

JUDGMENT

1/20

C.C. NO. 3011 OF 2022

Exhibit

Filed On

08 06 2022

Registered On

08 06 2022

Decided On

25 03 2026

Duration

Y M D

**IN THE COURT OF 2ND ADDITIONAL CHIEF JUDICIAL
MAGISTRATE, KHEDA AT NADIAD**

CRIMINAL CASE No. 3011 OF 2022

COMPLAINANT

C.J. Finance Ltd.

Jigneshbhai Jadishbhai Panchal

Aged : 51 years, Occupation : Job,

Residing at : C.J. House Motapor,

At : Nadiad, Ta : Nadiad, District : Kheda

VERSUS

ACCUSED

Bharatbhai Melabhai Parmar

Aged: Adult, Occupation: Job/ Agriculturist,

Residing at : House No.12, Dairy valu faliyu, at Po. Siholdi, Ta.

Vaso, Dist. Kheda.

Ld. Adv. P. R. Mahida For The Complainant.

Ld. Adv. J. V. Bhrambhatt For The Accused.

**The Complaint Under Section - 138 Of
The Negotiable Instrument Act**

J U D G M E N T

**APPLICABILITY OF THE PROVISIONS OF N.I. ACT TO
ELECTRONIC FUND TRANSFER.**

1. As the complaint is filed under Section 138 of the Negotiable Instrument Act in regards to the electronic fund transfer issued by the accused in favor of the complainant, the first question arise whether the electronic fund transfer governed under the Payment And Settlement Systems Act,2007 can be tried by adopting the procedure under the negotiable instrument act? To get answer to this question we need to reproduce section 25(5) of **The Payment And Settlement Systems Act 2007**, which reads thus;

25. Dishonour of electronic funds transfer for insufficiency, etc., of funds in the account.

(5) The provisions of Chapter XVII of the Negotiable Instruments Act, 1881 (26 of 1881) shall apply to the dishonour of electronic funds transfer to the extent the circumstances admit.

1.1 Thus, the Section 25 of the Payment And Settlement Systems Act, 2007 makes it clear that the provisions of chapter

XVII of the Negotiable Instruments Act, 1881 can be applied to the electronic fund transfer.

FACTS OF THE COMPLAINT IN BRIEF.

2. The facts of the case is that the complainant **Ceejay Finance** is registered Public Limited Company under the Companies Act and does the business of finance. As the accused was in need of finance he visited complainant's office to borrow **Rs.58,500/-**. The complainant gave the said amount to the accused after entering into an agreement. The accused promised to pay back the same.

2.1 As the accused did not returned the amount, on persistent request of the complainant, the accused issued a **Electronic Fund Transfer/Mandate** of **Rs.23,595/-** in favour of the complainant. At the time of issuance of mandate, the accused gave an assurance that the mandate would be cleared on presentation to the bank. Relying on the words of the accused complainant accepted the mandate. However, on presentation of the mandate by the complainant to his bank, the same was returned unpaid by the bank with return memo stating remarks of **"Balance Insufficient"**

2.2 Thereafter, the legal demand notice by R.P.A.D post was issued by the complainant to the accused through his Ld. Advocate and the said notice was served to the accused. In-spite of such notice, the accused has not paid any amount to the complainant, resultant, the present complainant under Section-

138 of N.I. Act has been filed. On examination of the complainant on oath and after verifying the documents produced among-with, the complaint was registered.

PLEA OF THE ACCUSED.

3. In response to summons issue, the accused appeared along-with his Ld. Advocate. The plea of the accused was recorded vide **Exh.6 & 9**, wherein the accused did not plead guilty and claimed the trial before the Court.

3.1 Looking at the facts of the complaint, documents produced along-with and evidence on oath, the summons triable procedure has been adopted for recording of plea and evidence. The Hon'ble Supreme Court in Mehsana Nagarik Sahakari Bank Ltd., Vs. Shreeji Cab Co.& Ors. Etc. 2013 (0) AIJEL-SC 54770 has observed when the evidence is recorded in full and not in a summary manner, there is no need for *denovo* trial.

EVIDENCE OF COMPLAINANT.

4. To support the case, the complainant has produced following evidences.

ORAL EVIDENCE

Sr. No.	Particulars	Exhibit
1.	Examination-in-chief of Mr.Jigneshbhai Jadishbhai Panchal.	04

DOCUMENTARY EVIDENCES

Sr. No.	Particulars	Exhibit
1.	Mandate	10
2.	Return memo of mandate	11
3.	Office copy of demand notice	12
4.	Acknowledgment slip and Track report	13
5.	General power of attorney	14

4.1 After-that the complainant has filed the evidence closing pursis vide **Exh.22.**

FURTHER STATEMENT/ EVIDENCE OF THE DEFENCE/ ABSENCE OF THE ACCUSED.

