Before the Court of Addl.Chief Metropolitan Magistrate at Bangalore (SCCH-12)

Present: Smt. Poornima.N. PAI, B.Com., LL.M.,
SCJ and ACMM, Bangalore.

Dated this the 2nd day of February, 2023

C.C.No.1328/2019

Complainant	M/s. IPSA Credit Pvt. Ltd., No.302, Eden Park, No.20, Vittal Malya Road, Bengaluru-560 001. by its Authorized Representative Sri.Sadananda.C.V. **(By Sri.V.S., Advocate)**
	V/s.
Accused	Smt.Punitha Munesha, W/o.Munesha Venkat, Aged 36 years, No.12, 11th Cross, Kaggadasapura Main Road, C.V.Raman Nagar Post, Bengaluru-560 0013 **(By Sri.V.A., Advocate)**

1. Date of commencement of offence : 04.01.2019
2. Name of the complainant : M/s. IPSA Credit Pvt. Ltd.
3. Date of recording of the evidence : 15.02.2019

4. Date of closing of evidence : 14.11.2022
5. Offence complained of : 138 of N.I. Act
6. Opinion of the Judge : Accused found guilty
7. Complainant represented by : Sri.V.S. advocate
8. Accused defence by : Sri.V.A. advocate

J U D G M E N T

The complainant company has filed present private complaint case under Section 200 of Cr.P.C against the Accused for the offence punishable U/s 138 of Negotiable Instruments Act.

2. The brief facts of the complaint are as under:

It is the case of complainant that, accused had purchased one Car under Hire Purchase Agreement dated 03.08.2012 and the complainant financed a sum of Rs.8,00,000/- to the accused as Car loan. The monthly repayment amount has calculated as Rs.35,200/- duration of installment was 35 months. Accused became the defaulter in payment of same and complainant kept on contacting the accused, finally towards full and final settlement of above amount, accused issued cheque in favour of complainant cheque bearing No.877849 dated 26.10.2018 for Rs.4,70,000/- drawn on Canara Bank, Kaggadasapura Branch, Bengaluru. The said cheque was presented through complainant Bank, Canara Bank, Lavelle Road Branch, Bengaluru and it was returned dishonored for the reason

"Funds Insufficient" on 26.10.2018. The Complainant got issued legal notice dated 19.11.2018, dispatched on 20.11.2028 and served to the accused on 27.11.2018. Accused never complied with the notice nor give any reply. Hence, the present complaint was filed for the offence punishable under Section 138 of N.I. Act.

3. After filing of the complaint, sworn statement of the complainant was recorded and after hearing the arguments and on considering the materials on record a criminal case was registered by my predecessor-in-office for the offence punishable under Section 138 of N.I. Act and summons has been issued to the accused for the said offence.

4. In pursuance of the process of the court, the accused appeared before this court through her counsel and got enlarged on bail. Thereafter, accusation was read over to the accused for the offence punishable under Section 138 of N.I.Act. The accused did not plead guilty and claimed to be tried.

5. The sworn statement of complainant is treated as examination in chief of complainant. The authorized representative of complainant got examined himself herself as P.W.1 and got marked Ex.P1 to 10 documents. He was cross-examined in detail by advocate for accused. Statement of accused U/sec 313 of Cr.P.C was recorded and case was posted for defense evidence. Accused examined herself as DW.1 and got marked Ex.D.1 to D.2 (a), (b), (c) documents.

6. Heard argument of advocate for complainant Sri.V.S. Advocate and Sri.V.A. advocate for accused. I have perused materials available on record.

7. The points that arise for my consideration are as under:

1. *Whether the complainant has made out the ingredients of section 138 of N.I.Act against the accused?*

2. *What order?*

8. My findings on the above points are as under:

Point No.1: Affirmative.

Point No.2: As per final order for the following:

R E A S O N S

9. **POINT NO.1** **:** It is well settled that in order to maintain a complaint U/Sec.138 of NI Act, five main facts to be established by the complainant before the court –

(i) The cheque in question should have been issued in discharge of whole or in part of a debt or liability.

(ii) The cheque in question should be presented for payment within six months or its specific validity period, whichever is earlier.

(iii) The Payee or holder should given notice of demand within 30 days of receiving the information of dishonor which may be due to insufficient of funds or amount payable exceeds the arrangement.

(iv) The drawer gets 15 days time after receipt of notice to make the payment and if he fails to pay he is liable to be prosecuted.

(v) Complaint can be made only by payee or the holder in due course within one month of arising of the cause of action.

