

# Cc No. 52473/16 Rajeev Malhotra vs . Naresh Kumar Page No. 1 Of 26 Pages on 19 October, 2022

IN THE COURT OF METROPOLITAN MAGISTRATE,  
KARKARDOOMA COURTS, DELHI.  
Presided by: Sh. Akhil Malik

UNIQUE ID : 02402R0037402014  
CC No. 52473/2016  
PS: Geeta Colony  
Sh. Rajeev Malhotra  
S/o Late Sh. Sawan Mal Malhotra  
R/o B-69, Rani Garden  
Behind Rani Garden School  
Delhi-110031

..... Complainant

VERSUS

Sh. Naresh Kumar  
Prop./Partner M/s Neeru cycle works  
S/o Late Sh.Ganga Ram  
R/o H. No. 12/37, Geeta colony,  
Delhi-110031  
Also At:  
12/41, Geeta Colony  
Delhi-110031

..... Accused

Complaint under section 138 of the Negotiable  
Instruments Act, 1881

Offence complained of	:	U/s 138 NI Act
Date of institution	:	04-02-2014
Plea of Accused	:	Not guilty
Date of decision of the case	:	19-10-2022
Final Order	:	Acquittal

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JUDGMENT

## STATEMENT OF FACTS AND REASONS FOR DECISION

1. The accused is facing trial for commission of offence punishable u/s 138 of The Negotiable

Instruments Act, 1881 (in short, NI Act).

2. Facts in brief:

As per complaint, the complainant and the accused had entered into partnership for carrying a business of cycles under the name and style of M/s Neeru Cycle Works at 7/240, Geeta Colony, Delhi and vide partnership deed dt. 17-10-2012 they started business with effect from 01-10-2012. As per the terms and conditions of the partnership deed, complainant contributed Rs 2,00,000 as equal amount contributed by accused and as per terms of the partnership deed, accused had to pay sum of Rs 10,000 per month to the complainant. Due to some dispute and differences between complainant and accused, the partnership was dissolved. In discharge of his liability, the accused issued cheque bearing number 674664 dated 17-08-2013 in sum of Rs. 3,80,000/- drawn on SBI, Khureji Khas branch to the complainant. The complainant presented the cheque for encashment. The cheque was returned unpaid with endorsement "Funds Insufficient"

vide cheque return memo dated 05-09-2013 and 13-11-2013. After receiving the cheque return memos, the complainant sent legal demand notice dated 18-12-2013 to the accused by registered post advising him to pay the CC no. 52473/16 Rajeev Malhotra Vs. Naresh Kumar Page No. 2 of 26 Pages amount of the cheque within 15 days of the receipt of the notice. The accused did not pay the cheque amount for discharge of his liability even after expiry of statutory period of 15 days from the date of service of notice and hence the present case.

3. Complainant examined bank official in his pre summoning evidence(CW-2). Copy of cheque return register was exhibited as Ex. CW2/1 and copy of e-mail alongwith screenshots regarding dishonor of cheques were exhibited as CW2/2 (colly) . Bank official stated that as per CW2/1 intimation of dishonor of cheque was sent to the complainant by way of courier on 28-11-2013.

4. Vide order dated 21-04-2014, cognizance of the offence u/s 138 NI of Act was taken by Ld. Predecessor of this court and the accused was summoned. On 04-06-2014 the accused put up his appearance before the court.

5. Vide order dated 08-07-2014, notice u/s 251 of Criminal Procedure Code, 1973 (in short, "Cr. P. C") was served upon accused. The accused did not plead guilty and claimed trial. The accused admitted that cheque pertained to his account and was signed by him. He stated that cheque in question along with six other blank signed cheques were given to the complainant. Accused admitted the receipt of legal notice. He further stated that complainant gave some of his cheques to his nephew Manoj Sehgal despite there being no transactions between accused and Manoj. Accused submitted that particulars of CC no. 52473/16 Rajeev Malhotra Vs. Naresh Kumar Page No. 3 of 26 Pages the cheque were not filled by him.

6. Vide order date 24-09-2014, application U/s 145(2) of N.I. Act filed by the accused was allowed and matter was listed for Complainant's Evidence (in short, C.E).

