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	सत्यमेव जयते	Registered on	:	06/02/2025		
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		Duration	:	Years	Months	Days
				01	05	28

IN THE HON'BLE COURT OF 3rd ADDL. SESSIONS JUDGE

Dist. : Jamnagar

Exh :- 31

Criminal Appeal No. : 69/2025		
Appellant (Original Accused)		**JANAKBA NARENDRASINH JADEJA** Age: 55 Years, Occupation: Household Work, Residing At : Swaminarayan Bhagat's Delo, Khodiyar Colony, Opposite Raj Chambers, Aerodrome Road, Jamnagar. Permanent Resident at : Village-Kathidewariya, Khambhaliya.
Versus		
Respondent (Respondent - Original Complainant)	1.	**M. D. TRADING COMPANY** *Through Power of Attorney* : **SANKABHAI PRABHATBHAI DESAI** Age: 64 Years, Occupation: Financier, Residing at : 201, Indraprasth Complex, Bedi Gate, Jamnagar.
	2.	**STATE OF GUJARAT** *Through* : Ld. A.P.P., Jamnagar.

APPEARANCE :-

Ld. Advocate for the Appellant	*Mr. N. D. Makwana* *Mr. D. R. Sodha*
Ld. Advocate for Respondent No. 1-Orig. Complainant	*Mr. R. R. Raval*
Ld. A.P.P. for the Respondent No. 2 - The State	*Mr. D. A. Jivrajani*

APPEAL UNDER SECTION 415 OF B.N.N.S., 2023 (U/S. 374(3) OF CODE OF CRIMINAL PROCEDURE AGAINST

CONVICTION FOR OFFENCE PUNISHABLE UNDER SECTION 138 OF NEGOTIABLE INSTRUMENTS ACT, 1881, VIDE JUDGMENT AND ORDER DATED 10/01/2025 OF CRIMINAL CASE NO. 7006/2017 PASSED BY LD. 7th ADDL. CHIEF JUDICIAL MAGISTRATE, AT JAMNAGAR.

-:: JUDGMENT ::-

[1]. The present Appellant is the Original Accused and the Respondent No.1 is the Original Complainant and they will be referred here-in-after by their original status as Accused and Complainant for the sake of brevity. The Respondent No. 2 is the State.

[2]. The Criminal Case No. 7006/2017 was filed against the present Appellant / Original Accused for the offence punishable under Section 138 of Negotiable Instruments Act, 1881, in the trial Court, by the Respondent No1 - Complainant. After conclusion of the trial, the Ld. 7th Additional Chief Judicial Magistrate, Jamnagar, was pleased to pronounce the Judgment and Order dated 10/01/2025 in Criminal Case No. 7006/2017 and was pleased to record the conviction of the Accused under Section 255(2) of Criminal Procedure Code, 1973, for the offence punishable under Section 138 of Negotiable Instruments Act, 1881 and the Accused was sentenced to simple imprisonment for a period of 2 years and fine of Rs.16,06,500/-, which is to be paid as compensation within 90 days and in case of default in payment of fine, the Accused will further suffer simple imprisonment for 4

Months. Being aggrieved and dissatisfied by the said Judgment and Order dated 10/01/2025, the present Appellant / Original Accused has preferred this appeal under Section 415 of B.N.S.S. (i.e. Section 374 of Code of Criminal Procedure, 1973).

[3]. After registering the appeal, notice was issued to the Respondents. The Respondent / Original Complainant had appeared through Ld. Advocate and opposed & strongly objected the appeal and submitted that the cheque in question was issued against the legal debts and liability and the order of the Ld. Trial Magistrate is just and proper and requested for not to interfere with the said order and to dismiss the appeal. The Respondent No.2 - State had appeared through the Ld. A.P.P. and supported the case of the Respondent No. 1 – Original Complainant and requested to dismiss the appeal.

