Section 255(2) of Criminal Procedure Code, 1973, for the offence punishable under Section 138 of Negotiable Instruments Act, 1881 and the Accused was sentenced to simple imprisonment for a period of 1 year and compensation of Rs.3,50,000/-, in case of default in payment of fine as a compensation, the accused will further suffer simple imprisonment for 2 months. Being aggrieved and dissatisfied by the said Judgment and Order dated 10/09/2024, the present Appellant / Original Accused has preferred this appeal under Section 415 of Bharatiya Nagarik Suraksha Sanhita, 2023 (under Section 374 of Code of Criminal Procedure, 1973).

[3]. After registering the appeal, notices were issued to the Respondents. The Respondent No. 2 / Original Complainant had appeared through Ld. Advocate and opposed & strongly objected the appeal and submitted that the cheque in question was issued against the legal debts and liability and the order of the Ld. Trial Magistrate is just and proper and requested for not to interfere with the said order and to dismiss the appeal. The Respondent No.1 - State had appeared through the Ld. A.P.P. and supported the case of the Respondent No. 1 – Original Complainant and requested to dismiss the appeal.

[4]. For adjudication of this appeal, following points for determination, arises:-

:: POINTS FOR DETERMINATION ::

1	Whether the Complainant has failed to prove the facts that the Accused had committed the offence punishable under Section 138 of Negotiable Instruments Act, 1881?
2	Whether the Judgment and Order dated 10/09/2024 passed in Criminal Case No. 520/2020 by Ld. 7 th Addl. Chief Judicial Magistrate, Jamnagar, is erroneous or illegal or perverse or with material irregularity, which requires interference by this Court and whether the said Judgment and Order deserves to be quashed and set aside ?
3	What's Order ?

[5]. My findings, arrived at, of the above stated points, are as under :

-: FINDINGS :-

1	In AFFIRMATIVE
2	In AFFIRMATIVE
3	As per FINAL ORDER

[6]. I have heard the Ld. Advocate Mr. D.N. Bheda for the Appellant - Accused and the Ld. A.P.P. Mr. D.A. Jivrajani for the State - Respondent No. 1 and the Ld. Advocate Mr. D.H. Parmar for the Respondent No. 2 - Complainant, at great length. I have also considered the impugned Judgment and Order dated 10/09/2024 passed in Criminal Case No. 520/2020 by Ld. 7th Addl. Chief Judicial Magistrate, Jamnagar and also gone through the evidence on record of the proceeding of the Criminal Case No. 520/2020. The Stay granted by this Court vide Order dtd.10/10/2024 passed below Exh.-5 on condition to deposit 20% of the fine Rs.70,000/- within 60 days and the implementation of said judgment and order of imprisonment is stayed till next returnable date.

[7]. The reasons, for the findings arrived at, of the above Points, are as under :

: REASONS :

POINT No. 1 to 3 :

(7.1). It is the case of the Complainant that he had given a Loan of Rs.5,50,000/- to the Accused and the said amount of Rs.5,50,000/- given to the Accused

is being supported by the Bank Statement / Passbook at Exh.-26. The Agreement at Exh.-15 was executed between the parties, whereby it was agreed that the Complainant had given Rs.5,50,000/- to the Accused. It is categorically stated by C.W. No. 1 – Nileshbhai Hematbhai Parmar in his examination-in-chief at Exh.-5 that out of the said amount Rs.5,50,000/-, the Accused has repaid Rs.2,00,000/-. Under such circumstances, the Complainant has proved the fact that he has given Rs.5,50,000/- to the Accused. It is clearly deposed by C.W. No. 1 – Nileshbhai Hematbhai Parmar in his examination-in-chief at Exh.-5 that the Accused has repaid Rs.2,00,000/- and there is outstanding amount of Rs.3,50,000/- only. Under such circumstances, the issue arises whether the Cheque was for discharging of the debts in a whole or part, meaning thereby if there is liability of Rs.3,50,000/- and the Cheque is of Rs.3,50,000/- or for the amount less than that, then the said cheque can be said to be given for discharging the legal debts in a whole or in part as required under Section 138 of Negotiable Instruments Act, 1881. If we go through the Cheque at Exh.-16, then it is of Rs.5,50,000/-. It is admitted by C.W. No. 1 – Nileshbhai Hematbhai Parmar in his cross-examination on Page 6 at Exh.-5 that the Accused had repaid Rs.2,00,000/- on dated 27/05/2019 out