5. After the above evidence was presented by the prosecution, the matter was kept for recording of a further statement of the accused. The F.S was ready, however, in-spite of sufficient, reasonable and fair opportunities were given to the accused, he did not remain present before the Hon'ble Court for recording his F.S. In such circumstances,I find it judicious to take the observations of **the Hon'ble Gujarat High Court in the judgment of Manoj Vasudev Sompura Vs. State of Gujarat R/SCR.A/6721/2023 dated 15.09.2023**

12. From the above set of facts, it appears that the decision to not remain present on the next date after getting his Further Statement u/s. 313 of Cr.P.C. recorded on the earlier date and to not conduct cross-examination of the complainant in spite of being afforded with sufficient opportunities, was a deliberate or voluntary decision taken by the petitioner. In the interregnum, there is nothing to suggest that the petitioner or

his advocate had filed any application requesting the trial Court to grant him an opportunity to record his Further Statement u/s. 313 of Cr.P.C. or to conduct cross-examination of the complainant. The petitioner went into oblivion after the date when his Further Statement u/s. 313 of Cr.P.C. came to be recorded but before it could be exhibited. **Therefore, the trial Court was left with no other option but to conduct the trial in the absence of the petitioner, who had deliberately or voluntarily chosen to evade the trial proceedings.** Under these circumstances, there was no reason for the trial Court to issue any warrant against the petitioner, as contended by learned advocate for the petitioner. Moreover, the petitioner had not produced any evidence in his defence or had made any submissions either oral or in writing.

14. Considering the facts and circumstances of the case, this Court is of the opinion that **the trial Court was completely justified in passing the impugned judgment and order. The decision to not conduct cross-examination of the complainant in spite of repeated opportunities and to not remain present on the next date of trial when his Further Statement u/s. 313 of Cr.P.C. recorded on the earlier date was to be exhibited was a deliberate, intentional and conscious decision on the part of the petitioner. It was not that the petitioner was not aware about the stage of trial proceedings. However, deliberately, the petitioner had chosen to remain absent from the trial proceedings** from the date his Further Statement u/s. 313 of Cr.P.C. was recorded but before it could be exhibited.

I further find it judicious to take the observations of **the Hon'ble Karnataka High Court in the judgment of Sunil Yadav Vs. Smt. Y.C. Manju, Criminal Revision Petition No.664/2020.**

4. The main contention of the counsel appearing for revision petitioner before this Court is that the Trial Court committed an error in dispensing the 313 statement and ought to have been secured and recorded the 313 statement and the same ground was also raised before the First Appellate Court that he has not been given reasonable opportunity to defend himself and committed an error in dispensing the 313 statement of the accused, if he has afforded an opportunity to defend himself, the result would be otherwise and counsel prays this Court to remand the matter to follow the procedure.

6. Having heard the revision petitioner's counsel and also the principles laid down in the judgment, the point that would for consideration of this Court are:

- 1) Whether this Court can exercise the revisional jurisdiction that Trial Court committed an error in dispensing the 313 statement in respect of the revision petitioner and committed an error in passing conviction and sentence whether the First Appellate Court also committed an error in affirming the judgment and whether it requires interference of this Court exercising the revisional jurisdiction?
- 2) What Order?

15. It is also important to note that considering the factual aspect of the case as well as proceedings under Section 138 of N.I. Act, it is settled law that same has to be concluded expeditiously in the light of guidelines issued by the Courts from time to time for speedy disposal of the cases, the scope of Section 142, 143 and 145 of N.I Act, it was not necessary for the Trial Court to wait for accused to make his appearance. The Court is empowered to proceed with the case without recording the statement of the accused under Section 313 of Cr.P.C. The mere use of word 'may' cannot be held to confer a discretionary power on the Court to consider or not to consider such defence, since it constitutes a valuable right of an accused for access to justice. If the accused has not bothered to remain present before the Court and also Court has to take note of the fact that complainant is running from pillar to pillar after filing of the case and when the material discloses that the accused did not bothered, Court has to exercise discretion and proceed with the case by dispensing with statement under Section 313 of the Code. The accused has no regard for directions of the Court. When such being the case, it is the discretion of the Magistrate to dispense with the recording of Section 313 of Cr.P.C.