Unless these five factors have been cumulatively established before the court by the complainant, no complaint U/Sec.138 will be maintainable. If any one of the factors is lacking such complaint is not maintainable.

10. In order to prove the case of the complainant, The authorized representative of complainant got himself examined as P.W.1 and got marked 10 documents in his favour. Cheque is marked as Ex.P.1, Signature of accused is marked as Ex.P.1(a). The bank return memo is marked as Ex.P.2. The office copy of legal notice is marked as Ex.P.3, Postal receipt is marked as Ex.P.4, postal acknowledgment is marked as Ex.P.5. Statement of Account is marked as Ex.P.6, Proposal for loan is marked as Ex.P.7, Board

Resolution is marked as Ex.P.8, Hire Purchase Agreement is marked as Ex.P.9, Notarized copy of Memorandum and Article of Association of Complainant Firm is marked as Ex.P.10. Based on these documents complainant has argued that, he has proved the necessary ingredients of section 138 of N.I.Act and prays for conviction of accused.

11. On perusal of Exs. P.1 to P.10, it is clear that the complainant has made out all the ingredients of section 138 of N.I. Act and accused has availed loan in complainant bank and became a defaulter.

12. **Under Sec. 138 of N.I.Act, regarding burden of proof sec. 118 of N.I.Act lays down that until the contrary is proved, it shall be presumed that every Negotiable Instrument was made of drawn for consideration. Sec. 139 of N.I.Act contemplates that unless the contrary is proved, it shall be presumed that the holder of the cheque received the cheque of the nature referred to in Sec. 138 for the discharge, in whole of any debt or liability. In a decision reported in 2001 Crl. Law Journal, page 4647 (SC) (Hiten P. Dalal V/S. Bratindranath Banerjee) it is observed that in the proceeding under Sec. 138 of N.I.Act, the complainant is not required to establish either the legality or the enforceability of the debt or liability since he can avail the benefit or presumption**

under Sec. 118 of 139 of N.I.Act in his favour. By virtue of these presumptions, accused has to establish that the cheque in question was not issued towards any legally enforceable debt or liability. In the year 2008, In Krishna Janardhan Bhat V/s Dattatreya G Hegde (2008 Vol. 2 SCC Crl. 166) the Hon`ble Supreme Court has held that existence of legally recoverable debt is not a presumption under Sec 138 of N.I.Act and the accused has a constitutional right to maintain silence and therefore it was argued later that the presumption u/s 139 of N.I.Act should be delicately balanced.

13. In a decision of Hon`ble Supreme court in the case of Rangappa V/s Mohan reported in A.I.R. 2010 SC page 1898, the Hon`ble Supreme Court has reconsidered this issue and clarified that the existence of legally recoverable debt or liability is a matter of presumption under Sec. 139 of N.I.Act. In para 14 of the judgment, the Hon`ble Supreme Court has observed that:

> **" Sec. 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. While section 138 of the Act, specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Sec. 139 is a device to prevent undue delay in the course of litigation. However, it must be**

remembered that the offence made punishable by Sec. 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the accused/defendant cannot be expected to discharge an unduly high standard or proof. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Sec. 139, the standard of proof for doing so is that of 'preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence, which creates doubt about the existence of a legally enforceable debt or liability, the presumption can fail. As clarified in the citation, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence on his/her own."

Relying upon the citation referred above wherein the Hon'ble Supreme Court has clarified regarding legally enforceable debt and the presumptions. Now it is clear that the presumption mandated by Sec. 139 of N.I.Act does not include existence of legally enforceable debt or liability. It is a rebuttable presumption. It is for the accused to prove his defence wherein he has to raise a probable defence which creates doubt about existence of legally enforceable debt or liability. Once he creates such doubt, then the burden shifts back to the complainant.

14. The objectives of the proceedings of Section 138 of the Act are that the cheques should not be used by persons as a tool of dishonesty and when cheque is issued by a person, it must be honoured and if it is not honoured, the person is given an opportunity to pay the cheque amount by issuance of a notice and if he still does not pay, he must face the criminal trial and consequences.