[4]. For adjudication of this appeal, following points for determination, arises :-

:: **POINTS FOR DETERMINATION** ::

1	Whether the complainant has failed to prove beyond reasonable doubt that the Accused has committed the offence punishable under Section 138 of Negotiable Instruments Act, 1881 ?
2	Whether the Judgment and Order dated 10/01/2025 passed in Criminal Case No. 7006/2017 by Ld. 7th Additional Chief Judicial Magistrate, Jamnagar, is erroneous or illegal or perverse or with material

	irregularity, which requires interference by this Court and whether the said Judgment and Order deserves to be quashed and set aside ?
3	What's Order ?

[5]. My findings, arrived at, of the above stated points, are as under :

-: <u>**F I N D I N G S**</u> :-

1	In **NEGATIVE.**
2	In **NEGATIVE.**
3	As per **FINAL ORDER**

[6]. I have heard the Ld. Advocate Mr. N. D. Makwana with Ld. Advocate Mr. D. R. Sodha for the Appellant – Original Accused and the Ld. Advocate Mr. R. R. Raval for the Respondent No.1 / Original Complainant and Ld. A.P.P. D. A. Jivrajani for the Respondent No.2 / State. I have also considered the impugned Judgment and Order dated 10/01/2025 passed in Criminal Case No. 7006/2017 by Ld. 7th Addl. Chief Judicial Magistrate, Jamnagar and also gone through the evidence on record of the proceeding of the Criminal Case No. 7006/2017. I have considered the Written Argument at Exh.-19 of the Appellant / Accused and the Written Argument at Exh.-22 of the Complainant / Respondent no. 1. The stay was granted vide Order dated 10/02/2025 below application Exh.-5, on condition of depositing 20% of cheque amount i.e. Rs. 3,21,300/- and sentence order was suspended.

[7]. The reasons, for the findings arrived at, of the above Points, are as under :

: **R E A S O N S** :

POINT No. 1 to 3 :

(7.1). It is deposed by C.W. No. 1 – Mr. Sankabhai Prabhatbhai Desai in his examination-in-chief at Exh.-4 that the Accused had earlier taken a Truck on loan from Sundaram Finance Company and the due amount of Rs.9,00,000/- has been paid by the complainant through cheque No. 141689 dated 09/03/2015 for Rs. 9,00,000/-, whose Receipt No. CRNR/406644 dtd.10/03/2015 for Rs. 9,00,000/- was issued by Sundaram Finance Company and hence, the Accused had taken loan of Rs.9,00,000/- through cheque by mortgaging his Truck No. GJ-10-X-9656 on dated 09/03/2015 and it's hypothecation entry is also done in the R.T.O. Jamnagar Office and the Accused had also executed an agreement as well as promissory note on dated 09/03/2015 and even the name of the complainant's hypothecation is also mentioned in R.T.O. Certificate dtd. 26/03/2015 and the Accused has to repay the said loan amount monthly installments each of Rs.54,000/-, but the Accused had not paid a single amount and the Accused wants to sell his said mortgaged truck and for the remaining dues along with interest, the Accused had given cheque having cheque No.

945025 for Rs.16,06,500/-, dtd.06/10/2017 of I.C.I.C.I. Bank, Jamnagar Branch, for discharging the said liability, in favour of the Complainant, but the said cheque at Exh.-24 was returned unpaid and therefore, the complainant clearly established that the Cheque in question was given to discharge the legal debt and liabilities of the Accused.

(7.2). It is further deposed by C.W. No. 1 – Mr. Sankabhai Prabhatbhai Desai in his examination-in-chief at Exh.-4 that he had accordingly deposited the said Cheque No. 945025 at Exh.-24 in his bank, but the bank had returned the Cheque No. 945025 at Exh.-24 unpaid with return memo dated 07/10/2017 at Exh.-25 with the reason – 'Funds Insufficient'. The said return memo dated 07/10/2017 at Exh.-25 alongwith Cheque No. 945025 at Exh.-24, was then returned back unpaid to the Complainant. The oral evidence of the Complainant at Exh.-4 get fully corroborated from the return memo at Exh.-24.

