

**Dashrathbhai Trikambhai Patel Vs. Hitesh Mahendrabhai Patel & Anr  
Criminal Appeal No. 1497 of 2022; October 11, 2022  
The Supreme Court of India**

**HELD THAT:** *No Offence for dishonor of cheque under provisions of Section 138 of the NI Act, 1881 is made out if the cheque is presented for full amount without endorsing the part payment made by the borrower after issuance of the cheque.*

**BRIEF FACTS:**

- This appeal arises from a judgment dated 12 January 2022 of the High Court of Gujarat. The High Court dismissed an appeal against the judgment of the Additional Chief Judicial Magistrate dated 30 August 2016 by which the first respondent was acquitted of the offence under Section 138 of the Negotiable Instruments Act 1881 . At the core, the issue is whether the offence under Section 138 of the Act would deem to be committed if the cheque that is dishonoured does not represent the enforceable debt at the time of encashment.*
- On 10 April 2014, the appellant issued a statutory notice under Section 138 of the Act to the first respondent-accused. It was alleged that the first respondent borrowed a sum of rupees twenty lakhs from the appellant on 16 January 2012 and to discharge the liability, issued a cheque dated 17 March 2014 bearing cheque No. 877828 for the said sum. It was further alleged that the cheque when presented on 2 April 2014 was dishonoured due to insufficient funds. The appellant issued the notice calling the first respondent to pay the legally enforceable debt of Rs. 20,00,000.*
- On 25 April 2014, the first respondent addressed a response to the statutory notice where he alleged the following: (i) The first respondent and the appellant are related to each other. The appellant's son married the first respondent's sister; (ii) The appellant lent the first respondent a loan of rupees forty lakhs. There was an oral agreement between the parties that the first respondent would pay rupees one lakh every three months by cheque and rupees eighty thousand in cash to the appellant. Two cheques were given to the appellant for security. It was agreed that the appellant*

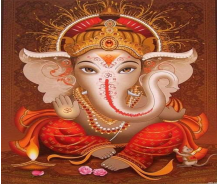
**FCS DEEPAK P. SINGH**

**(B.Sc. LLB, FCS, AIII, CRMP)**

Mobile No. +91 9920830041/7506904961

Email ID: [cs.deepakpsingh@gmail.com](mailto:cs.deepakpsingh@gmail.com)

Nation First-Jai Hind Jai Bharat



would return both the cheques when the sum lent was paid in full; (iii) The appellant's son-initiated divorce proceedings against the respondent's sister. However, the dowry that was given at the time of marriage is still in the possession of the appellant; and (iv) The cheques that were issued for security have been misused by the appellant.

4. On 12 May 2014, the appellant filed a criminal complaint against the first respondent for the offence under Section 138 of the Act. On 19 May 2014, the first respondent issued another reply to the legal notice. By the said reply, the earlier reply to the legal notice was sought to be amended by replacing the acknowledgment of having received a loan of rupees forty lakhs to rupees twenty lakhs.
5. By a judgment dated 30 August 2016, the Trial Court acquitted the first respondent of the offence under Section 138 on the ground that the first respondent paid the appellant a sum of rupees 4,09,315 between 8 April 2012 and 30 December 2013 partly discharging his liability in respect of the debt of rupees twenty lakhs. The Trial Court observed that the appellant has failed to prove that he was owed a legally enforceable debt of rupees twenty lakhs: "Therefore, the plaintiff's complaint proved that the accused has paid Rs, 4,09,315 out of the amount due as per fact. So that on the day the plaintiff deposited in the bank to recover a legal amount of Rs, 20,00,000/- The court believes that the prosecution has failed to prove that fact."

