

**The Court of JM 1<sup>st</sup> Class, Ramgarh****Present: Mrs. Smriti Tripathi****Judicial Magistrate****06<sup>th</sup> February, 2023****District: Ramgarh****Complaint Case No.541/2017****CNR: JHRG0300-0674-2019**

Complainant	Ram Avtar Sah, s/o Ramdayal Sah, aged about 61 years, r/o Gola Road, Sahu Colony, Ramgarh Cantt, PS and District Ramgarh
Represented By	Sri Mahendra Pd. Id. Advocate
Accused	Md. Alam, s/o Abul Hasan, aged about 51 years, r/o Dhuthuwa, PS Rajrappa, District: Ramgarh [A1]
Represented By	Sri Ghulam Jilani, Id. Advocate

Date(s) of Offence	12.11.2017
Date of Complaint	18.11.2017
Date of Issuance of Process	24.08.2018
Date of Substance of Accusation	15.04.2019
Date of Commencement of evidence	24.05.2019
Date of Judgment is reserved	24.01.2023
Date of Judgment	06.02.2023
Date of Sentencing Order, if any	06.02.2023

Rank of the Accused	Name of the Accused	Date of Arrest	Date of Release on Bail	Offences charged with	Whether acquitted or convicted	Sentence Imposed	Period of Detention undergone during trial for the purpose of s. 428, CrPC.
A1	Md. Alam	None	22.02.2019	s. 138, NI Act	Convicted	2 years, SI and ₹24,00,000/- fine, 2 months in default of payment	None

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1. The afore-named accused person (Hereinafter referred to as "A1") is facing trial for the offence u/s. 138 of Negotiable Instrument Act. (Hereinafter referred to as the "NI Act").

### COMPLAINANT'S CASE

2. The compendious case of Ram Avtar Sah (Hereinafter referred to as the "complainant") as arising out of his complaint petition filed u/s. 138 of NI Act against A1 is that the complainant and A1 were known to each other. Further, that the complainant paid ₹51,40,000/- to A1, Pradeep Agarwal and Imtiyaz Ahmad but neither did A1 transfer the land in his favor, nor did he returned the money. Then, the complainant filed Ramgarh P.S. Case No.38/2015, GR No. 731/2015, u/s 406, 420, 467, 471, 120B of IPC where they agreed that A1 will repay the complainant ₹44,00,000/- in five installments and only on this condition, A1 was released on bail. Then, while in custody, A1 issued a cheque, forwarded by the jailor in favor of the complainant bearing cheque no. 050471 dated 02.08.2017 of Axis Bank, Bokaro Branch. The said cheque was presented by the complainant for payment in his account maintained at SBI, Ramgarh branch on 18.09.2017, but was returned unpaid, and the same was communicated to the complainant vide return memo dated 19.09.2017 showing reason "insufficient fund" in the account of A1. Thereafter, the complainant sent a legal notice to A1 asking for repayment within 15 days, by speed post on 27.09.2017 which was duly served to A1 on 16.10.2017. Despite that, A1 did not pay the said amount to the complainant and hence, this case.

### PROCEEDINGS BEFORE THE COURT

3. On the basis of the material available on record, a prima facie case u/s. 138 of NI Act was found to be made out against A1 by the then court on 24.08.2018.

4. On 15.04.2019, substance of accusation for offence u/s. 138 of NI Act was explained to A1 and read over in simple Hindi to which he pleaded not guilty and claimed to be tried, and the case was fixed for evidence.

5. The complainant's evidence was closed on 22.06.2022 and the record was fixed for recording statement of A1. Thereafter, the statement of A1 was recorded u/s. 313 of CrPC on 05.08.2022 in which he denied the material available against him and claimed to be innocent.

6. Thereafter, the defense was provided with an opportunity to adduce evidence on its behalf, if any but the Id. counsel for the defense submitted that he does not want to adduce any evidence. Upon his prayer, the defence evidence was closed on 12.12.2022 and the matter was posted for arguments.

### **ARGUMENTS ADVANCED**

7. Ld. counsel for the complainant argued that the complainant has fully established his case by way of evidences and discharged his burden and it is now for A1 to rebut the presumption raised.