(7.3). It is further deposed by C.W. No. 1 – Mr. Sankabhai Prabhatbhai Desai in his examination-in-chief at Exh.-4 that he had issued legal notice dated 10/10/2017 at Exh.-26 issued through his Ld. Advocate to the Accused, which was served. The said oral evidence get corroborations from legal notice at Exh.-26, Postal Payment Receipt at

Exh.-27 and Postal RPAD Acknowledgment Card at Exh.-28. It is further deposed by C.W. No. 1 – Mr. Sankabhai Prabhatbhai Desai in his examination-in-chief at Exh.-4 that the Accused had neither given it's reply nor had paid the amount of dishonoured cheque and therefore, the Complainant had filed criminal complaint.

(7.4). It is defense of Accused that the postman is being not examined to prove that notice was sent and is served. If we go through Postal RPAD Acknowledgment Card at Exh.-28, then it clearly shows that the postman had went at given address & delivered it. The postman is not required to examine in view of presumption under Section 114(e) of Indian Evidence Act, 1872. In light of provision made under Section 27 of General Clause Act and Section 114(e) of Indian Penal Code, 1872, notice send by prepaid Regd. A. D. Post at correct address, is deemed to be served.

(7.5). There is neither oral nor documentary evidence to show that the outstanding due amount of Rs.16,06,500/- is being paid up, to the original Complainant by the Accused. Under such set of evidences, the ingredients attracting the offence punishable under Section 138 of Negotiable Instructions Act, are being proved and therefore, the Ld. Trial Magistrate has correctly recorded the conviction of the Accused and sentence him.

(8.1). The Learned Advocate for the Accused has vehemently argued that the Complainant is doing trade finance without any licence under The Gujarat Money-Lenders Act, 2011 and charging 2% interest per month and therefore, he is not entitled to recover the money. Further, the Ld. Advocate for the Accused has vehemently argued that as per the notification, interest cannot be charged more than 12% per annum in secured loan and interest cannot be charged more than 15% per annum in unsecured loan, whereas in the present case, the complainant is charging interest at the rate of 2% per annum. The Ld. Advocate for the Complainant has vehemently argued that there may be bar to recover the money under Civil Law, but the present case is of Criminal Offence, wherein the Complainant had paid up the outstanding finance amount of the vehicle of the Accused with the Sundaram finance company and that too by Cheque / Bank Transaction and the same is supported with an Agreement at Exh.-29 and Promissory Note at Exh.-30 and the same is also registered in the R.T.O. Office as a hypothecation of the Complainant as per Certificate at Exh.-31. The Ld. Advocate for the Complainant has further argued that the ingredients of Section 138 of Negotiable

Instruments Act, 1881, are : the Cheque was given to discharge debts or liabilities and it is returned unpaid and even after the issuance of Legal Notice, the Cheque amount is being not paid and in such a circumstances, the Criminal Office punishable under Section 138 of Negotiable Instruments Act, 1881, is made out and the same is not barred due to violation of any provisions of either Income Tax Act or The Gujarat Money-Lenders Act, 2011.

(8.2). The Ld. Advocate for the Appellant has relied on the decision delivered by the Hon'ble High Court of Bombay, at Aurangabad (Coram : Hon'ble Justice P.R. Borkar, J) in case of [1]**ANIL S/o. BABURAO KATARIA Vs. PURSHOTTAM S/o. PRABHAKAR KAWANE**, wherein observed that a loan advanced by a money lender who is doing business of money lending without licence is not a debt or other liability and provisions of Section 138 of the Act will not apply to such transaction. In the light of above, it cannot be said that in the present case, that the cheque issued by the Respondent in favour of the applicant was for the liability enforceable in law. In the said case, the issue was also whether the Complainant had actually lent Rs.4,00,000/- and whether he was capable to give such amount? Income of the

[1] ***ANIL S/o. BABURAO KATARIA Vs. PURSHOTTAM S/o. PRABHAKAR KAWANE : CrAppln 630/09 IN CrA(STAMP) 139/09, D/- 21/11/09***