### **APPEAL BEFORE GUJARAT HIGH COURT**

6. The appellant filed an appeal against the judgment of the Trial Court before the High Court of Gujarat. On 10 October 2019, the first respondent moved an application before the High Court of Gujarat seeking to place on record the amended reply dated 19 May 2014. By an order dated 11 October 2018, the High Court allowed the application for placing the additional evidence on record.
7. The High Court by its judgment dated 12 January 2022 dismissed the appeal, thereby upholding the judgment of the Trial Court acquitting the first respondent. The High Court affirmed the finding of fact by the Trial Court that a part of the debt owed by the

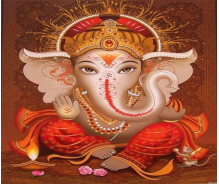
**FCS DEEPAK P. SINGH**

**(B.Sc. LLB, FCS, AIII, CRMP)**

Mobile No. +91 9920830041/7506904961

Email ID: [cs.deepakpsingh@gmail.com](mailto:cs.deepakpsingh@gmail.com)

Nation First-Jai Hind Jai Bharat



*first respondent to the appellant was discharged and thus the notice of demand issued under Section 138 of the Act is not valid.*

*In the course of the analysis, the following findings were entered:*

- (i) The appellant has in the course of his cross-examination accepted that the first respondent had deposited rupees 4,09,315 in his account;*
- (ii) There is a statutory presumption that the sum drawn in the cheque is a debt or liability that is owed by the drawer of the cheque to the drawee. The part - payment made by the first respondent ought to have been reflected in the statutory notice issued by the appellant. The sum in the cheque is higher than the amount that was due to the appellant. Thus, the statutory notice issued under Section 138 is not valid. It is an omnibus notice since it did not recognise the part-payment that was made; and*
- (iii) The cheque was a security for the money lent by the appellant. The undated cheque was presented to the bank without recognising the part- payment that was already made.*

### **MAIN ISSUE:**

*The primary contention of the first respondent is that the offence under Section 138 was not committed since the amount that was payable to the appellant, as on the date the cheque was presented for encashment, was less than the amount that was represented in the cheque. The question before this Court is whether Section 138 of the Act would still be attracted when the drawer of the cheque makes a part payment towards the debt or liability after the cheque is drawn but before the cheque is encashed, for the dishonour of the cheque which represents the full sum.*

### **ANALYSIS AND DECISION OF APEX COURT**

8. **Section 138 of the Act reads as follows:** “138. Dishonour of cheque for insufficiency, etc., of funds in the account.—Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an

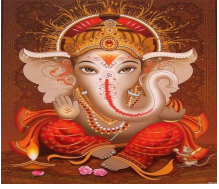
**FCS DEEPAK P. SINGH**

**(B.Sc. LLB, FCS, AIII, CRMP)**

Mobile No. +91 9920830041/7506904961

Email ID: [cs.deepakpsingh@gmail.com](mailto:cs.deepakpsingh@gmail.com)

Nation First-Jai Hind Jai Bharat



*agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years', or with fine which may extend to twice the amount of the cheque, or with both:*

**Provided that** *nothing contained in this section shall apply unless—*

*(a) the cheque has been presented to the bank within a period of three months from the date on which it is drawn or within the period of its validity, whichever is earlier;*

*(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice; in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and*

*(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.*

**Explanation.—For the purposes of this section, “debt of other liability” means a legally enforceable debt or other liability.**

**Section 138 of the Act provides that a drawer of a cheque is deemed to have committed the offence if the following ingredients are fulfilled:**

- (i) A cheque drawn for the payment of any amount of money to another person;*
- (ii) The cheque is drawn for the discharge of the ‘whole or part’ of any debt or other liability. ‘Debt or other liability’ means legally enforceable debt or other liability; and*
- (iii) The cheque is returned by the bank unpaid because of insufficient funds.*

*However, unless the stipulations in the proviso are fulfilled the offence is not deemed to be committed.*

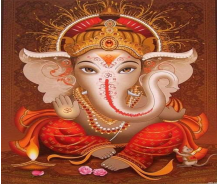
**FCS DEEPAK P. SINGH**

**(B.Sc. LLB, FCS, AIII, CRMP)**

Mobile No. +91 9920830041/7506904961

Email ID: [cs.deepakpsingh@gmail.com](mailto:cs.deepakpsingh@gmail.com)