Evidence of complainant To substantiate his case, the complainant adduced his evidence by way of affidavit Ex. CW1/1. The complainant was examined as CW-1. The complainant reiterated the facts mentioned in the complaint. He relied upon the following documents in support of his averments;

- i. Agreement dt. 17-10-2012 Ex. CW1/1.
- ii. Cheque bearing No. 674664 dated 17-08-2013 Ex. CW1/2.
- iii. Cheque return memo dated 05-09-2013 Ex. CW1/3.
- iv. Cheque return memo dated 13-11-2013 Ex. CW1/4.
- v. Bank statement of complainant showing cheque deposit Ex. CW1/4A.
- vi. Acknowledgment from Blue Dart Ex. CW1/4B.
- Vii. Return Envelop Ex. CW1/4.
- Viii. Legal Notice dt. 18-12-2013 Ex. CW1/5.
- ix. Postal receipts Ex. CW1/6 and Ex. CW1/7.
- x. Reply to legal notice Ex. CW1/8.

7. The witness was cross-examined on behalf of accused. During the same, following notable points were stated:-

a. Complainant stated that he knew the accused for the last 18 years approximately. Loan was given to the accused in June or August 2013 but complainant did not remember the exact date.

b. Complainant visited the house of the accused once or twice and accused visited house of complainant 2-3 times. Complainant had good business relationship with accused but the same deteriorated after 4-6 months of execution of CW1/1.

CC no. 52473/16 Rajeev Malhotra Vs. Naresh Kumar Page No. 4 of 26 Pages c. Complainant was earning Rs 15,000 per month and was not an Income Tax payee.

d. Complainant submitted that accused brought the stamp paper for Ex CW1/1 and denied the suggestion that he changed the first three pages of Ex CW1/1 as they did not bear the signature of the parties.

e. Money was given to the accused for opening a cycle rickshaw spare parts and repair shop in partnership. Shop was opened on Taj Enclave Road in Geeta Colony but complainant did not know the complete address of the shop.

f. Complainant was in that partnership only in part time capacity. He used to visit the shop once a week.

g. The accused had come to his house to collect the amount of Rs. 2 lac in the presence of Mr. Balesh singh and wife of complainant.

h. Complainant's family included his mother, wife ,two children and his brother's family though his kitchen was separate from his brother. He stated that he was able to meet all expenses of his family on income of Rs. 15000/- per month and used to save anything between Rs. 2000/- to Rs. 5000/- from his monthly income every month.

i. Ex. CW1/1 was prepared by the accused and not by him and was not a registered document. The said document was not attested in his presence by the notary.

j. He had given loan of Rs. 2 lacs to the accused in one go in cash which was given on 13th or 14th October 2012. Complainant denied the suggestion that he had never given any loan to the accused except for a loan of Rs. 50,000/- which has already been returned by the accused.

k. Complainant had available with him about Rs 70,000/- to Rs. 80,000/- in cash out of the loan amount of Rs. 2 lacs and the remaining amount was taken as loan by him from his friend Suresh. He had not taken loan from Suresh on interest.

l. He did not see the rent agreement of the shop of the accused. He had told his counsel that Ex. CW1/1 was executed in the presence of Balesh and his wife but he did not know if the same has been stated in his complaint or legal notice.

m. Complainant had not read the contents of Ex. CW1/1 CC no. 52473/16 Rajeev Malhotra Vs. Naresh Kumar Page No. 5 of 26 Pages before signing the same. He voluntarily stated that the accused had informed him of its contents and after its execution he also asked somebody else to read and tell him the contents of Ex. CW1/1.

n. He voluntarily stated that he had not given loan to any person apart from the accused. The accused has repaid Rs. 30,000/- to him in installments of Rs. 10,000/- during three months. There had been no legal termination of Ex. CW1/1. He denied the suggestion that the accused had paid him Rs. 50,000/- and not Rs. 30,000/- or that accused was not liable towards him for the cheque amount. He did not have any other cheque of the accused in his possession. He denied the suggestion that the accused has given him seven cheques for security including the cheque in question. He denied the suggestion that he had given one cheque of the accused to his nephew Manoj Kumar Sehgal to file another false case against the accused to harass him or that he has misused the cheque in question against the accused.

8. Vide order dated 23-06-2015, CE was closed and on 29-07-2015, accused was examined u/s 313 of Cr. PC. Accused reiterated the defence that was taken by him in his notice u/s 251. Accused stated

that the complainant misused the cheque in question against him. He further stated that though document Ex CW1/1 bore his signature at point B, the signatures were obtained for loan agreement and not for partnership agreement. There was no partnership with the complainant. It was submitted by the accused that he took loan of Rs 50,000 from complainant and cheque in question was given to the complainant along with seven other blank signed cheques as security at the time of advancement of loan. The loan amount was returned but complainant was still in possession of the remaining cheques.