Complainant for the year 2002-03 was Rs.60,000/- and for the year 2003-04 was Rs.57,989/- and there was no other documentary evidence to prove that the Complainant had actually given 4 lacs, whereas the defense was he had borrowed Rs.10,000/- and Rs.20,000/- and repaid Rs.50,000/-. In the present case, it is not the case of the Accused that the Complainant had not given the amount of Rs.9,00,000/-. Secondly, in the present case, there was a finance of Sundaram Finance on the vehicle of the Accused and the Complainant had paid the Rs.9,00,000/- through bank to the Sundaram Finance Company on behalf of the Accused and hypothecation of the Complainant is also registered in R.T.O. Office / R.C. Book. Thus, the facts and circumstances of the present case is different. Similarly, the Ld. Advocate for the Appellant has relied on the decision delivered by the Hon'ble High Court of Bombay, at Nagpur (Coram : Hon'ble Justice A.P. Bhangale, J) in case of [2]**SMT. NANDA W/o. DHARAM NANDANWAR Vs. NANDKISHOR S/o. TALAKRAM THAOKAR**, but it is having different facts and circumstances than that of the present case. In the present case, the money paid by the Complainant by cheque to the financier of the Accused – Sundaram Finance company and hypothecation of the Complainant is also recorded

[2] ***SMT. NANDA W/o. DHARAM NANDANWAR Vs. NANDKISHOR S/o. TALAKRAM THAOKAR : CrA 467/09, D/-12/1/10***

in the R.C. Book of the R.T.O.

(8.3a). The Ld. Advocate for the Original Complainant has relied on the decision delivered by the Hon'ble High Court of Calcutta (Coram : Hon'ble Justice P.N. Sinha, J) in case of [3]**SAMARENDRA NATHA DAS Vs. SUPRIYO MAITRA**, it has already been indicated above that learned Magistrate rightly issued process and rightly rejected prayer of the accused petitioner for discharging him. **The alleged violation of provisions of Income Tax Act, Indian Contract Act and Money Lenders Act are not at all a bar for continuation of the present criminal proceeding under section 138 of the NI Act** in view of the materials disclosed in the petition of complaint read with demand notice. Here a cheque was dishonoured when presented by complainant for encashment and it was accompanied subsequently by demand notice to the accused petitioner who issued the cheque, asking him to make payment of dishonoured cheque amount. In spite of receipt of demand notice, the amount of the bounced cheque was not paid and naturally all the initial ingredients of initiation of a proceeding under section 138 of the NI Act was complete.

(8.3b). It is held in the decision delivered by the Hon'ble

[3] ***SAMARENDRA NATHA DAS Vs. SUPRIYO MAITRA***
: 2006 AICLR 4 337 = 2005 SCC ONLINE CAL 628 : CRR 175/2005, D/- 16/12/05

Chhattisgarh High Court (Coram : Hon'ble Justice SANJAY KUMAR JAISWAL, J) in case of [4]**PURANLAL PESHWANI Vs. KU. RESHU KAUR** that **Objects of NI Act and Money Lenders Act are different** and **Money Lenders Act do not have overriding effect on NI Act** and **it is not essential element for offence of cheque dishonour that if complainant had given loan, she should be registered and licensed under Money Lenders Act**. Complainant had presented sufficient evidence to fulfill essential elements of crime under S.138 of NI Act. **Acquittal of accused on ground that complainant did not have money lending license, liable to be set aside**.

(8.3c). It is held in the decision delivered by the Hon'ble Rajasthan High Court (Coram : Hon'ble Justice S. R. BRAHMBHATT, J) in case of [5]**MANISHBHAI BHARATBHAI SHAH Vs. STATE OF GUJARAT** that **Complaint not liable to be dismissed on the ground that complainant was a money lender and failed to produce valid licence of money lending**, **since transaction made on basis of negotiable instrument falls under exclusion of Cl. (f) of S. 2 (9) of Bombay Money Lenders Act**.