8. Ld. counsel for A1 on the other hand argued that the complainant has lodged a false case and A1 did not take ₹51,40,000/- from the complainant who is incapable of lending such a large sum to anyone as he does not file ITR of this amount. He also submitted that the complainant has altered the cheque amount and A1 had only issued a blank cheque to him. He further argued that as the complainant has not been able to prove that legal notice was delivered to A1, his case is not made out. Finally submitting that the actual amount which A1 borrowed from the complainant is lesser, which has already been repaid, prayer was made to acquit A1.

### **POINTS OF CONSIDERATION**

9. Now, the Court will consider whether the complainant has been able to substantiate the accusation levelled against A1 beyond reasonable doubt or not, for which the complainant's case will be examined on the touchstone of the following **points of consideration:**

- I. *Whether this court has jurisdiction to proceed in the case?*
- II. *Whether A1 had drawn cheque no. 050471 dated 02.08.2017 on an account maintained by him in Axis Bank, Bokaro for payment of ₹12,00,000/- in favor of the complainant from out of that account?*
- III. *Whether the cheque was issued in discharge, in whole or in part, of legally enforceable debt/liability?*
- IV. *Whether the said cheque was presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity whichever is earlier?*
- V. *Whether the said cheque was dishonoured upon presentation stating the reason "insufficient fund"?*
- VI. *Whether the complainant issued valid written legal notice upon A1 within 30 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid?*

VII. *Whether A1 failed to pay the money as demanded within 15 days of receipt of the said notice?*

VIII. *Whether A1 has committed an offence punishable u/s. 138 of NI Act?*

### **EVIDENCES**

10. Before the Court dwells to consider the points of consideration as stated above, it will be apt to enlist the evidences brought by both sides, which have all been perused by the court in detail but reference to only the relevant portions of which is made in this judgment:

#### **List of Witnesses after-charge**

A. Complainant:

Rank	Name	Nature of Evidence
CW01	Ram Avtar Sah	Interested Witness

B. Defence:

Rank	Name	Nature of Evidence
DW01	Md. Taslim Ansari	Interested Witness

#### **List of Exhibits after-charge**

A. Complainant:

Sr. No.	Exhibit Number	Description
1	Ext. 1	Cheque no. 050471 dated 02.08.2017 of Axis Bank, Bokaro
2	Ext. 2	Copy of Bank Return Memo dated 19.09.2017.
3	Ext. 3	Legal Notice by dated 27.09.2017
4	Ext. 4	Speed post Receipt.
6	Ext. 5	Complaint Petition.
5	Mark X	Tracking report's photocopy.

B. Defence:

Sr. No.	Exhibit Number	Description
1	Ext. D1	Certified Copy of complaint no.540/2014
2	Ext. D2	Certified Copy of deposition of Ramavtar Sah in C. No. 540/2017
3	Ext. D3	CC of order-sheets from 12.09.17 to 13.11.17 in GR No. 731/2015
4	Ext. D4	Certified Copy of Agreement in GR No. 731/2015

## **FINDINGS**

11. Whether this court has jurisdiction to proceed in the case?

11.1 Section 142(2)(a), NI Act encapsulates that in cases where a 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 is where the jurisdiction would lie.

11.2 In the instant case, looking at **Ext. 1** and **Ext. 2** together, it appears that the cheque was deposited by the complainant to State Bank of India, Ramgarh branch, where he maintains an account.

11.3 Thus, this court has jurisdiction to try the instant case.

12. Whether A1 had drawn cheque no. 050471 dated 02.08.2017 on an account maintained by him in Axis Bank, Bokaro for payment of ₹12,00,000/- in favor of the complainant from out of that account?

12.1 The complaint petition states that A1 took ₹51,40,000/- from complainant for transfer of land but neither did he transfer the said land, nor did he return this money. Then, Ramgarh PS Case No. 38/2015 was filed by the complainant in which, during his judicial custody, A1 and others agreed to pay the complainant ₹44,00,000/- in furtherance of the same, the instant cheque was issued by A1, forwarded by the Jailor whilst he was in judicial custody, exhibited as **Ext. 1**. Ext. 1 is signed by A1. A1 has not disputed the fact that he signed this cheque. These are supported by his statements made on oath as CW01. In his cross examination, he has deposed that he received the said cheque while A1 was in custody. The legal notice, exhibited as **Ext. 3** mentions that the said cheque was a post-dated cheque.

