

C. R CASE NO: 5438 OF 2008  
COMPLAINANT: SHRI RAM KRISHNA DAS Vs  
ACCUSED: SHRI NARANARAYAN SHARMA

DISTRICT: KAMRUP  
IN THE COURT OF THE SUB DIVISIONAL JUDICIAL  
MAGISTRATE, (S),II, KAMRUP

CR CASE NO: 5438/ 2008

U/S 138 N. I ACT

COMPLAINANT: SHRI RAM KRISHNA DAS  
VERSUS  
ACCUSED: SHRI NARANARAYAN SHARMA

PRESENT : YUSUF AZAZ, SDJM, (S),II, KAMRUP

ADVOCATE FOR THE COMPLAINANT: SHRI A. ALI

ADVOCATE FOR THE ACCUSED: SHRI C. K TALUKDAR

OFFENCE EXPLAINED ON: 6/10/2009

EVIDENCE RECORDED ON: 14/12/2009, 21/9/2010, 26/7/2011,  
19/10/2011, 2/1/2012, 29/3/2012, 19/7/2012

ARGUMENT HEARD ON: 16/8/2012

JUDGMENT DELIVERED ON: 30/8/2012

### **JUDGMENT**

1. This is a case instituted under section 138 of the Negotiable Instruments Act, 1881 alleging therein that the accused, Shri Naranarayan Sharma had issued a cheque in favour of the

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complainant which was dishonoured as the accused had instructed to stop its payment.

2. The brief facts giving rise to the institution of this complaint case, as is revealed from the complaint is that, Shri Ram Krishna Das, the complainant had business relationship. The complainant had alleged that the accused issued a cheque bearing no:078005 dated 29/8/2008 for Rs.2,50,000/- in favour of the complainant for the discharge of his liability. The complainant accordingly deposited the said cheque for encashment to his bank, but the same was returned unpaid on 30/8/2008 as the accused stopped the payment of the said cheque.
3. The complainant thereafter issued legal notice to the accused on 8/9/2008 demanding the amount of cheque, but the accused failed and neglected to pay the same even after receipt of the notice; as such the complainant lodged this complaint under section 138 of the Negotiable Instruments Act,1881.
4. The accused was called upon to enter trial and upon his appearance the particulars of offence under section 138 of the Negotiable Instruments Act,1881 was explained to him to which he pleaded not guilty and claimed to be tried.
5. The complainant examined himself in support of his case and also examined the official witness of the bank and other witnesses; whereas the accused examined himself and one another witness in support of his defence.
6. The case of the accused, as is revealed from the statement of the accused recorded under section 313 CrPC and the other material on record is that according to the accused, the complainant was his business partner. The accused has contended that he gave the aforesaid cheque to the complainant as security, but the complainant withdrew the amount recoverable from the accused and inspite of that the complainant did not return the said cheque given as security. The accused has contended that he does not have legally enforceable debt or liability; hence the complaint is liable to be dismissed.
7. I have heard the learned counsels for both the parties.

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8. Upon hearing and on perusal of record I have framed the following points for determination in order to arrive at a definite finding as regards the dispute in this case-

- (1) Whether the accused issued the cheque for the discharge of any legally enforceable debt or liability?
- (2) Whether the cheque was dishonoured for stopping its payment by the accused?
- (3) Whether the accused has committed the offence under section 138 of the Negotiable Instruments Act, 1881?