(8.3d). It is held in the decision delivered by the Hon'ble

4 *PURANLAL PESHWANI Vs. KU. RESHU KAUR : AIRONLINE 2023 CHH 961 = ACQA 163/17, D/- 22/11/2023*

5 *MANISHBHAI BHARATBHAI SHAH Vs. STATE OF GUJARAT : AIR 2007 (NOC) 1571 (GUJ.) = 2007 (5) AKAR (NOC) 688 (RAJ.) = CrA 2361/06, D/- 28/02/2007*

Bombay High Court (Coram : Hon'ble Justice A. P. LAVANDE, J) in case of [6]**SHEIKH SHABBIR Vs. SHAIKH YUSUF** that **returning amount, which was advanced by complainant to accused in terms of memorandum of understanding, cannot be termed as money lending transaction** and **Transaction not hit by Goa Money Lenders Act (2001)**.

(8.3e). It is held in the decision delivered by the Hon'ble Madhya Pradesh High Court (Coram : Hon'ble Justice N. K. GUPTA, J) in case of [7]**DURGESH CHOURASIA Vs. SHIV KUMAR TIWARI** that cheques were given for payment of money lent to the petitioner and the **ground that since the complainants are money lenders, they cannot recover their money without their registration as money lenders** **is not tenable**.

(8.3f). It is held in the decision delivered by the Hon'ble Delhi High Court (Coram : Hon'ble Justice VIBHU BAKHRU, J) in case of [8]**GUDDO DEVI ALIAS GUDDI Vs. BHUPENDER KUMAR** that the Plea that **debt claimed by complainant is not enforceable by virtue of provisions of Punjab Registration of Money Lenders Act, 1938** and

[6] ***SHEIKH SHABBIR Vs. SHAIKH YUSUF***
: 2012 Cr.L.J. 4743 = 2012 ACD 1345 (BOM) = CrA 56/10, D/- 10/09/12

[7] ***DURGESH CHOURASIA Vs. SHIV KUMAR TIWARI***
: 2013 ACD 129 (MP) = MCrC 8240/11, D/- 15/05/12

[8] ***GUDDO DEVI ALIAS GUDDI Vs. BHUPENDER KUMAR***
: AIRONLINE 2020 DEL 252 = (2020) 3 CCC 729 (DEL) = CrRP 1246/19, D/- 11/02/20

further plea that **debt owed by accused was rendered unenforceable by virtue of provisions of the Income Tax Act**, **is also unmerited** as S. 269SS of Act, **does not render debt unenforceable or precludes lender from recovering same** and Conviction was proper.

(8.3g). It is held in the decision delivered by the Hon'ble Madras High Court (Coram : Hon'ble Justice K. B. K. VASUKI, J) in case of [9]**A. GUNASEKARAN Vs. P. VELUSAMY** that Accused **borrowed Rs. 2 Lakhs** from complainant and **agreed to pay interest @ 24% p.a.** and **Plea** by accused on dishonour of cheque issued by him, that **interest chargeable at 24% p.a. is prohibited** u/S. 3 of Tamil Nadu Prohibition of Charging Exorbitant Interest Act (38 of 2003) r/w S.7 of Tamil Nadu Money Lenders Act (26 of 1957), **cannot be enforced in any court of law and therefore, ingredients of offence u/S. 138 of N.I. Act, not attracted** . It is held that **such plea is not tenable** and **as the borrowal is supported by pronote**, **provisions of said Acts are not applicable**.

(8.3h). It is held in the decision delivered by the Hon'ble Hyderabad High Court (Coram : Hon'ble Justice C. PRAVEEN KUMAR, J) in case of

[9] ***A. GUNASEKARAN Vs. P. VELUSAMY***
: 2014 ACD 341 (MAD) = CrOP 15010/09, D/- 23/10/13

[10]VASUNDHARA PROJECTS Pvt. Ltd. Vs. STATE OF ANDHRA PRADESH that Plea by accused that there was no licence with complainant to do money lending business and therefore complaint u/S.138 of N.I. Act is not maintainable. Such plea is liable to be rejected. Money advanced by a Company in the form of loan is excluded from purview of Andhra Pradesh (Telangana Area) Money Lenders Act.

(8.3i). It is held in the decision delivered by the Hon'ble Punjab & Haryana High Court (Coram : Hon'ble Justice H. S. MADAAN, J) in case of [11]MANOJ KARWASARA Vs. PARHLAD SONI that Dismissal of 6 out of 66 complaint under S.138 of Negotiable Instruments Act (26 of 1881), for reasons of complainant having been found to be professional money lender practicing money lending without licence, is not proper.