15. The Hon’ble Supreme Court **in Electronics Trade & Technology Development Corporation Ltd., Secunderabad v/s. Indian Technologists & Engineers (Electronics) (P) Ltd. and Another (1996) 2 SCC 739** has also held as follows:

> **The object of bringing Section 138 on statute appears to be to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments. Despite civil remedy, Section 138 intended to prevent dishonesty on the part of the drawer of negotiable instrument to draw a cheque without sufficient funds in his account maintained by him in a book and induce the payee or holder in due course to act upon it. Section 138 draws presumption that one commits the offence if he issues the cheque dishonestly. It is seen that once the cheque has been drawn and issued to the payee and the payee has presented the cheque and thereafter, if any instructions are issued to the bank for**

> **non-payment and the cheque is returned to the payee with such an endorsement, it amounts to dishonour of cheque and it comes within the meaning of Section 138….”**

The Hon’ble Supreme Court had already observed earlier in Goa Plast (P) Ltd. V/s Chico Ursula D’Souza (2004) 2 SCC 235, this Court, while dealing with the objects and ingredients of Sections 138 and 139 of the Act, observed as follows :-

> **“The object and the ingredients under the provisions, in particular, Sections 138 and 139 of the Act cannot be ignored. Proper and smooth functioning of all business transactions, particularly, of cheques as instruments, primarily depends upon the integrity and honesty of the parties. In our country, in a large number of commercial transactions, it was noted that the cheques were issued even merely as a device not only to stall but even to defraud the creditors. The sanctity and credibility of issuance of cheques in commercial transactions was eroded to a large extent. Undoubtedly, dishonour of a cheque by the bank causes incalculable loss, injury and inconvenience to the payee and the entire credibility of the business transactions within and outside the country suffers a serious setback. Parliament, in order to restore the credibility of cheques as a trustworthy substitute for cash payment enacted the aforesaid provisions. The remedy available in a civil court is a long-drawn matter and an unscrupulous drawer**

normally takes various pleas to defeat the genuine claim of the payee.”

16. The Hon’ble Supreme Court has given directions to all the courts in India dealing with cases under Section 138 of N.I. Act to follow mandatory directions in order to bring uniformity in procedure and disposal of huge pendency of negotiable instrument cases in decision reported in **Indian Bank Association & Ors vs Union Of India & others by Hon’ble Justice K.S. Radhakrishnan, and Vikramajit Sen in WRIT PETITION (CIVIL) NO.18 OF 2013** as under;

Many of the directions given by the various High Courts, in our view, are worthy of emulation by the Criminal Courts all over the country dealing with cases under Section 138 of the Negotiable Instruments Act, for which the following directions are being given :-

DIRECTIONS:

1) Metropolitan Magistrate/Judicial Magistrate (MM/JM), on the day when the complaint under Section 138 of the Act is presented, shall scrutinize the complaint and, if the complaint is accompanied by the affidavit, and the affidavit and the documents, if any, are found to be in order, take cognizance and direct issuance of summons.

2) MM/JM should adopt a pragmatic and realistic approach while issuing summons. Summons must be properly addressed and sent by post as well as by e-mail address got from the complainant. Court, in appropriate cases, may

take the assistance of the police or the nearby Court to serve notice to the accused. For notice of appearance, a short date be fixed. If the summons is received back un-served, immediate follow up action be taken.

3) Court may indicate in the summon that if the accused makes an application for compounding of offences at the first hearing of the case and, if such an application is made, Court may pass appropriate orders at the earliest.

4) Court should direct the accused, when he appears to furnish a bail bond, to ensure his appearance during trial and ask him to take notice under Section 251 Cr.P.C. to enable him to enter his plea of defence and fix the case for defence evidence, unless an application is made by the accused under Section 145(2) for re-calling a witness for cross-examination.

(5) The Court concerned must ensure that examination-in-chief, cross-examination and re-examination of the complainant must be conducted within three months of assigning the case. The Court has option of accepting affidavits of the witnesses, instead of examining them in Court. Witnesses to the complaint and accused must be available for cross-examination as and when there is direction to this effect by the Court.

Therefore, directed all the Criminal Courts in the country dealing with Section 138 cases to follow the above-mentioned procedures for speedy and expeditious disposal of cases falling under Section 138 of the Negotiable Instruments Act. Hence, when direction is given by the Hon'ble Supreme Court it is mandatory to follow the procedure as laid down in the aforesaid case in trial of N.I.Act cases. Hence, this court has followed the procedures and directions issued from time to time by the Hon’ble Supreme Court and also the directions issued in the case of **Indian Bank Association & Ors vs Union Of India & others.**

17. In the present case the advocate for complainant has argued that, based on Ex.P.1 to P.10 as already explained the complainant has proved existence of legally recoverable debt based on sufficient documents and also proved that, the accused issued cheque for Rs.4,70,000/- having admitted the balance due from the accused and towards repayment of the same and when same was presented to his Bank for collection, it was returned for the reason “Funds insufficient”. Hence, he got issued a legal notice dated 19.11.2018 which was served to the accused on 27.11.2018. Hence, sufficient opportunities were given to the accused to repay the amount, but she failed to repay the same. Hence, he has prayed that he has proved the ingredients of section 138 of N.I.Act. So prays for conviction of accused.