12.2 Overwriting on Cheque/Filled by complainant: the Id. defence counsel argued that the cheque in question has overwriting which is not with initial. Upon perusal of **Ext. 1** it transpires that in the column where amount is written in words, 'thousand' has been struck and 'lakh' is written above it. The Id. counsel took recourse to s. 87, NI Act and argued that this would render the cheque void, as the cheque has been filled by the complainant and later he increased the amount, and stated that

without the report of handwriting expert on this, the cheque cannot be relied upon. Section 87, NI Act requires the alteration to be 'material'. Upon perusal of the column where amount is written in words, no overwriting is found. It also does not appear that two zeros have been inserted later on. Thus, looking at the instrument as a whole, the alteration does not seem to be a material alteration, but a simple typographical error. It has also been held by the Hon'ble Supreme Court in **Oriental Bank of Commerce v. Prabodh Kumar Tewari, 2022 SCC OnLine SC 1089** that the presumption which arises on the signing of the cheque cannot be rebutted merely by the report of a hand-writing expert. Even if the details in the cheque have not been filled up by drawer but by another person, this is not relevant to the defense whether cheque was issued towards payment of a debt or in discharge of a liability. Similarly, in **Bir Singh vs Mukesh Kumar, (2019) 4 SCC 197** after discussing the settled line of precedent on this issue, a two-Judge Bench of the Hon'ble Supreme Court held that is immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer. In the instant case, there is no dispute regarding signature of A1 on the said cheque, or existence of liability of ₹12,00,000/-

12.3 Moreover, the burden of proof in cases u/s. 138, NI Act is of 'reverse burden' and it is for A1 to show that the cheque was not signed by him or that the liability, as alleged did not exist which A1 has failed to establish.

13. **Whether the cheque was issued in discharge, in whole or in part, of legally enforceable debt/liability?**

13.1 As discussed in paragraph no. 11.1 of this judgment, the complainant has made out a case that the instant cheque was issued in lieu of the liability of repayment of amount taken for land transfer by A1 from complainant.

13.2 Let us again briefly recapitulate that A1 has not disputed having drawn the cheque on a bank account maintained in his name and having signed the same, for whichever amount, as long as it is lesser than the owed liability. Now once these foundational facts are admitted and a factual

basis is established, by virtue of Section 118(a) and Section 139 of the NI Act, a presumption of the cheque having been issued in discharge of a legally sustainable liability and drawn for good consideration, arises, and the burden of proof lies upon A1 to rebut the said presumption. This clearly is an instance of the rule of 'reverse onus' in action, where it is incumbent on A1 to lead what can be called 'negative evidence'. Evidence of a character not to prove a fact affirmatively, but to lead evidence to show non-existence of liability. Keeping in view, that this is a departure from the cardinal rule of 'presumption of innocence' in favor of the accused, and also keeping in mind that negative evidence is not easy to be led by its very nature. It is now fairly settled that A1 can displace this presumption on a scale of preponderance of probabilities and the lack of consideration or a legally enforceable debt need not be proved to the hilt or beyond all reasonable doubts. A1 can either prove that the liability did not exist or make the non-existence of liability so probable that a reasonable person ought under the circumstances of the case - act on the supposition that it does not exist. Simply put, A1 has to make out a fairly plausible hypothesis. This, A1 can do either by leading own evidence in his defence or even by punching holes within the case of the complainant in the testing ordeal of cross examination.

- 13.3 A1 has filed **Ext. D4** which is an agreement between both the sides dated 27.04.2013, for a friendly loan given by complainant to A1. However, this agreement mentions some other cheque numbers, for a different sum and is not concerned with the cause of action of the present complaint. The outcome of dishonor, if any, of those cheques constitutes a completely different cause of action than for which present case has been filed and is thus of no help to the defence side.
- 13.4 **Ext. D3** shows that in GR Case No. 731/2015, complainant received some amount from A1. That also is not concerned with the offence A1 is being tried for in this case. All this only goes on to show that indeed A1 owed some debt to complainant. The complainant's case is that in this very case, the parties arrived at an agreed amount, towards which payment was made by A1 while he was still in custody, vide the post-dated cheque in question, and upon presentment, it got dishonoured.

