

**IN THE COURT OF MS. ANU AGGARWAL, ADDL. CHIEF  
METROPOLITAN MAGISTRATE; NORTH-EAST,  
KARKARDOOMA COURTS : DELHI**

**Umesh Tyagi vs Arvind Kumar  
P S Shahdara  
U/S 138 N.I Act**

- (a) The Complaint case number : 48319/2015
- (b) The date of commission of offence : 27.11.2009
- (c) The name of complainant : Umesh Tyagi Director of Unicom Time Solution Pvt. Ltd., 517/D (New No. 1828), Gali No. 6, Vijay Park, Maujpur, Delhi – 110053.
- (d) The name, parentage etc. of accused : Arvind Kumar S/o Nain Singh R/o C-62, Gali No. 8, Jyoti Colony, Delhi.
- (e) The offence complained of/ proved : U/S 138 N.I Act
- (f) The plea of accused : Pleaded not guilty
- (g) The date of institution : 02.02.2010
- (h) The final order :
- (i) The date on which order was reserved : 24.01.2019
- (j) The date of such order : 02.02.2019
- k) Brief statement of the reasons for the decision

**JUDGMENT:**

1. The complainant has filed the present case u/s 138 NI Act for cheque amount of Rs. 2,00,000/- vide cheque no. 105712 dated

27.11.09. The brief facts of the case of complainant are as follows:-

2. As per complainant, he was previously known to the accused and was on visiting terms with him since 1 ½ year and accused requested him for a friendly loan of Rs. 2,00,000/-. Complainant gave the said amount to the accused in cash in second week of August, 2009 and the accused promised to repay the same within three months.
3. On 27.11.2009 upon demand of complainant, accused handed over a cheque no. 105712 dated 27.11.09 of an amount of Rs. 2,00,000/- drawn on ICICI Bank, Preet Vihar, Delhi, to the complainant.
4. The complainant presented said cheque for encashment on 30.11.2009 but same was returned/dishonoured with remarks Account Closed on 02.12.2009. Complainant issued legal notice dated 31.12.09 but accused failed to return the amount despite of service of legal notice. Hence, present case.
5. The accused was summoned and after supply of documents to the accused, notice U/s 138 NI Act was served upon the accused on 06.01.2011. The accused has stated that the cheque in question was given to complainant towards security for the loan of Rs. 1 lac which he had taken from complainant. He further stated that he had paid the entire loan amount to the complainant and when he demanded his cheques from the complainant, complainant gave him coloured photocopies of the cheque and misused his original cheque. The accused pleaded not guilty and claimed trial.

6. The complainant was cross examined, complainant examined Sh. Ayush Kansal as CW-2, Sh. Rakesh Kumar also examined as CW-2, Subhash Mishra examined as CW-3, Satya Prakash Sharma examined as CW-4 and Sayyed Faisal Hudda as CW-5. No other witness was examined by the complainant. Hence, CE was closed.
7. Accused was examined u/s 313 Cr.P.C. In his statement, accused has stated that he had given the cheque in question to the brother of complainant namely Ram Kishore Tyagi as security and he did not receive legal notice. He has stated that he had not taken any loan from the complainant. There was some money transaction between him and brother of complainant which has already been cleared. Ram Kishore Tyagi handed over coloured photocopies of cheque to him and misused the original cheque through the complainant.
8. Accused has examined himself as DW1 and Devak Ram Sharma as DW-2. No other witness was examined by the accused.
9. I have heard the final arguments and have perused the record.
10. Before proceeding any further it would be germane to refer to the propositions of law on the point. The Negotiable Instruments Act, 1881 raises two presumptions; According to Section 118 (a) it shall be presumed that every negotiable instrument was made or drawn for consideration. By virtue of this clause, the Court is obliged to presume that the instrument was made for consideration or until the contrary is proved. According to Section 139 of NI Act "it shall be presumed, unless the contrary

is proved that the holder of a cheque received the cheque for discharge in whole or in part, of any debt or other liability.” Under Section 139 NI Act there is a legal presumption that the cheque was issued for discharging an antecedent liability and that presumption can be rebutted only by the person who draw the cheque. Presumptions, both under Sections 118(a) and 139 of the Act, are rebuttable in nature. The burden is squarely upon the accused to rebut the presumptions and discharge the onus placed upon him to show that the cheque was not against any liability. It is a settled law that for this purpose, the accused is not required to enter the witness box in order to discharge the burden of proof that the law places upon him. In the case reported as “**Rangappa Vs. Sri Mohan 2010(5) SCALE 340**”, it has been held by a Three Judge Bench of the Apex Court that consideration attached to a cheque is a matter of presumption and the complainant is not required to prove it beyond reasonable doubt. The question that naturally arises is as to what is the standard of proof that the law requires and which the accused is expected to discharge in order to rebut the presumptions. In criminal matters, the standard of proof upon the prosecution is proof beyond reasonable doubt. However, the accused in order to rebut the presumption(s) against him is not required to conclusively establish his case. The burden of proof on accused in rebutting the presumption(s) is not as high as that of the prosecution. Reference in this regard can be made to the judgment reported as “**Hiten P. Dalal vs. Bratindranath Banerjee 2001 CriLJ 4647**”. It is also a settled principle that

where the accused has discharged the initial burden of rebutting the presumptions; the burden of proof shifts to the complainant and whether or not the accused has discharged the onus of proof placed upon him would depend entirely on the facts and circumstances of the case. In this regard the judgment of the Apex Court in **“M. S. Narayana Menon Vs. State of Kerala AIR 2006 SC3366”** can be fruitfully referred to.