(8.3j). It is held in the decision delivered by the Hon'ble Punjab & Haryana High Court (Coram : Hon'ble Justice JASJIT SINGH BEDI, J) in case of [12]AMARJEET SINGH Vs. OM PAL that accused disputing issuance of notice, could have made the payment on receipt of summons of Court. Plea that

[10] *VASUNDHARA PROJECTS Pvt. Ltd. Vs. STATE OF ANDHRA PRADESH : 2014 ACD 1031 (HYD) = (2015) 2 RECCRIR 98 = CrP 6355/13, D/- 28/01/14*

[11] *MANOJ KARWASARA Vs. PARHLAD SONI : 2021 Cr.L.J.(NOC) 454 (P&H) = 2020 ACD 864 (PANDH) = CrMA 599/14, D/- 17/02/2020*

[12] *AMARJEET SINGH Vs. OM PAL : 2023 ACD 596 (PANDH) = AIRONLINE 2023 P&H 343 = CRR 3183/14, D/- 17/03/23*

<u>complainant was a money lender</u>, **<u>accused cannot rebut presumption drawn against him</u>**, as, **<u>his signature on cheque stands admitted</u>** and **there is no principle of law that a financier cannot initiate a complaint U/S.<u>138 of Negotiable Instruments Act (26 of 1881)</u>**. It is held that **<u>Conviction is proper</u>**.

(8.3k). It is held in the decision delivered by the Hon'ble Calcutta High Court (Coram : Hon'ble Justice AJAY KUMAR GUPTA, J) in case of [13]**<u>TANAY AGARWAL Vs. GIRIRAJ DAGA</u>** and in the decision delivered by the Hon'ble Calcutta High Court (Coram : Hon'ble Justice AJAY KUMAR GUPTA, J) in case of [14]**<u>SHONAK AGARWAL Vs. MOHAN JHANGIANI</u>** that **<u>Plea</u>** of accused was that **<u>complainant was not having valid money lending licence or certificate</u>** and hence he cannot institute complaint. It is held that **<u>the provisions of Bengal Money Lenders Act (10 of 1940), does not limit operation of S. 138 of N.I. Act</u>** and **<u>both are independent and mutually exclusive to each other</u>**. **<u>If a person advances a loan even without having a valid money lending licence or certificate, he can institute and prosecute complaint u/S. 138 of N.I. Act on basis of cheques</u>** and **<u>he has to satisfy only mandatory requirements of S. 138 of N.I. Act</u>**. It is held that proceedings were not liable to be quashed.

[13] ***TANAY AGARWAL Vs. GIRIRAJ DAGA***
: AIRONLINE 2024 CAL 1317 = CRR 1897/21, D/- 07/10/2024

[14] ***SHONAK AGARWAL Vs. MOHAN JHANGIANI***
: AIRONLINE 2024 CAL 1320 = CRR 1910/21, D/- 07/10/24

(8.4). In view above, it is crystal clear that if there is any violation of any provision of Income Tax Act or The Gujarat Money-Lenders Act, 2011, then the same will considered a different offence, but it will not purge or wipe out the offence committed by the Accused for the offence punishable under Section 138 of Negotiable Instruments Act, 1881.

(8.5). The Learned Advocate for the Accused has vehemently argued that the Complainant has not produced the copy of Income Tax Return. If the complainant has not disclosed the loan amount given to the Accused in his income tax return, then it may constitute the offence under provision of Income Tax Act for which the Income Tax Authority certainly take action against the complainant, but for the reasons that the said amount is not disclosed in the Income Tax Return, it cannot lead us to conclude that the Accused had not borrowed the money and that Accused had not given the cheque in question for discharge of their legal debt and liability. It may constitute a different offence against income tax return, but it cannot wipe out the offence punishable under Section 138 of Negotiable Instruments Act, 1881, committed by the present Accused. Hence, the said submission of the Ld. Advocate for the Accused is not acceptable.