As per accused, the complainant had obtained his CC no. 52473/16 Rajeev Malhotra Vs. Naresh Kumar Page No. 6 of 26 Pages signature on two papers, one were the signatures at point B on Ex. CW1/1 and the paper bearing his other signatures had been given to his nephew who has misused them in the other case filed against him.

9. The accused expressed his willingness to lead defence evidence (in short, DE). Accordingly, the matter was listed for DE.

10. An application u/s 315 of Cr. PC was moved on behalf of accused for examination of accused as defence witness. The application was allowed vide order dated 02-09-2015.

#### Defence Evidence

11. The accused appeared in witness box as DW-1. As per his testimony, complainant had filed a false case against him. He had taken loan of Rs. 50,000/- only from the complainant which he had paid to the complainant in the presence of Mr. Sunny & Vishal at his shop. At the time of taking loan of Rs. 50,000/- from the complainant he had given 7 blank signed cheques to the complainant, however, he did not remember the serial numbers of the cheques. The complainant had given one cheque out of those 7 blank signed cheques to his nephew Manoj Sehgal, who had also filed a false case against him after misusing the same cheque. The agreement Ex. CW1/1 is a false and fabricated document. The complainant himself wrote Balesh Singh at point 'D' CC no. 52473/16 Rajeev Malhotra Vs. Naresh Kumar Page No. 7 of 26 Pages on Ex. CW1/1. He had also filed a police complaint against complainant and his nephew Manoj Sehgal at PS Geeta Colony.

He had executed an agreement for loan of Rs. 50,000/- with the complainant, on which he had signed on the last two pages only. The last two pages were the same in contents. However, the complainant misused the two pages of the said agreement in the present case and another case was filed by Manoj Sehgal. It was further stated that he was illiterate and could not read and write English. He could only sign in Hindi. As per accused, he never visited any notary for execution of Ex. CW1/1 He did not know any Balesh Singh. The complainant did not return his security cheque despite demanding from the complainant. He is not liable towards the complainant for the cheque in question.

Accused was cross-examined by counsel of complainant. During the same following notable points were stated:-

a) Accused had taken Rs. 50,000/- from the complainant in the year 2012, however, he did not remember the day or month of the same. A loan agreement was also executed for loan of Rs. 50,000/- at that time.

b) The agreement executed between them was a loan agreement and not a partnership deed. At the time of advancement of loan of Rs. 50,000/- some terms and conditions were agreed between the parties as per which 10% rate of interest per month was agreed and same was reduced in writing in loan agreement.

c) He denied the suggestion that the agreement executed between them was not a loan agreement but partnership deed.

He denied the suggestion that one partnership deed which is CC no. 52473/16 Rajeev Malhotra Vs. Naresh Kumar Page No. 8 of 26 Pages Ex. CW1/1 was executed between him and complainant and another partnership deed was executed between him and Manoj Kumar. He voluntarily stated that he did not know Manoj Kumar. He came to know that Manoj Kumar is the nephew of the complainant after complainant informed him about the same when he inquired from him after receiving legal notice.

d) He did not remember the date when he had filed the police complaint against the complainant. He admitted that he had filed the complaint after he came to know about the two cases filed by the complainant against him. He had filed the complaint after seeking advise from his counsel.

e) Counsel for complainant asked the accused about para no.4 and 8 of his complaint Ex. DW5/1(on record in connected matter bearing CC no. 52958/16) where he has mentioned about partnership deed and not about loan agreement.

f) Accused answered that he has mentioned in the complaint that the partnership deed is false. Partnership deed was never executed between them. He then stated he could not say what is written in the complaint Ex. DW5/1.

g) Accused stated that he did not know about the verification certificate for stamp paper , Ex. DW1/C1.

h) The contents of Ex. CW1/1 were not read to him. He had signed the same without reading the contents. Complainant asked him to sign on the two pages and he signed the same. He denied the suggestion that he had signed two partnership deed with two different people at different times. He further denied the suggestion that he had had taken Rs. 2,00,000/- from each person at the time of execution of partnership deed. He denied the suggestion that he himself had got made the partnership deed.

i) He denied the suggestion that he has after executing such documents also taken loan from several persons including Sardar Daljeet Singh & Kewal Krishan. He stated he did not know any Daljeet Singh or Kewal Krishan.

j) He had two bank accounts i.e. PNB, Krishna Nagar branch and SBI, Khureji branch and has closed both the accounts. He stated he could not produce the pass book for the said accounts as the same was destroyed by bank officials.

