

## M/S. Heena Investment vs . on 11 October, 2019

IN THE COURT OF SHRI AJAY SINGH PARIHAR,  
METROPOLITAN MAGISTRATE (WEST) NI ACT, WEST DISTT. THC,  
DELHI

CC No. 12123/2016

M/s. Heena Investment  
Office at T-6, Super Market, New Moti Nagar,  
Near Milan Cinema, New Delhi  
Through its Director Shri Sat Pal Luthra

..... Complainant

Vs.

Mr. Ved Prakash  
R/o N-3/26B, Mohan Garden,  
Uttam Nagar, New Delhi - 59.

.....Accused

Date of Institution	:	29/10/2014
Offence complained of	:	S.138 N.I. Act
Date of Decision	:	11.10.2019

COMPLAINT UNDER SECTION 138 NEGOTIABLE INSTRUMENTS  
ACT, 1881

### JUDGMENT

1. The present complaint has been filed by the complainant against the accused person under section 138 Negotiable Instruments Act, 1881.

2. The brief facts as alleged by the complainant in his complaint are that accused was given a loan of Rs. 80,000/- in April 2013 for a period of six months and executed a loan agreement dated 10.04.2013. The accused issued cheque bearing no. 134602 dated 10/10/2013 for Rs. 80,000/- drawn on SBI, 4 DLF Industrial Area, New Delhi - 110015 for repayment of loan amount.

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3. When the complainant presented the said cheque in the bank, it was returned unpaid by the banker of the complainant vide Bank Returning Memo dated 15/10/2013 with remark of "Funds Insufficient".

4. The complainant thereafter issued a legal demand notice dated 06/11/2013 through his counsel by way of courier and speed post, calling upon the accused person to pay the said cheque amount within a period of 15 days from the date of receipt of the notice. The said notice was delivered to the accused. However, despite knowledge of the legal demand notice, the accused person failed to pay the aforesaid dishonoured cheque amount. Hence, the present complaint u/s 138 Negotiable

Instrument Act 1881 (hereinafter the NI Act) was filed on 29/10/2014.

5. In order to prove his case, the complainant had examined himself CW-1 by way of affidavit EX C-1/A and has relied upon the following documents:

- (a) Resolution deed Ex CW-1/1.
- (b) Form No. 32 Ex CW-1/2.
- (c) Certificate of incorporation Ex CW-1/3.
- (e) Cheque No. 134602 dated 10.10.2013 for Rs. 80,000/- Ex CW-1/4.
- (f) Returning Memo Ex CW-1/5.
- (g) Legal notice Ex CW-1/6.
- (h) Postal receipt Ex CW-1/7.
- (i) Courier receipt Ex CW-1/8.
- (j) Return envelope Ex CW-1/9 and CW-1/10.
- (k) certificate of incorporation Ex CW-1/11.
- (l) Loan agreement Ex CW-1/12.
- (m) copy of bank statement Ex CW-1/13.

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6. On finding of a prima-facie case against the accused, the accused was summoned on 04.02.2015, where the accused appeared before the court on 17.09.2015.

7. Thereafter, notice u/s 251 Cr.P.C. was framed against the accused person on 21/11/2015 to which she pleaded not guilty and claimed trial. The plea of defence of the accused Ved Prakash was recorded where he stated that "I do not plead guilty and have defence to make. The present cheque in question bears my signatures but I have not filled up the other particulars in the cheque. I have not issued the cheque in question to the complainant. I had taken a loan of Rs. 50,000/- from Shunny Auto and he had got signed from me a bond in the sum of Rs. 50,000/-. I have not taken the alleged loan amount in the sum of Rs. 80,000/- from the complainant and I do not know how the cheque in question came into the possession of the complainant. I have not received legal demand notice from the complainant. I do not owe any liability to the complainant as I have not taken the alleged loan amount from the complainant. I do not know any Satpal Luthra but it could be the

proper name of Shunny Auto. I want to lead defence evidence."