**DISCUSSION, DECISION AND REASONS FOR THE DECISION:**

**POINT FOR DETERMINATION NO.1: Whether the accused issued the cheque for the discharge of any legally enforceable debt or liability?**

9. The complainant had contended that he had business relationship with the accused and that the accused issued the cheque in question for the discharge of his financial liability.
10. The complainant (PW1) has examined himself in support of his case and he has deposed that the accused was known to him. The PW1 has stated that he did some contract work with the accused as a partner and as a receipt of the said work, the complainant was entitled to receive Rs.3,70,000/- from the accused. The complainant has further deposed that the accused issued the cheque in question towards the partial discharge of his aforesaid liability. The complainant has produced the said cheque and the same is marked as exhibit 1. I have perused the aforesaid exhibit 1 and the perusal of the same clearly reveals that the said cheque was issued in favour of the complainant by the accused for Rs.2,50,000/-.
11. The accused was examined as regards the aforesaid cheque and the said question was put to him in his statement recorded under section

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313 CrPC to which the accused had admitted that the cheque belonged to him and also admitted his signature upon the said cheque. The accused, Shri Naranarayan Sharma (DW1) had examined himself in support of his case and he had admitted therein that he issued the said cheque in question in favour of the complainant, but had stated that the same was meant to be a security.

12. It is seen from the above that the accused has not denied the issuance of the cheque, but has only denied his liability, because according to the accused, he had already paid his liability.

13. The section 139 of the Negotiable Instruments Act, 1881 raises a statutory presumption that the holder of the cheque, unless the contrary is proved, received the cheque for the discharge in whole or in part of any debt or liability.

14. In the instant case at hand the complainant has produced the cheque issued by the accused, and the said fact is also admitted to by the accused, as such there is a statutory presumption raised in favour of the fact that the said cheque was issued for the discharge of a debt or liability.

15. In view of the above the burden now shifts to the accused to rebut the above presumption and raise a probable defence that the said cheque was not issued for any debt or liability.

16. The accused had stated that he and the complainant along with three other persons entered into a partnership business to execute the repairing work of ballot boxes. The DW1, Shri Naranarayan Sharma (accused) had produced the said partnership agreement and the same is marked as exhibit A. The accused has stated that it was agreed that after completion of the work, the amount received from the work would be deposited in the account of the firm. The accused has further deposed that he fell sick after completion of the work for the reason of which he gave an authority letter to the complainant to withdraw the bill amount, but the complainant did not return the said amount even after withdrawing the same. The DW1 has produced the said authority letter and the same is marked as exhibit B. The DW1 has further produced two other agreements between them and the same are marked as exhibit C and exhibit D. The DW1 (Accused) has contended that the complainant has acknowledged by

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way of exhibit C, the receipt of the payment of Rs.2,71,000 against cheque no:078005 for Rs.2,50,000/- (cheque in question). The accused has also produced an agreement between him and the complainant which is marked as exhibit D.

17. The accused had also examined one Shri Dharmeswar Bora (DW2) in support of his defence. The witness, Shri Dharmeswar Bora (DW2) is also one of the business partners and he has deposed that they were partners and they got the contract work for repairing the ballot boxes and accordingly they repaired it. The DW2 has stated that after settlement of the accounts of the partnership firm it was found that the complainant would be entitled to Rs.3,70,000/- as per exhibit D. The DW2 has stated that the partnership firm was entitled to receive Rs.2,71,000/- from Bajali office for their work done at Bajali and accordingly it was agreed that the complainant would receive the said amount. The DW2 has stated that as the said bill of Bajali was drawn in the name of the accused, the accused gave a cheque of Rs.2,50,000/- in the name of the complainant for security purpose and it was agreed that after the said amount was withdrawn from Bajali, the accused would give the same to the complainant and the complainant would return the cheque given by way of security.
18. The DW2 has stated that the complainant, on the basis of power of attorney, withdrew the said amount from Bajali and did not account for it; as such the accused went to Bajali and signed the receipt. The DW2 has stated that as the complainant received the bill of Bajali for Rs.2,71,000/- the liability of the said cheque (exhibit 1) has been erased.
19. The perusal of the evidence of the DW1 and the DW2 shows that none of them have disputed the liability of the accused, but in fact the accused has accepted his liability to pay to the complainant Rs.2,50,000/- and had issued the cheque in question. The perusal of the exhibit D, which is produced and relied upon by the accused shows that the complainant was entitled to receive Rs.3,70,000/-. The only defence, therefore, is that the complainant had withdrawn the amount from Bajali and hence the liability of the cheque in question is extinguished.