of Rs.5,50,000/- and therefore, the amount of Rs.3,50,000/- is outstanding. Thus, the Accused has paid Rs.2,00,000/- on dated 27/05/2019 as admitted by the Complainant himself. Under such circumstances, the liability of the Accused was only for Rs.3,50,000/- on dated 27/05/2019. If we go through the Cheque at Exh.-16, then it is of dated 28/08/2019 (after dated 27/05/2019). The fact admitted by the Complainant that on dated 27/05/2019 that the outstanding debt was only of Rs.3,50,000/-. In spite of that the Complainant had got deposited the Cheque dated 28/08/2026 at Exh.-16 for Rs.5,50,000/- and is returned unpaid on dated 13/11/2019. Admittedly, on dated 28/08/2019, there was no outstanding amount of Rs.5,50,000/-, but it was only of Rs.3,50,000/- and therefore, the Cheque of Rs.5,50,000/- cannot be said for discharging the debt in whole or in part.

- (7.2). The Ld. Advocate for the Complainant has submitted that the Cheque at Exh.-16 is supported with the Agreement at Exh.-15. The issuance of Cheque might have been supported by an Agreement at Exh.-15 and there was a legal debt of Rs.5,50,000/- and if the said Cheque would have been deposited before 27/05/2019, then certainly it will fall within the scope of Section 138 of Negotiable Instruments Act, 1881, but the Accused has paid Rs.2,00,000/- on dated

27/05/2019 and therefore, the Cheque of Rs.5,50,000/- deposited after dated 27/05/2019 cannot be said to be the cheque for discharging the legal debts in a whole or part, as the cheque is of much excessive amount than the legal debt of Rs.3,50,000/-. Under such circumstances, the case does not fall within a purview of Section 138 of Negotiable Instruments Act, 1881 and therefore, the Accused cannot be convicted for the said offence.

(7.3). Apart from this defense there are several other defenses taken by the Accused i.e. the loan was given to Mahadev Marketing, but no legal notice is being issued to Mahadev Marketing, the Complainant is not knowing the facts of transactions, several other complaints are being filed by the Accused against the other person, but none of the such defense could be accepted and such defense are not tenable at law.

(7.4). The only defense of the Accused, which is acceptable, is that the Cheque of Rs.5,50,000/- when deposited with the Bank for clearance was not for the amount of Rs.3,50,000/- or less than that and therefore, the same cannot fall under the four corners of issuance of cheque for discharge of debt / liability in a whole or part.

(7.5). The Ld. Advocate for the Complainant has submitted that the Complainant may not be knowing that he has to make endorsement behind the cheque that the Accused had paid Rs.2,00,000/- and the Cheque is to be presented only for collecting Rs.3,50,000/-. Neither any endorsement is made on the Cheque nor any Application given by the complainant to the bank that the said cheque was deposited only to collect Rs.3,50,000/-. If such Application or endorsement would have been made by the Complainant, the Bank would have called upon the Bank on which the Cheque was drawn for clearance of Rs.3,50,000/- only. If that would be the case, then certainly the offence under Section 138 of Negotiable Instruments Act, 1881, would have been made out, but unfortunately neither any endorsement is being made nor any Application is being made to the Bank that the Cheque at Exh.-16 is deposited to collect only Rs.3,50,000/- which is legal debt and liability of the Accused. If the Complainant has not followed the said procedure then he cannot take advantage and cannot say even that the Accused may be convicted because the Cheque is returned back. Merely, return of cheque is not sufficient, but the burden lies on the complainant to prove the basic facts as required under Section 138 of Negotiable Instruments Act, 1881, so as to raise the presumption. Unless the

basic facts are being proved that the cheque is for the amount, for discharging of legal debt in a whole or in part therein the presumption cannot be raised. The Complainant has failed to prove the basic facts required to raise the presumption as the Cheque is for the excessive amount than the legal liability exists on the date of submitting the Cheque in the bank for collecting the Cheque amount of Rs.5,50,000/-. Hence, the Trial Court has committed the serious error in convicting the Accused. The Hon'ble Trial Court has not discussed the said issue in the judgment as to how against legal liability of Rs.3,50,000/-, the Cheque of Rs.5,50,000/- can be deposited for clearance of Rs.5,50,000/-, without endorsement of Receipt of Rs. 2,00,000/-. The Ld. Advocate for the Accused has correctly argued that in case there would have been sufficient amount in the account of the Accused, then the Cheque at Exh.-16 would have been cleared for the amount of Rs.5,50,000/- though there was legal liability only for Rs.3,50,000/-. Under such circumstances, when the Cheque at Exh.-16 which is for Rs.5,50,000/- is not for discharging debt in whole (Rs.3,50,000/-) or in part (any amount less than Rs.3,50,000/-), then it cannot be said that the Complainant has proved the basic facts required under Section 138 of Negotiable Instruments Act, 1881 and the Accused cannot be convicted for the same.