8. After the framing of notice the complainant examined himself as CW-1 cross examined by the Ld. Counsel for the accused, thereafter complainant evidence was closed and the matter was listed for statement of the accused person u/s 313 Cr.P.C.

9. Statement of accused was recorded u/s 313 Cr.P.C. r/w Section 281 Cr.P.C. on 14/01/2019 wherein all the incriminating circumstances appearing in CC No. 12123/2016 Heena Investment Vs. Ved Prakash Page No. 3 of 13 evidence against the accused was put to him to which the accused stated that "I had taken a loan of Rs. 40,000/- from one Mr. Banshi and I had repaid the said loan to Mr. Banshi. The said cheque in question was issued to Mr. Banshi as a blank signed cheque at the time of taking of the loan. When I had asked Mr. Banshi for return of the cheque in question he stated that the cheque had been misplaced, however, he assured me that he would look for the same and return me the cheque. I do not know the complainant and neither have I given the cheque in question to the complainant nor have I taken any loan from the complainant. Mr. Banshi works as an employee in Sunny Auto."

10. After recording the above said statement of the accused, the accused did not lead any evidence. Thereafter, the matter was listed for final arguments.

11. The Ld. Counsel for the complainant and the accused person were heard at length in the present case and the matter was reserved for judgment.

12. The submissions made by the Ld. Counsel for the complainant and the accused person have been heard, written submission gone through and the record of the case has been thoroughly perused.

13. Before proceeding to the merits of the case, it is important to lay down the basic provision of law with respect to section 138 of the NI Act which is as follows:

Section 138 of Negotiable Instruments Act, 1881 makes dishonour of cheques an offence. It provides that "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 CC No. 12123/2016 Heena Investment Vs. Ved Prakash Page No. 4 of 13 account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both"

14. In order to ascertain whether the accused has committed an offence u/s 138 NI Act, the following ingredients constituting the offence have to be proved:

(a) The drawer of the cheque should have issued the cheque for the discharge, in whole or in part of a legally enforceable debt or other liability.

(b) The cheque 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.

(c) The drawer of such cheque fails to make the payment of the said amount of money within fifteen days of the receipt of the notice from the payee or the holder in due course demanding the payment of the said amount of money.

It is only when all the above mentioned ingredients are satisfied that the person who has drawn the cheque can be set to have committed an CC No. 12123/2016 Heena Investment Vs. Ved Prakash Page No. 5 of 13 offence u/s 138 NI Act.

15.It is important to reproduce Sec.118 of the Indian Evidence Act, 1872 and Sec.139 of N.I. Act here Section 118(a) of the Act provides that until the contrary is proved, it shall be presumed that "that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration.

Further, Section 139 of the Act lays down that "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.

In the case of Hiten P. Dayal Vs. Bratindranath Bannerjee (2001)6 SCC 16, the Hon'ble Supreme Court of India had observed that "Because both sections 138 and 139 Cr.P.C. required that the court shall presume the liability of the drawer of the cheque for the amount for which the cheques are drawn as noted in State of Madras Vs. A.Vaidyanatha Iyer AIR 1958 SC 61, it is obligatory on the court that to raise this presumption in every case where the factual basis for raising of the presumption has been established. It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused"

16.Further, in the case of K.N. Beena Vs. Muniyappan AIR 2001 SC 2000, it CC No. 12123/2016 Heena Investment Vs. Ved Prakash Page No. 6 of 13 was established as follows :

"In complaint u/s 138 the court has to presume that the cheque had been issued for a debt or liability, this presumption is rebuttal, however, the burden of proving that the cheque has not been issued for the discharge of debt or liability is lies on the accused".

17.The accused has stated in his defence u/s 251 of Cr.P.C. that he has not given the cheque to the complainant, however, the accused has admitted his signature on the cheque. In such

circumstances, the statutory presumption u/s 118 Indian Evidence Act and Section 139 NI Act is raised in favour of the complainant.