12. Sh. Sunny Chauhan appeared in witness box as CC no. 52473/16 Rajeev Malhotra Vs. Naresh Kumar Page No. 9 of 26 Pages DW-2. He stated that he knew the complainant and cheque in question was taken from the accused when complainant advanced loan of Rs. 50,000/- @ 10% interest per month. The accused returned the loan amount to the complainant in his presence. The agreement Ex. CW1/1 did not bear his signatures anywhere.

It was further stated that the complainant had taken seven cheques from the accused as security for the loan of Rs. 50,000/- and the cheque in question is one of those cheques. Ex. CW1/1 was not prepared in front of him. He did not know any Balesh Singh whose name is appearing as a witness on Ex. CW1/1. He had also gone with the accused to file complaint against the complainant at PS Geeta Colony. The complainant has filed a false case against the accused.

During his cross-examination, DW-2 stated that Naresh Kumar is his paternal uncle (chacha). The accused had taken Rs.50,000/- from the complainant in January, 2012, however, he did not remember exact date. The accused had returned loan of Rs. 50,000/- to the complainant after 3-4 months in his presence. The accused regularly paid interest to the complainant.

Witness stated that he was told about the 7 cheques by the accused as well as complainant. As per him, the accused demanded cheque after return of loan from complainant, but the complainant did not return the same to him.

Ex. CW1/1 was not prepared before him. One loan agreement was prepared before him. He expressed his CC no. 52473/16 Rajeev Malhotra Vs. Naresh Kumar Page No. 10 of 26 Pages inability to identify signature of accused on Ex. CW1/1.

He did not go to PS. Geeta Colony for lodging complaint dated 03.01.2014 against the complainant. He also stated that the cheque in question was given blank to the complainant along with six other blank cheques. He denied the suggestion that the cheque in question was given by the accused to the complainant for settlement of accounts between them as per their partnership.

13. Sh. Jagmohan Kumar was examined as DW-3. As per his testimony, he had brought reply from the Income Tax department, Ex. DW3/1, as per which the complainant did not file his ITR for Assessment years 2010-2011, 2011- 2012 & 2012-2013.

14. Sh. Balesh Singh was examined as DW-4. During his examination in chief, he stated that accused had entered into a partnership agreement with Mr. Rajeev Malhotra. Both, accused Naresh and complainant Rajeev Malhotra were known to him as Rajeev Malhotra & Naresh performed the role of Sita & Hanuman respectively in Ramleela and he also used to perform miscellaneous tasks in the Ramleela. The partnership agreement between accused and complainant was executed in the year 2012 near the festival of Dusshera though he did not remember the exact date.

He further deposed that the said agreement was executed in the house of the complainant Rajeev Malhotra in the presence of the accused, himself and Rajeev Malhotra only. He admitted that he could not understand CC no. 52473/16 Rajeev Malhotra Vs. Naresh Kumar Page No. 11 of 26 Pages any paragraph in English. He did not remember whether the said agreement was in Hindi or English as the same was executed long time back and he did not know the contents of the agreement. He signed the agreement at the instance of accused and the complainant. Rajeev Malhotra lived across his home and he knew him since childhood.

The agreement Ex. CW1/1(OSR) was not prepared before him. Accused Naresh Kumar had brought the document prepared at the residence of the complainant Rajeev Malhotra. He was called by Rajeev Malhotra to sign as a witness to the agreement Ex. CW1/1(OSR) on the last page. He could not say whether the document was attested before him or not. The agreement Ex. CW1/1(OSR) bore his signature at point 'C'. He could not say whether the agreement Ex. CW1/1 was notarized in his presence or not. He could not say if any other person had signed the agreement as a witness. He further stated that he could not say whether the accused and the complainant had signed the agreement Ex. CW1/1 in his presence or not as it was long back.