11. Having dwelt upon the law as regards presumptions and the burden of proof in matters arising under Section 138 Negotiable Instruments Act, 1881, I shall now deal with the merits of the present case.

12. According to the complainant, he had given a loan of Rs. 2,00,000/- to the accused pursuant to which the cheque in question was issued. The accused has taken the defence in his notice that he had taken the amount of Rs. 1 lac from the complainant and gave the cheque in question as security. He has already returned the said amount and complainant has misused the original cheque and gave him the coloured photocopy of the cheque. However, in his statement u/s 313 Cr.P.C., he has stated that he had taken the loan of Rs. 1 lac from the brother of complainant Ram Kishore Tyagi and had given the cheque in question to him. The complainant has been cross examined by the accused.

13. The accused has examined himself as DW-1 and has stated that he had taken the loan from Ram Kishore Tyagi of Rs. 1 lac and had handed over the three signed blank cheques to him with two stamp papers as security. On 06.01.10, he returned the

loan amount to Ram Kishore Tyagi in presence of Kailash Chand Upadhyay. Ram Kishore Tyagi returned all his three cheques and two stamp papers. Thereafter, one of his friend Naresh joined him and asked about the payment. He informed him that payment has been made to Ram Kishore Tyagi. Naresh asked him for cheque and stamp papers. He went outside to collect the same, which were torn by Ram Kishore Tyagi. Naresh apprised him that those were coloured copies of original. He went to Ram Kishore Tyagi who assured him that no legal action would be initiated.

14. Therefore, according to the accused, he had returned the loan amount to Ram Kishore Tyagi in the presence of Kailash Chand Upadhyay. However, the accused has not examined Kailash Chand Upadhyay to prove that any such amount was returned to Ram Kishore Tyagi. The accused has also not examined Naresh who had informed him about the coloured copies of the cheque. According to the accused, Ram Kishore Tyagi had returned three cheques and stamp papers to him. Those papers were torn by Ram Kishore Tyagi. It is the own defence of the accused that he gave blank signed cheque to Ram Kishore Tyagi. However, the perusal of the torn cheque placed on record by the accused Ex. CW1/DX1 reflect that it is not blank. It is bearing the date of 27.11.2009 and is of an amount of Rs. 2,00,000/-. If the accused had handed over the blank signed cheque to Ram Kishore Tyagi, then howcome the torn cheque which has been placed on record by accused himself bears the date with an amount. There is no explanation given by the

accused as to howcome he took the coloured copy of cheque from Ram Kishore Tyagi with date and amount of Rs. 2 lac written on it when he had given the cheque as blank signed cheque. Further, the original cheque Ex.CW1/A bears the signature of accused in blue ink. Though, the signatures are not visible in the torn cheque Ex. CW1/DX1, but the accused himself has claimed that it is coloured copy of the original. In the coloured copy of the cheque, only print of signature would appear as in the photocopies and the coloured copy cannot have the original signatures of the accused. If the accused was handed over with the coloured copy of the cheque, then howcome, he did not check his signatures on the coloured copy and howcome, he did not question with respect to the photocopies signatures on the coloured copy of the cheque. The perusal of coloured copy of the cheque Ex. CW1/DX1 on record reflect that the accused has not placed that portion of the torn cheque where the name of the person in whose favour it has been issued appears and the signature of the drawer appears. Only the portion containing the account number, cheque number, date and amount has been placed on record. The manner in which the coloured cheque has been torn reflect the deliberate attempt to place on record only the portion containing account number, cheque number, date and amount and to withheld the portion containing the name of drawee and signature of drawer.

15.The accused has not placed on record any document to show that he had taken an amount of Rs. 1 lac from Ram Kishore

Tyagi and had issued cheque in question to him as security. No document has been placed on record by the accused to prove that he has already returned the said amount to Ram Kishore Tyagi. The accused has not examined Kailash Chand Upadhyay to prove the transaction between him and Ram Kishore Tyagi and Naresh to prove that Ram Kishore Tyagi had given coloured copy of the cheque in question to him.