18. In the case of Rangappa Vs. Sri Mohan (2010) 11 SCC 441, it was held that the presumption mandated by section 139 of NI Act does include the existence of a legally enforceable debt or liability. This is in the nature of the rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. 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 CC No. 12123/2016 Heena Investment Vs. Ved Prakash Page No. 7 of 13 man.

19. It is submitted by Ld. counsel for accused that accused obtained loan from one Mr. Banshi and the cheque in question was issued to the Mr. Banshi and not to the complainant. It is further submitted that the accused has already repaid the loan amount to Mr. Banshi. Per contra, ld. Counsel for the complainant has stated that the accused obtained loan of Rs. 80,000/- from the complainant against which a loan agreement Ex. CW-1/12 was executed which was duly signed by the accused.

20. It is the defence of the accused in his application u/s 145(2) NI Act that he obtained loan of Rs. 40,000/- from Mr. Banshi and that he has repaid the loan amount to Mr. Banshi. In notice u/s 251 Cr.P.C. accused stated that he has taken loan of Rs. 50,000/- from Shunny Auto. Again in his statement u/s 313 Cr.P.C. accused states that he took a loan of Rs. 40,000/- from one Mr. Banshi. The accused further states in his statement u/s 313 Cr.P.C. that the cheque given to the Mr. Banshi was misplaced and the same was not returned. It is pertinent to mention here that the cheque has been dishonoured for the reason of funds insufficiency and not for the reason of stop payment. There is contradiction in respect of loan amount as well as the person from whom the loan amount was taken. Accused has only stated in his statement u/s 313 Cr.P.C. that Mr. Banshi works for Sunny Auto, however, no oral or documentary evidence has been led by the accused to substantiate the same.

The accused has stated in his statement u/s 313 Cr.P.C. that the cheque was misplaced and that the loan amount was repaid. It is expected from a reasonable person that in such circumstances instruction should have been issued to the bank for stop payment of misplaced cheque, however, CC No. 12123/2016 Heena Investment Vs. Ved Prakash Page No. 8 of 13 accused preferred not to do so. Further, accused has not brought Mr. Banshi as witness or placed on record any bond allegedly signed by accused nor brought any receipts of payment made to Mr. Banshi.

21. It is stated by the ld. Counsel for the accused that Mr. Banshi handed over the cheque given to him to complainant and that Mr. Banshi was the employee of the complainant. The accused has not produced any document showing Mr. Banshi as the employee of the complainant and nor had made any effort to examine him. In the light of the above discussion, the defence taken by the accused

appears to be sham and hence rejected.

22. It is further submitted by the Ld. Counsel for the accused that loan agreement Ex. CW-1/12 was a blank paper which was signed by the accused and later on misused by the complainant. It is further submitted by the Ld. Counsel for the accused that notary who has notarized the loan agreement Ex. CW-1/12 was not called as a witness and hence the loan agreement is not reliable. The perusal of the loan agreement Ex. CW-1/12 shows that first party is the accused and the second party is the complainant. The complainant in his cross-examination has stated that the stamp paper was purchased from one Hansa Stamp Vendor by the accused. The loan agreement also bears the signature of the accused at three places. The accused has not disputed his signature on loan agreement.

The accused has not led any oral or documentary evidence to substantiate his defence that the document was blank when it was handed over to complainant or that the contents have been got typed by the complainant. This court is of the view that no prudent person with reasonable intelligence would hand over blank documents to any person and CC No. 12123/2016 Heena Investment Vs. Ved Prakash Page No. 9 of 13 then let them be in their possession. This court is not inclined to believe the version of the accused. In fact, the signatures on the loan agreement appears to be above revenue receipt. How it is possible that signature of accused appear above revenue receipt if the same were made on blank paper. The accused does not seem to have acted in a way claimed by him.