(7.6). I have taken into consideration the decision delivered in case of ¹DASHRATH TRIKAM PATEL Vs. HITESH MAHENDRA PATEL, wherein held that when a part-payment of the debt is made after the cheque was drawn, but before the cheque is encashed, such payment, held must be endorsed on the cheque under Section 56 of Negotiable Instruments Act and the cheque cannot be presented for encashment without recording the part-payment. Therefore, if the unendorsed cheque is dishonoured on presentation, the offence under Section 138 of Negotiable Instruments Act, would not be attracted since the cheque does not represent a legally enforceable debt at the time of encashment.

(7.7). The Ld. Advocate for the complainant has submitted that they were not aware that they have to make endorsement. The Complainant has got issued the Legal Notice at Exh.-18 on dated 12/12/2019. Thus, even if the Complainant is not aware with the law, then also when he come in contact with the Ld. Advocate through which he had got issued the Legal Notice, his Ld. Advocate could have advised him that there should be some endorsement on the Cheque that the Cheque is presented for Rs.3,50,000/- and he could have also

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DASHRATH TRIKAM PATEL Vs. HITESH MAHENDRA PATEL
: (2023)1 SCC 578 = 2022 SCC Online SC 1376 = CrA 1497/22, 11/10/22
(Cr.A. 426/2024 – S. 138 NIA, 1881 - 1 Yr +F 3.5L - BJ-A - 3rd ASJ, Jamnagar)

advised him that the Complainant could have filed the summary suit. Now if the time limit for filing the Summary Suit has been expired, then that does not mean that by hook and crook the Accused is required to be convicted and that is not the spirit of law. It is the criminal offence and not a suit for recovery for the amount of the Complainant and Accused cannot be convicted, more particularly in any criminal offence and hence, the Accused is entitled to get the acquittal and the Complainant has miserably failed to prove the fact beyond reasonable doubt that Accused has committed the offence punishable under Section 138 of Negotiable Instruments Act, 1881 and therefore, I Answer the **POINT No. 1 in AFFIRMATIVE.**

- (7.8). In view of the reasons stated here-in-above and evidence on record and finding arrived at Point No. 1 and settled principle of law, the complainant has failed to prove that the Accused has committed the offence punishable under Section 138 of Negotiable Instruments Act, 1881 and therefore, the impugned Judgment and Order dated 10/09/2024 passed in Criminal Case No.520/2020 by the Ld. 7th Additional Chief Judicial Magistrate, Jamnagar, calls for interference by this Court and required to be quashed and set-aside by allowing this Appeal. Accordingly, I answer the **POINT No. 2 in AFFIRMATIVE** and answer the **POINT No. 3**

by passing following FINAL ORDER :

-: FINAL ORDER :-

- The appeal is hereby Allowed.
- The Judgment and Order dated 10/09/2024 passed in Criminal Case No. 520/2020, by Hon'ble 7th Addl. Chief Judicial Magistrate, Jamnagar, District-Jamnagar, is hereby quashed and set-aside.
- After expiry of Appeal period, if there is no stay from the Hon'ble High Court, then the amount deposited by the Accused shall be returned back to the Accused.
- Yadi, alongwith the Copy of this Judgment and Order as well as the Record and Proceeding of Criminal Case No. 520/2020, is ordered to be sent back to the Hon'ble 7th Additional Chief Judicial Magistrate, at Jamnagar, Dist. : Jamnagar, forthwith.

Signed, pronounced and declared in the open Court on this 7th day of August, 2026, at Jamnagar.

Date : 07/08/2026
Place : Jamnagar

(Rasikkumar V. Mandani)
3rd Additional Sessions Judge
Jamnagar, at Jamnagar.
(Code : GJ00715)

// A.M.S + sf //