Nation First-Jai Hind Jai Bharat



**The conditions in the proviso are as follows:**

- (i) *The cheque must be presented in the bank within three months from the date on which it was drawn or within the period of its validity;*
  - (ii) *The holder of the cheque must make a demand for the payment of the 'said amount of money' by giving a notice in writing to the drawer of the cheque within thirty days from the receipt of the notice from the bank that the cheque was returned dishonoured; and*
  - (iii) *The holder of the cheque fails to make the payment of the 'said amount of money' within fifteen days from the receipt of the notice.*
9. *It must be noted that when a part-payment is made after the issuance of a post-dated cheque, the legally enforceable debt at the time of encashment is less than the sum represented in the cheque. A part-payment or a full payment may have been made between the date when the debt has accrued to the date when the cheque is sought to be encashed.*
10. *Thus, it is crucial that we refer to the law laid down by this Court on the issuance of postdated cheques and cheques issued for the purpose of security.*

**In Indus Airways Private Limited v. Magnum Aviation Private Limited** , the issue before a two-Judge Bench of this Court was whether dishonour of post-dated cheques which were issued by the purchasers towards 'advance payment' would be covered by Section 138 of the Act if the purchase order was cancelled subsequently. It was held that Section 138 would only be applicable where there is a legally enforceable debt subsisting on the date when the cheque is drawn.

**In Sampelly Satyanarayana Rao v. Indian Renewable Energy Development Agency Limited** , the respondent advanced a loan for setting up a power project and post-dated cheques were given for security. The cheques were dishonoured and a complaint was instituted under Section 138. Distinguishing *Indus Airways (supra)*, it was held that the test for the application of Section 138 is whether there was a legally enforceable debt on the date mentioned in the cheque. It was held that if the answer is in the affirmative, then the provisions of Section 138 would be attracted.

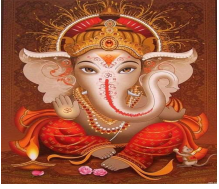
**FCS DEEPAK P. SINGH**

**(B.Sc. LLB, FCS, AIII, CRMP)**

Mobile No. +91 9920830041/7506904961

Email ID: [cs.deepakpsingh@gmail.com](mailto:cs.deepakpsingh@gmail.com)

Nation First-Jai Hind Jai Bharat



***In Sripati Singh v. State of Jharkand*** , this Court observed that if a cheque is issued as security and if the debt is not repaid in any other form before the due date or if there is no understanding or agreement between the parties to defer the repayment, the cheque would mature for presentation:

*“17. A cheque issued as security pursuant to a financial transaction cannot be considered as a worthless piece of paper under every circumstance. ‘Security’ in its true sense is the state of being safe and the security given for a loan is something given as a pledge of payment. It is given, deposited or pledged to make certain the fulfilment of an obligation to which the parties to the transaction are bound. If in a transaction, a loan is advanced and the borrower agrees to repay the amount in a specified timeframe and issues a cheque as security to secure such repayment; if the loan amount is not repaid in any other form before the due date or if there is no other understanding or agreement between the parties to defer the payment of amount, the cheque which is issued as security would mature for presentation and the drawee of the cheque would be entitled to present the same. On such presentation, if the same is dishonoured, the consequences contemplated under Section 138 and the other provisions of N.I. Act would flow.”*

*18. When a cheque is issued and is treated as ‘security’ towards repayment of an amount with a time period being stipulated for repayment, all that it ensures is that such cheque which is issued as ‘security’ cannot be presented prior to the loan or the instalment maturing for repayment towards which such cheque is issued as security. Further, the borrower would have the option of repaying the loan amount or such financial liability in any other form and in that manner if the amount of loan due and payable has been discharged within the agreed period, the cheque issued as security cannot thereafter be presented. Therefore, the prior discharge of the loan or there being an altered situation due to which there would be understanding between the parties is a sine qua non to not present the cheque which was issued as security. These are only the defences that would be available to the drawer of the cheque in a proceedings initiated under Section 138 of the N.I. Act.*

***Therefore, there cannot be a hard and fast rule that a cheque which is issued as security can never be presented by the drawee of the cheque. If such is the understanding a cheque would also be reduced to an ‘on demand promissory note’ and in all circumstances, it would only be a civil litigation to recover the amount, which is not the intention of the statute.***

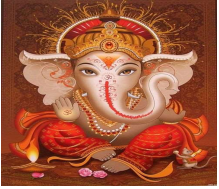
**FCS DEEPAK P. SINGH**

**(B.Sc. LLB, FCS, AIII, CRMP)**

Mobile No. +91 9920830041/7506904961

Email ID: [cs.deepakpsingh@gmail.com](mailto:cs.deepakpsingh@gmail.com)