18. As stated above, the complainant has established the fact that, the accused has issued cheque for repayment of loan in favour of the complainant and same has been bounced for above said reason. The complainant also established all required ingredients to constitute an offence punishable under section 138 of N.I.Act.

19. It is the argument of advocate for accused that, the complaint itself is not maintainable as GPA holder who gave the evidence has no knowledge about any of the transaction. He has argued that, it is argued by advocate for accused that only 4 EMI was pending and the complainant has shown exorbitant amount of Rs.4,70,000/-. The cheque was never issued for repayment of any loan amount. There was an arbitration done by complainant Company and exparte order was obtained. The accused has challenged the same in AC No.AS103/2019 and the matter was stayed with condition of depositing 50% of awarded amount of Rs.4,70,000/- and she has already deposited Rs.2,65,000/- after filing of this case in pursuance of arbitration award. The arbitration appeal was allowed and arbitration award was set aside by the District Court. Pendency of this arbitration case is not informed in the present case, hence offence under Section 138 of N.I. Act is not maintainable, when already arbitration award is passed. He again argued that, when accused has already given Rs.2,65,000/- as per the order of the Court, this case has to be dismissed and there is no due amount payable by the accused. Hence, he has prayed to dismiss the complaint and acquit the accused as the cheque issued for security is mis used by the bank for recovery of a loan higher than what actually is disbursed by the bank.

20. The complainant is throughly cross examined about the cheque and how it was given by the accused. It is only the defense of the accused that, at the time of loan

agreement they have taken blank cheque which was misused by them and they have filed a false case. The accused has admitted that, she has taken vehicle loan from complainant Company to the tune of Rs.8,00,000/-.

21. In the cross-examination it is suggested that, the arbitration case was filed by Manju.N.Gowda, Advocate in AS No.103/2019. It is admitted that, the same is pending before the Court and in the stay order, 50% is ordered to be deposited in the bank by the accused and accused has complied the order and deposited Rs.2,65,000/- after filing of the case. It is suggested that, accused was due to pay only 2 installments, but heavy interest was imposed and the cheque which was given as security was filled by them for Rs.4,70,000/- and a false case is filed by them. Complainant has denied this aspect. It is also suggested that, some agent of the Company had collected both EMI from the accused and they did not deposit the same to the Company. It is also suggested that, accused is not due to pay any amount to the complainant Company. All these suggestions are denied by the complainant.

22. Accused has led evidence as DW.1 and produced arbitration award, bank statement to show that she has paid Rs.2,65,000/- on 14.11.2019, 16.12.2019 and 23.01.2021. Apart from this, there is no document to show that she has paid the entire amount of Rs.4,70,000/-. She has clearly stated that the amount of Rs.1,65,000/- was deposited by her

as per the order of DRT. Now, the arbitration award is set aside and there is no award against this accused, hence if this case is also acquitted, then the complainant cannot recover any amount from the accused towards balance loan amount. Apart from Ex.D.1 and D2 the accused has not produced any document to show that, she has made payment towards her loan and not liable to pay the amount shown in the cheque as on date.

23. When availment of loan amount is admitted by the accused and issuance of cheque as security is admitted and she failed to prove that she has repaid the entire loan as on the date of presentation of the cheque, I am of the opinion that, the essential ingredients of Section 138 of N.I. Act is proved by the complainant. In such circumstances this court has relied upon the recent decision of The Hon'ble Supreme Court in **Criminal Appeal Nos.1269-1270 of 2021 arising out of SLP (Criminal) No.252-253/2020 in the case of Sripati Singh (since deceased) through his son Gaurav Singh V/s The State of Jharkhand and another**, wherein, a similar case was discussed and where a cheque issued as security can be presented for recovery of loan amount towards discharge of loan. The Hon'ble Supreme Court has relied upon the decision already passed in **Sampelly Satyanarayana Rao V/s Indian Renewable Enery Development Agency Ltd (Criminal Appeal No.867 of 2016) and in M/s. Womb Laboratory Pvt. Ltd V/s Vijay**

Ahuja and Another (Criminal Appeal No.1382-1383-2019), wherein, it held that;

> We are of the view that the question whether a post dated cheque is for discharge of debt or liability depends on the nature of the transaction. If on the date of the cheque liability or debt exists or the amount has become legally recoverable, the Section is attracted and not otherwise.
>
> It is not undisputed that the loan was duly disbursed on 28.02.2002 which was prior to the date of the cheques. Once the loan was disbursed and installments have fallen due on the date of the cheque as per the agreement, dishonour of such cheques would fall under Section 138 of N.I.Act. The cheques undoubtedly represent the outstanding liability.