- 13.5 **DW01** has not denied the existence of any debt/liability. What he has however deposed is that towards the debt that A1 and his father took from the complainant, he has already paid a higher amount. This does not go on to show that the liability of ₹12,00,000/- did not exist. Whether it already existed, or later on A1 took more money from the complainant or whether the complainant's case is false *in toto* has not been established by A1 in his defence at al.
- 13.6 Thus, what is indeed, vital is existence of a debt-liability of the cheque amount which did exist in this case, as proved by the complainant, and could not be rebutted by A1.
- 13.7 Non-Filing of Income Tax: The court would now briefly take up A1's case he tried to make out again and again during cross examination of CW01, examination of DW01 and in the course of arguments. Simply put, A1's case is that the complainant could not have given ₹51,40,000/- to A1 as he does not file ITR of that value. That, in the considered opinion of this court is a whole other consideration. Even if true, if one does not file ITR of the amount which he transfers to purchase a land, then that could attract another penal law but will not go on to show that no debt/liability existed between the parties. This defence, thus, does not come to the rescue of A1.
- 13.8 In the opinion of this court, in the present case A1 has not succeeded in rebutting the presumption of legal liability even on the scale of preponderance of probabilities. He was explained the incriminating circumstances appearing in evidence against him, drawing his attention to each evidence, and in his plea, A1 had denied the material against him generally and did not state anything circumstantial regarding the issuance of said cheque or non-existence of the debt/liability.
- 13.9 Regard being had to these, this court is of the considered opinion that having to return the amount taken from someone for transfer of land is a legally enforceable debt/liability towards settlement of which, A1 had issued a cheque of ₹12,00,000/- in favor of the complainant.
14. Whether the said cheque was presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity



whichever is earlier?

14.1 As per Reserve Bank of India's circular no. RBI/2011-12/251 dated November 4, 2011, cheques are valid only for a period of three months, taken from the date mentioned on them. The cheque in question i.e. Ext. 1 was dated 02.08.2017 and as per Ext. 2, issued by Axis Bank Ltd, Ramgarh Branch, it was dishonored on 19.09.2017. although the exact date on which it was presented is not mentioned, but it can safely be presumed that it was presented within its validity period.

15. Whether the said cheque was dishonoured upon presentation stating the reason "insufficient fund"?

15.1 Return memo from the bank, exhibited as **Ext. 2** mentions that cheque no. 050471, dated 02.08.2017 for ₹12,00,000/- which was presented while it was still within its validity period was dishonored for the reason "funds insufficient" on 19.09.2017. he said reason is very well envisaged to constitute an offence u/s. 138, NI Act.

16. Whether the complainant issued valid written legal notice upon A1 within 30 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid?

11.1 Section 138(b) and 138(c) of NI Act requires that within 30 days of receipt of the return memo, the holder should serve a legal notice upon the drawer, asking him to make payment of the cheque amount and giving the drawer 15 days' time for such repayment.

11.2 In the instant case, the return memo i.e. **Ext.2** is dated 19.09.2017 and the complainant issued a legal notice upon A1 on 27.09.2017 as evidenced by **Ext. 4**. This is within the 30-day statutory time-period.

17. Whether A1 failed to pay the money as demanded within 15 days of receipt of the said notice?

17.1 Receipt of legal notice: The tracking report, showing when exactly A1 received the said legal notice is not a part of evidences. Photocopy of a page of handwritten ledger has been filed by the complainant which has been marked as X for identification and contains no evidentiary value. In

such a case, section 27, the General Clauses Act comes to play. It is a well-settled position now, as held by the Hon'ble Supreme Court in the case of **K. Bhaskaran Versus Shankaran Vaidhyan Balan & Another (1999) 7 SCC 510** (at para 24) that, the principles incorporated under Section 27 of the General Clauses Act can preferably be imported in a case where a signatory has dispatched the notice by post with the correct address written on it. The Hon'ble Supreme court, further held that if the address is correctly written then the notice can be deemed to have been served on the sendee, unless he proves that the same was not served upon him for which he was not responsible. The same was relied upon by the Hon'ble High Court of Jharkhand in the case **M/s Noddy Auto Pvt. Ltd. Through its Managing Director, Dharamveer Singh and Ors V/s The state of Jharkhand and Ors. [Cr.M.P No. 2025 of 2020]**. Therefore, the said legal notice is deemed to be validly delivered on 27.10.2017.

17.2 Paragraph no. 8 of the said legal notice, exhibited as **Ext. 3** shows that A1 was given 15 days' time after receipt of this notice to pay the complainant a sum of ₹12,00,000/-

17.3 Nothing is on record to show that A1 repaid this amount after receiving the said legal notice. A1 has not exhibited any reply to the said legal notice. A1 has also not filed any evidence showing that he repaid any amount to the complainant. Even in when the material against him was put to him by the court, he did not state anything about making such repayment after receipt of the said legal notice.