He stated that complainant informed him that the agreement Ex. CW1/1 was executed as partnership between accused and the complainant for cycle rickshaw repair shop of the accused Naresh Kumar. As per the agreement between the parties Rajeev Malhotra was to give Rs. 2,00,000/- to the accused Naresh Kumar for the partnership. Further as per the agreement accused Naresh Kumar will give Rs. 10,000/- per month to Rajeev Malhotra against investment of Rs. 2,00,000/-. He also CC no. 52473/16 Rajeev Malhotra Vs. Naresh Kumar Page No. 12 of 26 Pages stated that before the said agreement Rajeev Malhotra had given Rs. 80,000/- to the accused Naresh Kumar at the shop of the accused Naresh Kumar and the same was not reduced in writing. He could not tell the exact date and month when Rs. 80,000/- was advanced to the accused but as per him, it was advanced in the year 2012. One cheque of Rs.3,80,000/- was given by the accused to the complainant in the year 2013.

He never had any partnership or business transactions with the complainant Rajeev Malhotra. He denied the suggestion that he was deposing falsely at the instance of the complainant. He further denied the suggestion that he did not have any knowledge about the agreement Ex. CW1/1(OSR).

In his cross-examination, DW-4 stated that he knew the accused since childhood. The cheque in question of Rs. 3,80,000/- was given in his presence by the accused to the complainant in lieu of settlement of the partnership that was existing between accused and the complainant. Witness was confronted with Ex. CW1/2 and he admitted that the cheque in question was the same that was given to the complainant by the accused.

15. HC Subhash Mavi, PS Geeta Colony was examined as DW-5. He had brought the summoned record i.e. General complaint register 2014, containing DD entry No. 41-B dt. 03-01-2014. The photocopy of the same was Ex. DW5/1.

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16. Sh. Madan Lal Gupta (Notary Public) was summoned and examined as DW-6. During his examination in chief, he stated that he was appointed as a Notary Public by Government of India and his licence number was 4921 dated 21.11.2007.

He stated that the document Ex. CW1/1(OSR) was not notarized by him and he never signed on this document and the same document did not bear his stamp. He had no concern with document Ex. CW1/1(OSR) in any manner.

17. DW-6 was cross-examined by counsel for complainant and he stated that he had been appointed as a Notary Public from Government of India since 21.11.2007.

Witness was shown Ex. CW1/1 and he again stated that the stamp at point A & B on Ex. CW1/1 did not belong to him. He stated he attested partnership deed, relinquishment deed, bill of exchange, promissory note, agreement to sell, GPA, SPA, letter of possession & affidavit of marriage. He also made entries of notarization in his register. He made entry in his notary register only when both parties were present before him.

He denied the suggestion that he attested the above said documents without making entries of the same in his notary register. He himself attested the documents. He knew Ms. Babita who was his clerk. He denied the suggestion that Ms. Babita used to put stamp and attest the documents which used to come for notarization. He denied the suggestion that he had given blank stamp papers with his notary stamp to some other persons. He CC no. 52473/16 Rajeev Malhotra Vs. Naresh Kumar Page No. 14 of 26 Pages did not know any Krishan Chand Grover & Devender Grover who were the deed writers and doing the business of documentation.

DW-6 in his further cross-examination brought his Notary register for year 2013. He submitted that his notary registry for period 07.05.2012 to 27.12.2012 was not available with him as same has been seized by IO of Police Station New Ashok Nagar in case FIR No. 568/14. He voluntarily stated that he had brought, copy of seizure memo of Notary register dated 10.07.2015. (Mark DW6/X).

He had brought his original seal. Copy of seal was Ex. DW6/X1.

He deposed that he did not enter every notarization in his Notary register compulsorily. He made entry in his Notary register whenever the party asked as well as on his own. He did attestation only when all the parties concerned were present. He did not necessarily made entry of attestation of affidavit in his notary register. He voluntarily stated that he attest affidavit only when the party is present before him.

His cross -examination was deferred and on the next date of hearing he stated that he had not brought his Notary Register for the year 2013 as same had been misplaced. He had given information of the same at Police Post Tis Hazari Courts, Delhi. He had also lodged on line complaint for the same. Copy of his application was Ex. DW6/X2. Copy of his complaint was Mark DW6/X3.

In his further cross-examination, he denied the CC no. 52473/16 Rajeev Malhotra Vs. Naresh Kumar Page No. 15 of 26 Pages suggestion that he had not produced the notary register intentionally. He denied the suggestion that he lodged the complaint so as not to produce the notary register of year 2013 before this court.

He admitted that he had maintained Notary Fee Register as per Notary Rules 1956. He did not know whether it was possible that after taking the e-stamp paper, the person can make a fake stamp and get it attested.