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20. The DW1 had stated that he fell sick for the reason of which he authorized the complainant to withdraw the amount from Bajali. The DW2 has also deposed as regards the above fact, but his statements are quite different from that of the DW1 (accused). The DW2 had stated that the complainant, on his own, without the consent of the accused, withdrew the amount from Bajali by showing a power of attorney.
21. The statements of the DW1 and the DW2 as regards this point are quite different from each other and hence lead me to doubt their testimony in this regard. The DW1 had stated that he had authorized the complainant to withdraw the amount as he fell sick; whereas the DW2 has stated nothing about the sickness of the accused and had stated that the complainant withdrew the amount on the basis of power of attorney.
22. The DW1 has stated that he authorized the complainant by way of exhibit B to withdraw the amount; whereas the DW2 has not stated about any authorization and has not stated anything about the exhibit B, but has stated that the complainant withdrew the amount on the basis of power of attorney without their knowledge. It is seen from the above there are vital differences in the statement of the DW1 and the DW2 regarding the withdrawing of the said amount from Bajali.
23. The story set up by the defence to show that the complainant withdraw the said amount from Bajali cannot be believed because the accused has not produced any document to show that the complainant withdrew the said amount. The complainant had allegedly withdrawn the amount from Bajali office, which is a government institution; as such there must be some document to show that the complainant had withdrawn the amount on behalf of the accused. The non production of any such documents leads me to draw adverse inference against the case set up by the defence.
24. Further the accused has contended that the complainant withdrew the amount and did not give it to him, but when he asked for the cheque in question, the complainant did not hand over the cheque and later on filed this case. The DW2 has stated in this regard that after the complainant withdrew the cheque, the accused went to Bajali and signed upon the receipt because the bill was in the name of the

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accused. The perusal of the above renders statements made by the accused (DW1) and the DW2 very improbable, because, if the complainant had withdrawn the amount and not accounted for it, then there was no reason for the accused to go and sign the receipt later on at Bajali, without taking back the cheque in question. Further it cannot be believed that a government institution would disburse such a huge sum of money without taking receipt of the same in the first place. In view of the above the contention of the accused that the complainant withdrew the amount from "Bajali" and later on he went and signed the receipt cannot be believed.

25. The learned counsel for the defence has contended that the complainant has acknowledged the receipt of the amount against the cheque in question by exhibit C; hence there is no existing liability. The exhibit C is allegedly executed and signed by the complainant, but the said document was not produced and shown to the complainant when he appeared as a witness in this case. The above document (exhibit C) was all along in the possession of the accused, as such there is no plausible reason or explanation as to why the said document was not produced for the perusal of the complainant at the initial stage of the trial. The defence had cross examined the complainant (PW1), but the defence had not at all cross examined the complainant as regards the execution of the exhibit C. It was imperative for the defence to have produced the said document at the earliest stage of the trial and further to cross examine the complainant on the said document, because he (Complainant) is allegedly the author of the said document; hence he would be the best person to depose as regards the execution of the same.

26. The exhibit C further reveals that the same was allegedly executed in the presence of two independent persons namely, Shri Hiranya Goswami and one Dhiraj Sarma, but strangely enough the defence has failed to examine the aforesaid two persons to prove the execution of the exhibit C by the complainant. The above referred two persons were the best persons to state and prove that the exhibit C was executed by the complainant, but non examination of the aforesaid persons is fatal to the case of the defence, because their non examination would amount to shielding material witness. The non examination of the aforesaid two persons leads me to draw adverse inference against the case set up by the defence.