16. The accused has admitted that the coloured copy of the cheque was not given to him by the complainant. The accused has stated that his blank cheque was misused by Ram Kishore Tyagi in connivance with complainant. However, the perusal of the cheque in question Ex. CW1/A and coloured copy of the cheque Ex. CW1/DX1 reflect that both bears the date of 27.11.09 and an amount of Rs. 2 lac. As opined earlier, the accused has failed to explain as to howcome, he accepted the coloured copy of cheque from Ram Kishore Tyagi with date and amount of Rs. 2 lac when he had given the blank signed cheque to him for a loan of Rs. 1 lac. Further, the perusal of the coloured copy of cheque Ex. CW1/DX1 reflect that the date and amount is written in original blue ink and not in the coloured photocopy ink. If a coloured copy cheque was given to the accused, then the date and amount cannot be in the original blue ink.

17. The complainant while cross examining the accused had put to him a pro-note Ex. DW1/CX1. According to the complainant, the said pro-note was executed by the accused at the time of loan. Since the said pro-note was not filed with the complaint and

there was no averment in the complaint with respect to pro-note, complainant examined Satya Prakash Sharma as CW-4, who is witness to the pro-note and CW-5 Syed Faisal Hudda as handwriting expert. CW-4 Satya Prakash Sharma is signatory of pro-note Ex. CW1/CX1 (Ex. DW1/CX1). The accused first admitted his signatures on Ex. DW1/CX1 in the cross examination but then denied his signatures. He denied that Satya Prakash Sharma accompanied him at the time of receiving loan. CW-4 Satya Prakash Sharma has stated in the cross examination that he had signed Ex. CW1/CX1 (Ex. DW1/CX1) at his house and complainant and accused had come to him together. He has identified his signature on pro-note and there is nothing in the cross examination of CW-4 Satya Prakash Sharma to doubt his testimony. He has proved that pro-note Ex. CW1/CX1 was executed in his presence and accused and complainant were present at the time of its execution. Complainant has examined CW-5 Syed Faisal Hudda, handwriting expert to prove that pro-note bears the signatures of accused. His report is Ex. CW5/1. Perusal of report Ex. CW5/1 reflect that CW5 has opined that disputed signature marked as D-1(signatures of accused) on pro-note Ex. DW1/CX1 is genuine signature and has been written and signed by accused Arvind Kumar. There is nothing on record to create doubt on the genuineness of the report Ex. CW5/1. The forensic report Ex. CW5/1 has proved that pro-note Ex. CW1/CX1 (DW1/CX1) bears the signature of accused. Though, accused has denied his signatures on Ex. DW1/CX1, but he

has not led any evidence to prove that Ex. DW1/CX1 is not bearing his signature. Perusal of pro-note Ex. DW1/CX1 reflect that accused had taken a loan of Rs. 2 lac from the complainant pursuant to which, the pro-note was executed. The signatures of the accused are on the stamp affixed to pro-note. Even according to the complainant, he had given a loan of Rs. 2 lac to the accused in the second week of August 2009 and even pro-note bears the date 08.08.09.

18. Further, the accused has taken contradictory stand. In reply to his notice on 06.01.11, he has stated that he had taken the loan from the complainant and gave cheque to him as security, but complainant misused his cheque. In his statement u/s 313 r/w Section 281 Cr.P.C., he has stated that the cheque in question was given to Ram Kishore Tyagi and he did not receive any legal notice. He has further stated that he was in confidence that coloured photocopies of cheques were original till the knowledge of the present case. However, in his affidavit of evidence Ex. DW1/1, he has stated that on 06.01.10, he had repaid the amount to Ram Kishore Tyagi of Rs. 1 lac and Ram Kishore Tyagi handed over three cheques and two stamp papers to him. Since Ram Kishore Tyagi was pressing for destroying the same, accused destroyed those cheques by tearing them. At about 09.30 pm, his friend visited him and informed him that the torn cheque is coloured photocopy of cheque. If, as per the statement u/s 313 Cr.P.C., he considered the coloured photocopy of the cheque as original till the filing of the present case, then when Ram Kishore Tyagi got the

opportunity to tear them apart. Further, if on 06.01.10, he came to know that he has been cheated by Ram Kishore Tyagi and instead of original coloured photocopies have been handed over to him, then no reason has been specified as to why no complaint was made by him as against Ram Kishore Tyagi.

19. Therefore, it is clear from the court record that accused had taken a loan of Rs. 2 lac from the complainant and executed pro-note Ex. DW1/CX1. He had issued the cheque in question in discharge of his liability towards the payment of abovesaid loan, but the cheque got dishonored on account of "account closed". The accused has admitted receiving of legal notice dated 06.01.10 and 19.02.10 in his cross examination but he did not reply to the said legal notice. Therefore, adverse inference is required to be drawn as against accused.

20. In view of the above observations, accused stands convicted for offence u/s 138 NI Act.

Announced in open Court  
on 02<sup>nd</sup> February 2019

(ANU AGGARWAL)  
ACMM( North East)  
Karkardooma Courts, Delhi.