18. Having considered the factual aspects of this case is concerned, not a case for remanding the matter only on the ground that **313 statement was not recorded and the same is a discretion of the Magistrate to dispense the same having considered the factual aspects of the case and hence I do not find any error committed by the Trial Court** in dispensing the same and proceeded against the petitioner and the same cannot be a whims and fancy of the accused to seek for remand the matter when the opportunity was given to him and not utilized the same and no grounds to set-aside the order and remand the matter for fresh consideration.

5.1 Thus, in light of observations of the Hon'ble High Courts, in a case under Section 138 of the Negotiable Instruments Act, when the accused is continuously avoiding the trial, then in such a situation, if the trial is conducted in the absence of the accused, it is permissible. In this case, the accused has neither remained present at the time of F.S, nor he has presented any evidence and therefore, the matter was proceeded further.

ARGUMENTS OF THE PARTIES.

6. The Ld. Advocate for the complainant has argued that-

- Exh-4 is the affidavit of the complainant wherein he has supported all the facts of the complaint.
- Exh-10 is the **mandate** given by the accused bearing his signature to the complainant.
- Exh-11 is the return memo of "**Balance Insufficient.**"
- Exh-12 is the demand notice given to the accused.
- Exh-13 is the Acknowledgment slip and track report of notice given to the accused.
- Exh-14 is the General Power of Attorney of the complainant.
- The complainant has proven the facts of the complaint through oral as well as documentary evidence.
- The complainant has proved his foundational facts.
- The complainant is the holder in due course of the mandate. According to Sections 138,139 and 118(A) of the Negotiable Instruments Act, the presumption in this case is in favour of the complainant and the onus is on the accused to rebut that presumption however, the accused has failed to

do.

- Considering all the above facts and evidence, the prosecution has proven the case against the accused beyond a reasonable doubt and has requested that the maximum punishment be imposed on the accused and the legal amount be refund.

6.1 Neither the accused nor his Ld. Advocate were present and did not argue their case despite being given a sufficient, reasonable and fair opportunities.

ISSUES.

7. In view of the above facts, in my opinion the following issues arises for the judicial decision of the said case.

1. Does, the prosecution prove that the accused **borrowed Rs. 58,500/-** from the complainant. The accused did not repay the amount within the stipulated time. When the complainant demanded money, the accused gave a mandate to the complainant. On presentation of the said mandate in bank the same was not honored due to **"Balance Insufficient"**. Thereafter, the complainant gave a legal notice through the accused. Though, the said notice was served to the accused, he has not repaid the amount to the complainant within stipulated time and thus, he has committed an offence under Section 138 of Negotiable Instruments Act?

2. Does the accused prove that he has no legal debt or liability against the complainant?

3. What order?

DECISION ON ISSUES.

8. My decision on issues are as follows:
 1. In the affirmative.
 2. In the negative.
 3. As per final order.

REASONS.**EVALUATION OF THE EVIDENCE**

9. Considering the nature of issues no.1 and 2, they are related to each other and therefore, in order to avoid repetition and for brevity they have been discussed simultaneously. To decide whether the accused has committed an offence under Section 138 of the Negotiable Instruments Act? It is very important to keep in mind the relevant definitions under Payment and Settlement System Act, 2007 and the provisions of the N.I. Act, as they are applicable to the mandate as well.

Section-2(c) of the Payment and Settlement Systems Act, 2007 defines;

Electronic Funds Transfer means any transfer of funds which is initiated by a person by way of instruction, authorisation or order to a bank to debit or credit an account maintained with that bank through electronic means and includes point of sale transfers, automated teller machine transactions, direct deposits or withdrawal of funds, transfers

initiated by telephone, internet and card payment;

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 provision 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/three 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 of other liability” means a **legally enforceable debt or other liability.**

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, **of any debt or other liability.**

140. Defence which may not be allowed in any prosecution under section 138.—It shall not be a defence in a prosecution for an offence under section 138 that the **drawer had no reason to believe** when he issued the cheque **that the cheque may be dishonoured** on presentment for the reasons stated in that section.

142. Cognizance of offences.—1[(1)] Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—

(a) **no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing,** made by the payee or, as the case may be, the holder in due course of the cheque;

(b) such complaint is made **within one month of the date on which the cause of action arises** under clause (c) of the proviso to section 138:

2[Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period;]

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138.].

3[(2) The offence under section 138 shall be inquired into and tried only by a court within whose local jurisdiction,—(a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or

(b) if the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.

Explanation.—For the purposes of clause (a), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account.]

146. Bank's slip prima facie evidence of certain facts.—

The Court shall, in respect of every proceeding under this Chapter, on production of Bank's slip or memo having thereon the official mark denoting **that the cheque has been dishonoured**, presume the fact of dishonour of such cheque, **unless** and until such fact is **disproved**.