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27. In addition to the above the signature upon the said exhibit C is not owned by the complainant; hence the burden lie upon the accused to prove the same, but the same is not proved to the satisfaction of this court. The accused has not identified the signature of the complainant upon the exhibit C. Moreover the accused is an interested witness, as such his evidence regarding the execution of the exhibit C cannot be relied upon in the absence of any corroboration from independent source.
28. The perusal of the cheque in question reveals that the same was issued on 29/8/2008; whereas the exhibit C was allegedly executed on 15/7/2008. The fact that the cheque in question was issued after the alleged execution of the exhibit C goes on to show that the said exhibit C is not a genuine document, because the complainant could not have known on 15/7/2008 itself that the accused would issue to him a cheque on 29/8/2008 bearing the same cheque no.
29. It is seen from the above discussion that the story set up by the defence cannot be believed because the accused has failed to prove the same by leading cogent evidence.
30. The perusal of the cross examination of the PW1 reveals that the accused had suggested to him that as because the cheque book of the accused remained in the possession of the complainant, the complainant on his own filled up the cheque. The above suggestion clearly suggests that the accused is trying to mislead the court by raising inconsistent defence. The accused had at one point of time stated that the complainant filled up the cheque on his own, whereas later on the accused had stated that he gave the said cheque on his own, but gave it for security and not for the discharge of any liability. The above inconsistency goes on to show that the accused is not being truthful in his defence and had improved upon his defence.
31. In view of the above discussion it is held that the accused had issued the cheque (exhibit 1) for the discharge of his liability.
32. In view of the above discussion it is held that the accused has failed to dislodge the presumption by bringing on record any credible evidence to show that the cheque in question was issued as a security

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and not for the discharge of his liability; hence it is held that the said cheque was issued for the discharge of a legally enforceable liability.

33. Further there is nothing on record to doubt or disbelieve the complainant; as such it is held that the accused had issued the said cheque in favour of the complainant for the discharge of his debt.

34. In view of the above it is held that the accused had issued the said cheque (exhibit 1) for the partial discharge of his liability of Rs.2,50,000/-.

35. DECISION: The cheque was issued for the discharge of a legally enforceable liability.

**POINT FOR DETERMINATION NO.2: Whether the cheque was dishonoured for stopping its payment by the accused?**

36. The complainant has deposed that the said cheque was presented to his bank for encashment, but the same was dishonoured because the accused has instructed for stopping its payment.

37. The complainant (PW1) has produced the cheque return memo issued to him informing the dishonor of the said cheque as the accused had stopped the payment of the said cheque and the said cheque return memo is marked as exhibit 2. The official of the Industrial Co- Operative Bank, Shri H.P Borah (PW2) was examined by the complainant on his behalf and the said witness had proved the exhibit 2 and also proved that the accused maintained an account in that bank. The PW2 was not at all cross examined in this regard.

38. In addition section 146 of the Negotiable Instruments Act, 1881 provides for statutory presumption as regards the cheque return memo issued by the bank in respect of the dishonor of the cheque; hence it is held that the said cheque was dishonoured as the accused had instructed for stopping its payment.

39. In view of the discussions made above it is held that the said cheque was dishonoured as the accused had instructed to stop its payment.

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40. DECISION: The cheque was dishonoured as the accused had instructed to stop its payment.

**POINT FOR DETERMINATION NO.3: Whether the accused has committed the offence under section 138 of the Negotiable Instruments Act,1881?**

41. The offence under section 138 is complete on the satisfaction of certain conditions which are that the cheque has to be issued on the account maintained by the accused and that the cheque has to be issued for the discharge of a debt or liability. It is further provided that the said cheque has to be deposited within six months of its issuance or within its validity and that the notice regarding the dishonor of the cheque for insufficient funds ought to be given within 30 days of the receipt of information regarding the dishonor.