(8.6). The Ld. Advocate for the Accused has vehemently argued that the Loan amount was Rs. 9,00,000/-, whereas the Cheque amount is Rs.16,06,500/-. The complainant has produced the Statement of Account a Exh.-35 showing outstanding amount of Rs.16,06,500/- and the Cheque at Exh.-24 is also Rs.16,06,500/-. It is deposed by C.W. No. 1 – Mr. Sankabhai Prabhatbhai Desai in his cross-examination at Exh.-4 that he is maintaining entries of the amount given to the Accused in the Books of Account. It is true that the Books of Account are not produced, but the Statement of the Account of the Accused is produced at Exh.-35 showing that the amount of Rs.16,06,500/- is outstanding. Hence, the said submission of the Ld. Advocate for the Accused could not be accepted.

(8.7). The Ld. Advocate for the Original Complainant has relied on the decision delivered by the Hon'ble Bombay High Court, at Nagpur (Coram : Hon'ble Justice A.S. Chandurkar & Hon'ble Justice Mrs. Vrushali V. Joshi, JJ) in case of [15]**PRAKASH MADHUKARRAO DESAI Vs. DATTATRAYA SHESHRAO DESAI**, wherein held that a transaction not reflected in the books of accounts and/or Income Tax returns of the holder of the cheque in due course can be permitted to be

[15] *PRAKASH MADHUKARRAO DESAI Vs. DATTATRAYA SHESHRAO DESAI : 2023:BHC-NAG:12352 = CrA 795/18, D/-19/8/23*

enforced by instituting proceedings under Section 138 of the Act of 1881 in view of the presumption under Section 139 of the Act of 1881 that such cheque was issued by the drawer for the discharge of any debt or other liability, execution of the cheque being admitted. Violation of Sections 269-SS and/or Section 271-AAD of the Act of 1961 would not render the transaction unenforceable under Section 138 of the Act of 1881.

(8.8). The Ld. Advocate for the Original Complainant has relied on the decision delivered by the Hon'ble Supreme Court (Coram : Hon'ble Justice R. Banumathi and Hon'ble Justice A.S. Bopanna, JJ) in case of [16]**D.K. CHANDEL Vs. M/s. WOCKHARDT LTD.**, wherein held that as rightly observed by the High Court, production of the account books/cash book may be relevant in the civil court; but may not be so in the criminal case filed under Section 138 of the N.I. Act. This is because of the presumption raised in favour of the holder of the cheque.

(8.9). The Ld. Advocate for the Accused has vehemently argued that the loan by the Complainant was given on the old vehicle. The Ld. Advocate for the Complainant has submitted that it is true that they have given the loan on old vehicle, which was

[16] ***D.K. CHANDEL Vs. M/s. WOCKHARDT LTD. : CrA 132/20, D/-20/1/20***

hypothecated with Sundaram Finance Company. The evidence shows that the Complainant had given the outstanding amount of loan to the Sundaram Finance company and released their hypothecation and get noted hypothecation of the Complainant in the R.C. Book of the R.T.O. Thus, it is refinanced. Therefore, it is but natural that the vehicle would have been old one and not new one, but the amount given by the Complainant is proved by Agreement at Exh.-29 and Promissory Note at Exh.-30 and hypothecation is proved by R.T.O. Certificate at Exh.-31. Hence, the said submission of the Ld. Advocate for the Accused could not be accepted.

(8.10). The Ld. Advocate for the Accused has vehemently argued that the excessive amount is being filled up in the Cheque than the outstanding amount. It is deposed by C.W. No. 1 – Mr. Sankabhai Prabhatbhai Desai in his cross-examination at Exh.-4 that as per the Agreement, they have made a calculation of the outstanding in the presence of the Accused and the Accused has given the Cheque of the said outstanding amount. Moreover, the Statement of the outstanding is produced at Exh.-35 which tallies with the Cheque Amount. Hence, the said submission of the Ld. Advocate for the Accused is not acceptable.