He denied the suggestion that he usually notarized documents without making entry in the Notary register. He further denied the suggestion that he had not maintain any Notary Fee Register. He denied that that he has not maintained any Notary Register as per the regulations of Notary Rules 1956 deliberately.

18. Vide order dated 16-03-2021, DE was closed and matter was listed for final arguments.

19. I have heard arguments on behalf of both the parties, gone through the judgments relied upon by them and have carefully gone through the material on record.

#### Analysis and conclusion

20. To prove his case, Ld. Counsel for complainant emphasized that the cheque in question had been issued by the accused in discharge of his legal liability and all the ingredients of offence u/s 138 of NI Act are fulfilled in the instant case. Ld. Counsel further emphasized that the accused failed to rebut the statutory presumption in favour CC no. 52473/16 Rajeev Malhotra Vs. Naresh Kumar Page No. 16 of 26 Pages of the complainant.

It was further argued that testimony of DW-2 Sunny and DW-6 Madan Lal Gupta was not trustworthy and testimony of DW-4 , Balesh Singh did not corroborate the version of accused.

21. On the other hand, Ld. Defence counsel led emphasis on the following facts to seek acquittal of accused:

a). The accused had not issued the cheque for discharge of any liability. He had given blank cheques to complainant as security for a loan of Rs 50,000 which was taken by him.

b). Ex CW1/1 was not a partnership agreement but a loan agreement and complainant changed the pages. The said document is not proven as even the notary submitted that it did not bore his stamp.

c). The complainant failed to show his financial capacity to advance Rs 2,00,000 when he was earning Rs 15,000 per month and had a family depending upon him.

d). Complainant himself in his cross-examination stated that "I had given the loan to the accused in June or August 2013 but I do not remember the exact date". This is contradictory to his version of partnership deed which is dated 17 October 2012.

e). The partnership deed shows investment of 2 lacs by both the parties but the complaint, legal notice and affidavit of complainant are silent of the same.

f). Complainant failed to show how accused has outstanding liability of the cheque amount against him.

22. Since accused is facing trial for commission of offence punishable u/s 138 of NI Act, it is necessary to discuss the essential ingredients of the offence.

To attract offence u/s 138 NI Act, following requirements must be fulfilled: -

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1. The cheque was drawn by a person on an account maintained by him for payment of money.

2. The said cheque has been issued in discharge, in whole or in part, of any legal debt or other liability.

3. The said cheque has been presented to the bank within a period of three months from the date of cheque or within the period of its validity.

4. The aforesaid cheque, when presented for encashment, was returned unpaid/dishonoured.

5. The payee of the cheque issued a legal notice of demand to the drawer within 30 days from the receipt of information by him from the bank regarding the return of the cheque.

6. The drawer of the cheque failed to make the payment within 15 days of the receipt of aforesaid legal notice of demand.

23. Adverting to the facts of the case, in notice u/s 251 Cr.P.C, the accused admitted his signature on the cheque in question. He also admitted that he had issued the cheque to the complainant and that the cheque pertained to his account. Factum of dishonor of the cheque is not in dispute. It is also not in dispute that the cheque was not presented within statutory period. Legal notice was dispatched within the statutory time limit and accused has admitted receiving the same. Institution of the complaint within limitation is also not in dispute.

24. Thus, the basic and significant question for determination is:

"Whether the accused had issued the cheque in question in discharge of legally enforceable debt or liability" .

25. It is material to discuss that a negotiable instrument including a cheque carries following presumptions in terms of Section 118 (a) and Section 139 of the NI Act:

Section 118 of the NI Act provides :

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"Presumptions as to negotiable instruments: Until the contrary is proved, the following presumptions shall be made:

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;"

Section 139 of the N.I Act further provides as follows:

"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."

26. Thus, the combined effect of Section 118(a) and Section 139 of NI 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. However, the said presumptions are rebuttable in nature.

27. In Rangappa V. Sri Mohan, (2010) 11 SCC 441, a three-judge bench of Apex Court observed that:-

"Section 139 of the NI Act is stated to be an example of a reverse onus clause which is in tune with the legislative intent of improving the credibility of negotiable instruments."

The Hon'ble Supreme Court further observed that the offence under Section 138 of the NI Act is at best a regulatory offence and largely falls in the arena of a civil wrong and therefore the test of proportionality ought to guide the interpretation of the reverse onus clause. The CC no. 52473/16 Rajeev Malhotra Vs. Naresh Kumar Page No. 19 of 26 Pages accused is not expected to discharge an unduly high standard of proof and he is only required to raise a probable defence or creating doubt about the existence of a legally enforceable debt or liability for thwarting the prosecution. The standard of proof for doing so would be on the basis of "preponderance of probabilities".