It is clearly discussed and held in the said citation that, whether the cheque represents discharge of existing enforceable debt or liability or whether it represents advance payment without there being subsisting debt or liability. In the said case, it is held that, 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 fulfillment 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 time-frame 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 represent the same. On such presentation, if the same is dishonored, the consequences contemplated under Section 138 and other provisions of N.I. Act would flow.

24. The materials brought on record are not sufficient to shift the burden of proof upon the complainant and the accused has not discharged her primary onus. But, based on Ex.D.1 and D.2, which is Arbitration Judgment in AS No.186/2019 and statement of account, Ex.D.2 the accused has paid Rs.2,65,000/- after filing the case and the outstanding amount is now only Rs.2,05,000/-. I am of the opinion that, the complainant is entitled to claim at the most this amount of Rs.2,05,000/- and not Rs.4,70,000/-. With these observations I am of the opinion that the complainant has succeeded to prove the ingredients of section 138 of N.I.Act against the accused. Hence I have answered Point No.1 in the "**Affirmative**".

25. **<u>POINT NO.2</u>** : The very purpose of enactment of N.I.Act is to promote the use of Negotiable Instrument while to discard the issuance of cheque without having sufficient funds in their account. Such being the case, the intention of the legislature is that the complainant be suitably compensated by accused be punished for his act. There is no provision in the Code of Criminal Procedure for imposing default sentence for enforcement of payment of compensation. In this regard, the Hon'ble Supreme Court in a decision reported in 1988(4) SCC 551 in the case of Hari Singh vs. Sukhbir Singh and others at para No.11 of the judgment was pleased to hold that, the court may enforce an order by imposing sentence by default. This view of Hon'ble High Court was again re-affirmed in a decision reported in 2002(2) SCC 420 in the case of Suganthi Suresh Kumar Vs. Jagadheeshan at para No.11 of the judgment and it is pleased to hold that:

When this court pronounced in the case of Hari Singh vs. Sukhbir Singh that a court may enforce an order to pay compensation by imposing the sentence in default it is open to all courts in India to follow the said course. The said legal position would continue to hold good until it is overruled by a Bench of this court.

Therefore, it is deemed fit to provide a default sentence in order to enforce the payment of compensation. Upon the discussion made above, I proceed to pass the following:

O R D E R

Acting U/Sec.255 (2) of Cr.P.C. accused is found guilty for having committed the offence punishable under section 138 of Negotiable Instruments Act.

The accused is hereby convicted and sentenced to pay a fine of Rs.2,10,000/- and in default to pay the fine, she shall undergo a simple imprisonment for a period of six months.

Out of the fine amount recovered, an amount of Rs.2,05,000/- shall be paid to the complainant as compensation under section 357(3) of Cr.P.C. and the remaining Rs.5,000/- shall be confiscated to the State towards expenses of the court proceedings.

Office is directed to issue copy of this judgment to the accused free of cost.

The Bail bond and surety bond executed by the accused stands cancelled.

(Dictated to the stenographer, transcript thereof, corrected by me and then pronounced in the open court this the 2nd day of February,2023).

(Poornima.N.Pai),
XI Addl. Small Causes Judge and
ACMM, Bangalore.

A N N E X U R E

List of the witnesses examined on behalf of complainant:

PW1	Sri.Sadananda.C.V.

List of the documents exhibited on behalf of complainant:

Ex.P.1	Cheque
Ex.P.1(a)	Signature of accused on Ex.P.1
Ex.P.2	Bank memo
Ex.P.3	Office copy of Legal Notice
Ex.P.4	Postal Receipt
Ex.P.5	Postal acknowledgement
Ex.P.6	Statement of Accounts
Ex.P.7	Proposal of loan
Ex.P.8	Board Resolution
Ex.P.9	Hire Purchase Agreement
Ex.P.10	Notarized copy of Memorandum and Articles of Association.

List of the witnesses examined on behalf of accused:

DW.1	Smt.Punitha Munesha

List of the documents marked on behalf of accused:

Ex.D.1	Certified copy of Judgement in Com.A.S. No.186/2019.
Ex.D.2(a), (b) & (c)	Statements of Accounts

(Poornima.N.Pai),
XI Addl. Small Causes Judge and ACMM,
Bangalore.

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