42. In the instant case at hand it is already held that the cheque was issued by the accused in the account maintained by him and that the said cheque was dishonoured as the accused had instructed to stop its payment. The cheque (exhibit 1) was issued in the instant case on 29/8/2008 and it was presented within six months for encashment. The cheque return memo (exhibit 2) further shows that the information regarding the dishonor of the said cheque was received on 30/8/2008; and that the demand notice was issued by the complainant on 8/9/2008, which is within 30 days from the receipt of information of dishonor. The notice was admittedly received by the accused on 10/9/2008. The complainant had thereafter instituted this complaint on 24/10/2008 which is within 30 days after the lapse of 15 days from the date of receipt of demand notice; hence the complaint is lodged within the period of limitation.

43. The learned counsel for the accused has contended that the said cheque was dishonoured with the endorsement that “*payment stopped by drawer*” hence the complaint under section 138 of the Negotiable Instruments Act,1881 is not maintainable. The said contention of the accused is not sustainable, because the same is no longer res integra and it is already settled by the Hon’ble Supreme Court of India in the case of **Modi Cements Ltd. Vs Kuchil Kumar Nandi [1998 CrLJ1397]** that even in case where the cheque was

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dishonoured by “Stop Payment instruction” or otherwise, the same would be covered under the provision of section 138 of the Negotiable Instruments Act,1881.

44. In view of the above discussion it is held that all the ingredients of the offence under section 138 of the Negotiable Instruments Act,1881 are satisfied in the instant case and further the complainant has satisfied all the requisites for the institution of the complaint; hence it is held that the accused has committed the offence under section 138 of the Negotiable Instruments Act,1881.

45. DECISION: The accused has committed the offence under section 138 of the Negotiable Instruments Act,1881.

46. In view of the discussions made above and the decisions reached in the foregoing points for determinations it is held that the accused has committed offence under section 138 of the Negotiable Instruments Act,1881 and as such the accused is convicted under section 138 of the Negotiable Instruments Act,1881.

47. I have heard the parties. I am not inclined to extend the benefit of the provisions of the Probation of Offenders Act,1958, because the offence committed is in the nature of an economic offence and the backbone of the nation depends on a healthy economy. Moreover the real intention behind the enactment of the said offence is to provide quick remedy to the payee or the holder of the cheque, and also to instill a sense of confidence and assurance to the business community.

48. Considering the nature of the offence and the other attending facts and circumstances of this case, the accused is convicted of the offence under section 138 of the Negotiable Instruments Act,1881 and he is sentenced to undergo simple imprisonment for 6 (six) months and further to pay compensation of Rs.4,30,000/- (four lakh thirty thousand) to the complainant as the cheque amount is Rs.2,50,000/- and about four years have elapsed from the date of loan. It is further directed that the accused shall undergo simple imprisonment for another two months in default of the payment of compensation.

49. Furnish a free copy of the judgment to the accused immediately.

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50. The case is disposed of on contest.

Given under my hand and the seal of this court on this the 30<sup>th</sup> day of August, 2012 at Guwahati.

Yusuf Azaz,  
SDJM(S) II, Kamrup

**APPENDIX**

**PROSECUTION EXHIBITS:**

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- 1) EXHIBIT 1- CHEQUE
- 2) EXHIBIT 2- RETURN MEMO
- 3) EXHIBIT 3- DEMAND NOTICE
- 4) EXHIBIT 3(1)- POSTAL RECEIPT
- 5) EXHIBIT 4-LETTER DT.10/10/2008 ISSUED BY POSTAL DEPARTMENT
- 6) EXHIBIT 5- REPLY NOTICE
- 7) EXHIBIT 6- AUTHORIZATION LETTER
- 8) EXHIBIT 7- STATEMENT OF ACCOUNT

**DEFENCE EXHIBITS**

NONE

**PROSECUTION WITNESSES**

- 1) SHRI RAM KRISHNA DAS
- 2) SHRI H.P BORAH
- 3) SHRI UPEN LAHKAR
- 4) PRASANTA DAS

**DEFENCE WITNESSES**

- 1) SHRI NARANARAYAN SHARMA
- 2) SHRI DHARMESWAR BORA

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