28. The court has to now consider whether the accused has been successful in discharging the burden of proof.

29. Counsel for accused has challenged the financial capacity of complainant. It is argued that complainant himself in his cross examination admitted that he was earning Rs 15,000 per month and his wife and two children were dependent upon his income. As per complainant , he used to save Rs 2,000 to 5,000 from his monthly income. Complainant deposed that he had Rs 70,000 to 80,000 with him but the remaining amount was taken as a loan by him from his friend Suresh. It is pertinent to mention that complainant did not mention this fact in his complaint, legal notice or evidence affidavit. He did not examine Suresh as a witness. I find merit in the submission of counsel for accused that it is quite unlikely that a person having savings of Rs 2,000-5,000 per month, who has family members dependent upon him, would be able to advance loan/invest Rs 2,00,000 .

30. In Basalingappa v. Mudibasappa, (2019) 5 SCC 418: AIR 2019 SC 1983, the Hon'ble Supreme Court has observed as follows:

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"During his cross-examination, when financial capacity to pay Rs. 6 lakhs to the accused was questioned, there was no satisfactory reply given by the complainant. The evidence on record, thus, is a probable defence on behalf of the accused, which shifted the burden on the complainant to prove his financial capacity and other facts.

31. Reliance can also be placed on judgment of hon'ble Supreme Court of India in K. Prakashan Vs P.K. Surenderan, (2008) 1 SCC 258 where it was declared that:-

"The criminal court while appreciating the evidence brought on record may have to weigh the entire pros and cons of the matter which would include the circumstances which have been brought on record by the parties. The complainant has been found to be not a man of means. He had allegedly advanced a sum of Rs. 1 lakh on 13.01.1994. He although had himself been taking advances either from his father or brother or third parties, without making any attempt to realize the amount, is said to have advanced sums of Rs. 86,000/- on 8.06.1994. Likewise he continued to advance diverse sums of Rs. 28,000/-, Rs. 50,000/-, Rs. 40,000/- and Rs. 12,000/- on subsequent dates. It is not a case where the appellant paid any amount to the respondent towards repayment of loan. He even did not charge any interest. He had also not proved that there had been any commercial or business transactions between himself and the appellant. When the appellant required so much amount and why he alone had been making payments of such large sums of money to the appellant has not been disclosed. According to him, he had been maintaining a diary. A contemporaneous document which was in existence as per the admission of the complainant, therefore, was required to be brought on records. He failed to do so. He also did not examine his father and brothers to show that they were men of means and in fact advanced a huge sum to him only for the purpose of grant of loan by him to the appellant."

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32. Counsel for complainant has argued that the partnership deed Ex. CW1/1 is reflective of the fact that complainant had given Rs 2,00,000 to the accused. As per him, the witness Balesh Singh DW-4 also corroborated the same.

Ld. counsel for accused has denied the validity of partnership deed and states that accused had only signed on the last page and previous pages were changed by complainant. The partnership deed was not registered and further, the notary public too stated that he did not notarize or sign the partnership deed Ex. CW1/1. Also, even DW-4 said that document CW1/1 was not prepared before him. He expressed his inability to state whether signatures on the document were done in his presence or whether document was notarized in his presence or not.

Counsel for complainant pointed out that even the last page of the document CW1/1 on which signature of accused is admitted expressly states that :-

"That the partnership shall further invest their capital in the said firm, as per business requirement time to time" which shows that accused was clearly aware that the document was a partnership deed.

33. It is worth mentioning that para 2 and para 3 of the questioned document CW1/1 states that :-

"2. That the partners have invested their capital in the above said partnership business, according to the entry of partnership books."

"3. That both the parties have invested equal amount ie. Rs 2,00,000(Rs 2 Lacs) in the above said business"

CC no. 52473/16 Rajeev Malhotra Vs. Naresh Kumar Page No. 22 of 26 Pages From this, it logically follows that both parties invested equal amount. The partnership deed does not talk about amount of Rs 2,00,000 being due upon the accused. . It does not state that complainant had invested the amount but accused had not. It only states that accused will pay Rs 10,000 per month to the second party. Complainant in cross examination dated 21-04-2015 stated that accused repaid three installments of Rs 10,000 and CW1/1 (OSR ) continued till three months though there was no legal termination of CW1/1. Therefore, even if we rely upon CW1/1,(a document whose validity has been denied by accused and notary) it fails to show how accused had Rs 3,80,000 due against the complainant.