18. **Whether A1 has committed an offence punishable u/s. 138 of NI Act?**

18.1 Regard being had to the discussion made above, it is clear that the complainant has established that for repayment of money given by him to A1 for transfer of land which A1 did not, he issued a cheque bearing no. 050471 dated 02.08.2017 on an account maintained by him in Axis Bank, Bokaro for payment of ₹12,00,000/-. The same was presented by the complainant within its validity period to State Bank of India which was further dishonored by Axis Bank, Ramgarh Branch for 'funds insufficient' and returned on 19.09.2017. Then, within 30 days' time-

period, on 27.09.2017, the complainant sent a legal notice to A1 asking him to make repayment within 15 days. The said legal notice is deemed to have been delivered on 27.10.2017. even after passage of 15 days from this date, A1 did not repay the said amount to the complainant.

18.2 Having established the, the complainant has raised a presumption of offence u/s. 138, NI Act which A1 has not been able to rebut.

18.3 Thus, A1 has committed an offence u/s. 138, NI Act.

**ORDERED**

19. Thus, this court is of the considered opinion that the complainant has established beyond reasonable doubt that A1 committed an offence u/s. 138, NI Act. A1 is accordingly, **convicted** of having committed an offence u/s. 138, NI Act.

20. Let a copy of this judgment be provided forthwith to the convict, free of cost. Let him be now be heard on the quantum of sentence. A copy of this judgment be placed on the official website of the District Court.

Pronounced by me in open court.

(Dictated and corrected)

Sd/-

Sd/-

**(Smriti Tripathi)**  
**JO Code: JH02021**  
JM 1<sup>st</sup> Class, Ramgarh  
Ramgarh, dated the 06<sup>th</sup> February, 2023

**(Smriti Tripathi)**  
**JO Code: JH02021**  
JM 1<sup>st</sup> Class, Ramgarh  
Ramgarh, dated the 06<sup>th</sup> February, 2023

**Later on,  
06.02.2023**

**HEARING ON THE POINT OF SENTENCE**

21. Learned counsel of the convict person submitted that he is a first-time offender and there is no evidence brought on record from the complainant about the fact that the convict person was previously convicted and also there is no evidence about any criminal antecedent of the convict and thus, prayed to release the convict on due admonition instead of passing the sentence.
22. Learned counsel of the complainant submitted that after due discussion, this Court has rightly come to a firm conclusion that the convict person had committed the offence **u/s. 138, NI Act** and he must be convicted with maximum punishment for the long ordeal the complainant has suffered on his account.
23. After hearing both the sides, perusing the case record and considering the nature of the offence, this court is of the considered view that in this case, the convicted person is not entitled to get the benefit according to the provision of Probation of Offenders Act and giving him a benefit therein will be defeating the very purpose of the NI Act. The guilt of the convict is quite clear in the crime he is convicted for. Hence, convict person namely **A1 Md. Alam** is hereby sentenced as under:

<b>Rank of the Convict</b>	<b>Name of the Convict</b>	<b>Sections under which convicted</b>	<b>Sentence of imprisonment</b>	<b>Fine</b>	<b>Sentence in default of fine</b>
A1	Md. Alam	138, NI Act	2 years, SI	₹24,00,000/-	2 months

24. The Court is of the opinion that the aforesaid punishment is sufficient for the ends of justice and sentence in default of payment of the levied fine shall run **concurrently**.
25. The fine levied is to be **paid to the complainant** as compensation u/s. 357(3), CrPC within 30 days of this judgment. Amount paid as interim compensation paid, if any, shall be adjusted accordingly.
26. The period of detention in the custody, if any, during trial, be adjusted towards the substantive sentence as per provisions of section 428 of The Code

of Criminal Procedure, 1973.

27. Let the copy of the judgment be provided to the convict free of cost.

Pronounced by me in open court.

(Dictated and corrected)

Sd/-

Sd/-

**(Smriti Tripathi)**

**JO Code: JH02021**

JM 1<sup>st</sup> Class, Ramgarh

Ramgarh, dated the 06<sup>th</sup> February, 2023

**(Smriti Tripathi)**

**JO Code: JH02021**

JM 1<sup>st</sup> Class, Ramgarh

Ramgarh, dated the 06<sup>th</sup> February, 2023