9.1 Now, whether the accused has committed the offence under Section 138 of the Negotiable Instruments Act or not? has to be examined keeping in mind the **essential elements** of the above definitions, **along with the oral as well as documentary evidence** produced by the parties, if any.

PRESENTATION OF MANDATE.

10. If we read the mandate presented vide Exh.10, it has been issued on 15.03.2022. As per Section 138 of the Act, it has to be presented to the bank within a maximum of three months. The return memo presented vide Exh.11 expresses that the mandate was presented to the bank on 16.03.2022. Hence, the mandate was presented to the bank within the said time limit. Thus, Section 138 of the Act is complied with.

RETURN OF MANDATE.

11. The complainant has submitted the mandate return memo vide Exh.11, which has been returned with the remark of "**Balance Insufficient**". Thus, Section 138 of the Act is complied with.

DEMAND NOTICE.

12. According to Section 138 of the Act, the holder of a mandate shall, within one month of the knowledge of the mandate being dishonoured, have to give a written demand notice to the drawer of the mandate for the said amount. The bank return memo presented at Exh.11 is of 07.04.2022 and the copy of the demand notice presented at Exh.12 is of 29.04.2022 and that notice has been served to the accused on 07.05.2022. Thus, the complainant has demanded the said amount in writing from the accused within thirty days from the return of the mandate. Thus, the provisions of the law has been complied with.

COGNIZANCE AS PER SECTION 142.

13. The complaint is filed in writing. In the present case, the complainant sent the demand notice dated 29.04.2022 at Exh.12 to the accused, which is found to have been served on 07.05.2022. The accused has to pay the money within fifteen days of receiving the said notice and if the accused fails to pay the money, then the complaint has to be filed within one month. In the present case, the complaint has been filed on 08.06.2022. Here, as the accused has failed to pay amount within fifteen days of the service of the notice, the complaint is filed within one month after expiry of such fifteen days and therefore, the provisions of the law is complied with.

AFFIDAVIT AND CROSS-EXAMINATION OF THE COMPLAINANT'S EVIDENCE.

14. The complainant has supported all the facts of the complaint on oath in his affidavit of examination-in-chief vide Exh.04. Then-after, in-spite of sufficient, reasonable and fair opportunities were given to the accused remained absent and he preferred not to cross-examine the complainant.

PRESUMPTION OF SECTION 139.

15. The Section 139 of the presumes that the mandate has been issued under a legal debt or liability in favor of the holder of the mandate. In the present mandate, the complainant is the holder of the mandate and thus the said mandate has to be presumed as a matter of law to have been given by the accused under a legal debt or liability to the complainant. Now, if the

accused wants to rebut such a fact and wants to prove a fact against it, then the responsibility of proving such a fact rests on the head of the accused. If the accused claims that the disputed mandate was not given to the complainant or he has no legal debt or liability against the complainant, then the onus is on the accused to prove such a fact and if the accused fails to prove such a fact, then according to the provisions of law, the fact that the said mandate was given by the accused to the complainant under a legal debt or liability is to be considered as proved.

FACTS PROVED BY THE COMPLAINANT AND ITS REBUTTAL BY THE DEFENCE.

16. After considering all the oral as well as documentary evidence it transpires that the complainant has followed all the requirements of the Section 138 of the Negotiable Instrument Act and therefore, the complainant has proved his foundational facts. Now, once the complainant has proved his case the presumption under Section 118 and 139 of the Act goes against the accused. Thus, the onus is on the accused to rebut the fact proven by the complainant. And therefore, it becomes necessary to take into account the facts raised by the accused, if any.

16.1 The accused has not presented any documentary evidence to rebut the proven facts of the complainant.

16.2 On filing of the present case, the accused has been issued a summons from the said court. The same has been served and the accused has appeared with his Ld. Advocate. The plea of

the accused has been recorded wherein he did not plead guilty and claimed the trial. **Thus, since filing of this case, the accused is well aware of the fact that a case under the Negotiable Instrument Act is pending against him in the court. The accused has been given sufficient, reasonable and fair opportunity. The accused could have presented evidence in his defense, but despite being given a fair opportunities, the accused has not presented any kind of oral or documentary evidence.** According to the general principle of criminal jurisprudence, the onus is on the prosecution to prove the case against the accused beyond reasonable doubt. **But Sections 118 and 139 of the Negotiable Instrument are exceptions to the above general principle.** When the complainant has a mandate, it has to be presumed that it is legally due from the accused as per Section 118 and 139. Now if the accused wants to prove the contrary fact, then the onus is on the accused to rebut the presumption of Section 139. Just by not pleading guilty the accused cannot be presumed innocent in trial under Negotiable Instrument Act. He must rebut the proved foundational facts of the complainant with strong, concrete and cogent evidence.