Nation First-Jai Hind Jai Bharat



*When a cheque is issued even though as 'security' the consequence flowing therefrom is also known to the drawer of the cheque and in the circumstance stated above if the cheque is presented and dishonoured, the holder of the cheque/drawee would have the option of initiating the civil proceedings for recovery or the criminal proceedings for punishment in the fact situation, but in any event, it is not for the drawer of the cheque to dictate terms with regard to the nature of litigation." (emphasis supplied).*

11. **Based on the above analysis of precedent, the following principles emerge:**
- (i) *Where the borrower agrees to repay the loan within a specified timeline and issues a cheque for security but defaults in repaying the loan within the timeline, the cheque matures for presentation. When the cheque is sought to be encashed by the debtor and is dishonoured, Section 138 of the Act will be attracted;*
  - (ii) *However, the cardinal rule when a cheque is issued for security is that between the date on which the cheque is drawn to the date on which the cheque matures, the loan could be repaid through any other mode. It is only where the loan is not repaid through any other mode within the due date that the cheque would mature for presentation; and*
  - (iii) *If the loan has been discharged before the due date or if there is an 'altered situation', then the cheque shall not be presented for encashment.*
12. **This Court in NEPC Micon Ltd. v. Magna Leasing Ltd.** held that the Courts must interpret Section 138 with reference to the legislative intent to suppress the mischief and advance the remedy. The objective of the Act in general and Section 138 specifically is to enhance the acceptability of cheques and to inculcate faith in the efficacy of negotiable instruments for the transaction of business. Section 138 criminalises the dishonour of cheques. This is in addition to the civil remedy that is available. Through the criminalisation of the dishonour of cheques, the legislature intended to prevent dishonesty on the part of the drawer of a negotiable instrument.

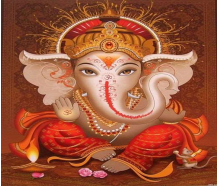
**FCS DEEPAK P. SINGH**

**(B.Sc. LLB, FCS, AIII, CRMP)**

Mobile No. +91 9920830041/7506904961

Email ID: [cs.deepakpsingh@gmail.com](mailto:cs.deepakpsingh@gmail.com)

Nation First-Jai Hind Jai Bharat



*The interpretation of Section 138 must not permit dishonesty of the drawee of the cheque as well. A cheque is issued as security to provide the drawee of the cheque with a leverage of using the cheque in case the drawer fails to pay the debt in the future. Therefore, cheques are issued and received as security with the contemplation that a part or the full sum that is addressed in the cheque may be paid before the cheque is encashed.*

- 13. The appellant contends that the purpose of Section 138 of the Act would be defeated if the dishonour of the cheque issued for security is not included within the purview of Section 138 where the payment of a part of the cheque amount is made. It was contended that it would lead to a possibility where the drawer of the cheque could evade prosecution under Section 138 by paying a small amount of the debt while defaulting on the remaining payment.*

**Section 56 stipulates that** *if there is an endorsement on a negotiable instrument that a part of the sum mentioned in the cheque has been paid, then the instrument may be negotiated for the balance.*

**Section 56 reads as follows:** *“56. Indorsement for part of sum due.- No writing on a negotiable instrument is valid for the purpose of negotiation if such writing purports to transfer only a part of the amount appearing to be due on the instrument; but where such amount has been partly paid a note to that effect may be indorsed on the instrument, which may then be negotiated for the balance.”*

**Section 15 defines the phrase ‘indorsement’ as follows:** *“15. Indorsement.- When a maker or holder of a negotiable instrument signs the same, otherwise than as such maker, for the purpose of negotiation, on the back or face thereof or on a slip of paper annexed thereto, or so signs for the same purpose a stamped paper intended to be completed as a negotiable instrument, he is said to indorse the same, and is called the “indorse”.”*

- 14. Under Section 56 read with Section 15 of the Act, an endorsement may be made by recording the part-payment of the debt in the cheque or in a note appended to the cheque. When such an endorsement is made, the instrument could still be used to negotiate the balance amount. If the endorsed cheque when presented for encashment of the balance amount is dishonoured, then the drawee can take recourse to the provisions of Section 138.*