23. It is further submitted by the Ld. Counsel for the accused that the complainant has no certificate for money lending. The complainant in his cross-examination has stated that the complainant company has money lending licence. The counsel for the complainant has stated that certificate of registration is already on record Ex. CW-1/11 vide which the complainant company has been authorized to lend money. The accused has not disputed the document Ex. CW-1/11 i.e. certificate of registration. Since the certificate of registration Ex. CW-1/11 has been duly proved, there is no reason for not relying on the said document. The complainant has also filed form No. 32 Ex CW-1/2 under which he has been shown as Director of the complainant company and as per resolution deed Ex. CW-1/1 the complainant has been authorized to pursue present criminal proceedings. In view of the said documents, the defence taken by the accused does not seem to be reliable and hence rejected.

24. Further, no evidence has been led at all on behalf of the accused to support his statement and to rebut the presumption raised against him. Thus, in the absence of any evidence to that effect, the said version of the accused is vague and improbable.

25. The Hon'ble High Court of Delhi in the case of V.S. Yadav Vs. Reena, 172 CC No. 12123/2016 Heena Investment Vs. Ved Prakash Page No. 10 of 13 (2010) DLT 561 has held that "there is no presumption of law that the explanation given by the accused was truthful. It was further held that the offence u/s 138 of the NI Act is a technical offence and the complainant is only supposed to prove that the cheques issued by the accused were dishonoured, the complainant's statement that the cheques were issued against the liability or debt is sufficient proof of the debt or liability and the

onus shifts to the accused to show the circumstances, against which the cheques came to be issued and this can be proved by the accused only by way of evidence and not by leading no evidence".

26.The accused in the present case has failed to lead any evidence at all to aid him in the discharge of his onus. He has not been able to rebut the presumption that is raised in favour of the complainant with respect to the existence of a legally recoverable debt or liability of Rs. 80,000/-. Thus, the first ingredient of Section 138 NI Act has been proved by the complainant.

27.The second ingredient of the offence is that the cheque 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.

28.A perusal of bank dishonour memo ie. Ex CW-1/5 shows that the cheque in CC No. 12123/2016 Heena Investment Vs. Ved Prakash Page No. 11 of 13 question, on being presented in the bank was returned dishonoured due to "funds insufficient" on 26/11/2012.

Thus, in the opinion of the court, the second ingredient of the offence is also met in the present case.

29.As far as the third ingredient is concerned, which is that the drawer of such cheque fails to make the payment of the said amount of money within fifteen days of the receipt of the notice from the payee or the holder in due course demanding the payment of the said amount of money.

30.It is submitted by Ld. counsel for the accused that accused never received any legal demand notice from the complainant. The legal notice Ex CW 1/6 was sent within the limitation period. The accused has stated in his defence u/s 251 CrPC that he did not receive legal demand notice, however, the address mentioned on the legal demand notice is the same as mentioned on the notice u/s 251 Cr.P.C. Thus, in view of section 27 General Clauses Act, presumption can be taken that the legal notice was duly delivered to accused.

Hence, this court is of the opinion that the legal notice sent by complainant was duly received by the accused.

31.Despite delivery of the legal notice, the accused failed to make the payment to the complainant that he was liable to pay, within 15 days from the date of receipt of notice.

Hence, the third ingredient of the offence u/s 138 N. I. Act has also been proved by the complainant.

Having considered the entire evidence, this court is of opinion that the CC No. 12123/2016 Heena Investment Vs. Ved Prakash Page No. 12 of 13 complainant has successfully proved all the essential ingredients of Sec.138 N.I. Act. Accordingly, the accused is held guilty for committing the offence punishable u/s 138 N. I. Act. He is hereby convicted for the offence u/s 138 N. I. Act.

Let he be heard on the point of sentence separately. AJAY

Digitally signed  
by AJAY SINGH

SINGH      PARIHAR  
Date: 2019.10.11  
PARIHAR      17:03:27 +0530

Announced in the open court  
on 11.10.2019.

(AJAY SINGH PARIHAR)  
MM-04(NI) ACT (West)  
THC, Delhi / 11.10.2019

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