16.3 The **Hon'ble Supreme Court Judgment Kishan rao v/s Shankargouda, Criminal Appeal No. 802 of 2018, 2018 SCC Online SC 651** it has been stated that,

Held that **a mere denial of the existence of debt by the accused is not sufficient to acquit the accused** and that under Section 139 of the negotiable Instruments Act, there is a presumption that the accused had issued the cheque for the discharge of some debt or liability and **if the accused leads**

no evidence for his defence rebutting this presumption, then he can be convicted.

16.4 Thus, as seen above, the accused has to clearly prove that either he has no legitimate debt towards the complainant or his signature is not on the said cheque. In the present case, the accused has not been able to bring any such fact on record.

FINAL CONCLUSION.

17. **It is essential to note here that this case has not been proceeded ex-parte.** The accused was summoned on filing of the complaint. The accused appeared with his Ld. Advocate. The plea of the accused was recorded wherein he did not plead guilty and claim the trial. Thus, as the accused contested the matter, the trial was proceeded. Thus, **The accused is well aware of the fact that the trial is pending against him before the Hon'ble Court. However, he preferred not to participate into the proceedings.** One of the important reasons for the large number of pending cases under the Negotiable Instruments Act in the Courts is the continuous absence of the accused. Moreover, the accused who intentionally do not appear before the Court despite knowing very well that the trial is pending against them in the Court play a special role in such huge pendency. **The accused shall be granted sufficient, reasonable and fair opportunity to defend himself, but that opportunity cannot be infinite, because if that opportunity becomes infinite, the purpose of justice will be defeated.** Under the pretext of opportunity for defence, the accused should not have any ulterior motive to prolong the case unnecessary. Here in present case on hand,

despite giving the accused a fair trial, he did not present any evidence in his defence.

17.1 Thus, in light of the above discussions, the accused is found guilty of the offence under Section 138 of the Negotiable Instruments Act and deserves punishment. If the words of the Section 138 of the Negotiable Instruments Act are to be read, it gives discretionary power to the Hon'ble court regarding the punishment. The maximum punishment is two (02) years of imprisonment or a fine up to two times the amount of the mandate or both. Thus, the discretion lies with the Hon'ble court to order the punishment keeping in mind the facts of the case. There should be special and extra-ordinary circumstances for the maximum punishment in any offence. No such unusual and special circumstances are found in the present case. As discussed above, the complaint has succeeded in proving the case against the accused and therefore, the answer to point no.1 is given in the affirmative. As the accused has failed to rebut the proven facts of the complainant, the answer to point no.2 is given in the negative. Considering the elements like the punishment, the gravity of the offence, the age of the accused etc., while answering to issue no.3, I found following final order judicious.

ORDER

1. The accused - **Bharatbhai Melabhai Parmar**, Residing at : House No.12, Dairy valu faliyu, at Po. Siholdi, Ta. Vaso, Dist. Kheda., is found guilty of the offence under Section 138 of the Negotiable Instruments Act, 1881 and is

sentenced to undergo **simple imprisonment** for a term of **twelve (12) months** under Section 255(2) of the Criminal Procedure Code, 1973.

2. As per Section 357(3) of the Criminal Procedure Code., the accused is ordered to pay the total amount of the **mandate, Rs.23595/- (Rupees Twenty Three Thousand Five Hundred Ninety Five Only)** along-with **10%** of cheque amount as cost and loss occurred to the complainant. **Thus the accused is ordered to pay total amount of Rs.25,954/- (Rupees Twenty Five Thousand Nine Hundred Fifty Four Only)** to the complainant as compensation within one month.
3. If the accused defaults in paying the above compensation amount, then for such default, the accused is ordered to undergo **simple imprisonment for a further period of six (06) months.**
4. If there is a default in paying the amount of compensation, the execution of the punishment for the default shall be deemed to have commenced after the completion of the main punishment.
5. It is ordered that a copy of this order be provided to the accused free of cost upon his appearance.
6. If the accused in this case has previously served any sentence, then as per Section 428 of the Criminal Procedure Code, 1973, it is ordered that such sentence

served shall be set off against the sentence imposed.

7. As per Section 418(2) of the Criminal Procedure Code, an arrest warrant against the accused for the execution of the sentence shall be issued.

Signed and pronounced in the open Court today on this 25th day of March, 2026.

25.03.2026
Nadiad

Shrikant Dilipbhai Trivedi
2nd Addl. Chief Judicial Magistrate,
Nadiad (Dist. Kheda)
Code No. GJ01104.

A.S.N