**FCS DEEPAK P. SINGH**

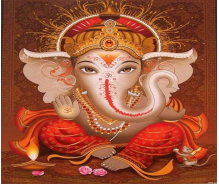
**(B.Sc. LLB, FCS, AIII, CRMP)**

Mobile No. +91 9920830041/7506904961

Email ID: [cs.deepakpsingh@gmail.com](mailto:cs.deepakpsingh@gmail.com)

Nation First-Jai Hind Jai Bharat





*Thus, when a part- payment of the debt is made after the cheque was drawn but before the cheque is encashed, such payment must be endorsed on the cheque under Section 56 of the Act. The cheque cannot be presented for encashment without recording the part payment. If the unendorsed cheque is dishonoured on presentation, the offence under Section 138 would not be attracted since the cheque does not represent a legally enforceable debt at the time of encashment.*

## **THE DECISION OF THE COURT**

15. *In view of the discussion above, we summarise our findings below:*

- (i) For the commission of an offence under Section 138, the cheque that is dishonoured must represent a legally enforceable debt on the date of maturity or presentation;*
- (ii) If the drawer of the cheque pays a part or whole of the sum between the period when the cheque is drawn and when it is encashed upon maturity, then the legally enforceable debt on the date of maturity would not be the sum represented on the cheque;*
- (iii) When a part or whole of the sum represented on the cheque is paid by the drawer of the cheque, it must be endorsed on the cheque as prescribed in Section 56 of the Act.*

*The cheque endorsed with the payment made may be used to negotiate the balance, if any. If the cheque that is endorsed is dishonoured when it is sought to be encashed upon maturity, then the offence under Section 138 will stand attracted;*

- (iv) The first respondent has made part-payments after the debt was incurred and before the cheque was encashed upon maturity. The sum of rupees twenty lakhs represented on the cheque was not the 'legally enforceable debt' on the date of maturity. Thus, the first respondent cannot be deemed to have committed an offence under Section 138 of the Act when the cheque was dishonoured for insufficient funds; and*

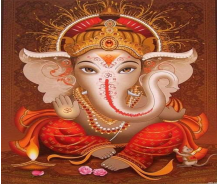
**FCS DEEPAK P. SINGH**

**(B.Sc. LLB, FCS, AIII, CRMP)**

Mobile No. +91 9920830041/7506904961

Email ID: [cs.deepakpsingh@gmail.com](mailto:cs.deepakpsingh@gmail.com)

Nation First-Jai Hind Jai Bharat



- (v) *The notice demanding the payment of the 'said amount of money' has been interpreted by judgments of this Court to mean the cheque amount. The conditions stipulated in the provisos to Section 138 need to be fulfilled in addition to the ingredients in the substantive part of Section 138. Since in this case, the first respondent has not committed an offence under Section 138, the validity of the form of the notice need not be decided.*

16. *For the reasons indicated above, the appeal against the judgment of the High Court of Gujarat dated 12 January 2022 is dismissed.*

**CONCLUSION:** *it is a landmark judgement by the court, in which court clarify that dishonour of a cheque for full amount value written in cheque without endorsement of part payment made by the drawer does not fall under provisions of Section 138 of the NI Act, 1881. Since the cheque presented to the bank for the honour does not represent a valid debt and legally enforceable debt at the time of presentation of the cheque. Since drawer has already paid some amount after issue and before presentation of the cheque and in this case cheque is valid only for balance of payment secured by issue of the cheque and not the full amount of the cheque.*

**DISCLAIMER** *the case law presented here is only for sharing information and knowledge with the readers. The views are personal. In case of necessity do consult with professionals for more clarity and understanding on subject matter.*

**SOURCE:** <https://www.livelaw.in/top-stories/no-offence-under-section-138-ni-act-if-cheque-is-presented-for-full-amount-without-endorsing-part-payment-made-by-borrower-supreme-court-211341?infinitemscroll=1>

**FCS DEEPAK P. SINGH**

**(B.Sc. LLB, FCS, AIII, CRMP)**

Mobile No. +91 9920830041/7506904961

Email ID: [cs.deepakpsingh@gmail.com](mailto:cs.deepakpsingh@gmail.com)

Nation First-Jai Hind Jai Bharat