34. Counsel for accused has also emphasized that case of complainant does not reveal how amount of Rs 3,80,000 was due by the accused. He argued that even assuming Rs 2,00,000 was due upon the accused as the principle amount, the total does not come to be Rs 3,80,000. CW1/1 bears date 17/10/2012 whereas cheque was presented on 17/08/2013. Therefore, maximum amount of Rs 1,00,000 (10,000 per month for 10 months) was due as profit to the complainant. However, complainant in his cross examination admitted that he had received Rs 30,000 as profit so total profit due would be Rs 70,000(30,000 subtracted from 1 lac). Hence, going by complainant's version, maximum amount of Rs 2,70,000 (2,00,000 principle amount and 70,000 profit) was due

upon the CC no. 52473/16 Rajeev Malhotra Vs. Naresh Kumar Page No. 23 of 26 Pages accused on 17/08/2013 and not Rs 3,80,000.

Counsel for complainant argued that Balesh Singh, DW-4 did state that complainant had given accused Rs 80,000 before the said agreement. However, DW-4 did not say whether this was repaid or due upon the accused. This fact was not mentioned by the complainant in his complaint, evidence or legal notice. No such question was put to accused when he was cross examined by the counsel for complainant. Also, even assuming this highly dubious submission, total outstanding amount would still only be Rs 3,50,000(Rs 2,70,000 + Rs 80,000) and not Rs 3,80,000.

No matter how generously we interpret the materials on record in favour of complainant, we cannot reach the conclusion that Rs 3,80,000 was due upon the accused.

35. Ld. Counsel for complainant also emphasized on the following contradictions in the version of accused :-

Accused in his examination in chief stated that he returned the loan in the presence of Mr Sunny and Vishal at his shop whereas in connected matter titled Manoj Sehgal vs Naresh Kumar bearing CC no. 52958/16 accused stated that he also returned the loan in the presence of his friend Naveen.

Accused has himself referred to CW1/1 as partnership deed and not as loan agreement in the complaint Ex DW5/1 (placed in connected matter bearing CC no. 52958/16 ) filed by him.

36. These inconsistencies do not help the complainant because complainant himself has repeatedly stated that he CC no. 52473/16 Rajeev Malhotra Vs. Naresh Kumar Page No. 24 of 26 Pages had given loan to accused. "I had given loan of Rs 2,00,000 to accused in one go in cash which was given on 13 or 14 October 2012."(Cross-examination dated 21.04.2015)". Whereas as per his complaint, complainant claims he contributed Rs 2,00,000 as per clause 5 of CW1/1.

This is also inconsistent with his earlier statement:-

"I had given loan to accused in June or August 2013, but I do not remember the exact date". (cross-examination dated 21.04.2015) It is also settled position of the law that the case of the complainant should stand on its own legs. It cannot take advantage of the weakness of the defence, nor can the court, on its own make out a new case for the complainant and convict the accused on that basis. If defence version is incorrect, it does not mean that the version of complainant is necessarily correct.

37. In the present case, after considering the totality of the facts and circumstances along with the evidence available on record, it becomes clear that the accused has successfully raised a probable defence in his favour by poking holes in the version of complainant and showing that cheque was not given for discharge of liability of Rs 3,80,000.

The complainant, on the other hand has miserably failed to establish one of the fundamental ingredients of Section 138 of the Act, i.e. that the dishonoured cheques were issued in discharge of a legally recoverable debt or CC no. 52473/16 Rajeev Malhotra Vs. Naresh Kumar Page No. 25 of 26 Pages liability.

38. In view of the evidence adduced, documents put forth and arguments advanced by the parties and further in view of the above discussion, the court is of the considered view that the accused Naresh Kumar is not guilty of offence under Section 138 of Negotiable Instruments Act, 1881 and accordingly, he is hereby acquitted under Section 138 of Negotiable Instruments Act, 1881.

A copy of this judgment be given free of cost to the convict.

AKHIL

Digitally signed  
by AKHIL MALIK  
Date: 2022.10.19  
18:06:32 +0530

MALIK

Announced in the open Court  
today i.e. 19-10-2022

(AKHIL MALIK)  
MM (Municipal) East District  
Karkardooma Court/ Delhi.

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