(8.11). At one point of time, the Ld. Advocate for the Accused has taken the defense in the cross-examination of C.W. No. 1 – Mr. Sankabhai Prabhatbhai Desai at Exh.-4 that no loan is given to the Accused. The Agreement at Exh.-29 and Promissory Note at Exh.-30 as well as Certificate of R.T.O. at Exh.-31 and the Receipt of Sundaram Finance at Exh.-32 clearly shows that the complainant had paid up the outstanding amount of vehicle finance of the Accused had with Sundaram Finance Company. Under such circumstances, the Complainant though have paid the amount to Sundaram Finance, but it was to refinance the loan amount on the vehicle of the Accused and therefore, it cannot be accepted that no loan was given to the Accused. It is held in the decision delivered by the Hon'ble Bombay High Court (Coram : Hon'ble Justice S. M. MODAK, J) in case of [17]**M/s. RAJ EXPORTS Vs. STATE OF MAHARASHTRA** that the **purpose of executing promissory note was to seek a promise from borrower to pay amount** and on that basis, **availability of remedy to file summary suit for recovery of money**, **does not debar lender/complainant to initiate action for offence under S.138 of NI Act**. Hence, the said submission of the Ld. Advocate for the Accused is not acceptable.

[17] ***M/s. RAJ EXPORTS Vs. STATE OF MAHARASHTRA***
: 2023 ACD 912 (BOM) = CrA 1158/04, D/- 13/04/23

(8.12). The Ld. Advocate for the Accused has vehemently argued that the blank Cheque with the signature of the Accused was obtained by the Complainant. It is clearly denied in the cross-examination of C.W. No. 1 – Mr. Sankabhai Prabhatbhai Desai at Exh.-4 that the blank cheque with signature of the Accused was taken. Further, the Accused has neither produced any document to show that he has made any police complaint or complaint to the bank that the said Cheque at Exh.-24 is misused or misplaced. The evidence given on oath by C.W. No.- 1 - Mr. Sankabhai Prabhatbhai Desai at Exh.-4 is not rebutted by any evidence and therefore, there is no reason to disbelieve the same. Moreover, if the Accused has given such signed cheque at Exh.-24 without filling any details, then the Accused has given the authority to the holder to fill-up the cheque details. Hence, the said submission of the Ld. Advocate for the Accused is not acceptable.

(8.13). The Ld. Advocate for the Appellant has relied on the decision delivered by the Hon'ble High Court of Bombay (Coram : Hon'ble Justice Abhay M. Thipsay, J) in case of [18]**GIRDHARI PARMANAND MOTIANI Vs. VINAYAK BHAGWAN KHAVNEKAR**, wherein there was no

[18] *GIRDHARI PARMANAND MOTIANI Vs. VINAYAK BHAGWAN KHAVNEKAR : 2016 ALL MR (CRI) 1909 = CrA 19/05 n 21/05, D/- 14/8/15*

genuine transactions on the basis of bills of exchange and in all probability taken the blank hundies and blank signed cheques at that time itself and there were number of suspicious feature about the case of the Complainant and the probability of the complainant had taken blank signed cheques from the Appellant was apparent, but such are not facts in the present case. Thus, the said authority will not assist the case of the Accused.

(8.14). The Ld. Advocate for the Original Complainant has relied on the decision delivered by the Hon'ble Supreme Court (Coram : Hon'ble Justice A.K. Sikari & Hon'ble Justice Ashok Bhushan, JJ) in case of [19]**KISHAN RAO Vs. SHANKARGOUDA**, wherein held that there is no valid basis for the High Court to hold that the accused has been successful in creating doubt in the mind of the Court with regard to the existence of the debt or liability. The appellant has proved the issuance of cheque which contained signatures of the accused and on presentation of the cheque, the cheque was returned with endorsement "insufficient funds". Bank official was produced as one of the witnesses who proved that the cheque was not returned on the ground that it did not contain signatures of the accused rather it was returned due to insufficient

[19] ***KISHAN RAO Vs. SHANKARGOUDA***
: AIR 2018 SC 3173 = 2018 (8) SCC 165 = CrA 803/18, D/-2/7/18

funds. We are of the view that the judgment of High Court is liable to be set aside on this ground alone.

(8.15). The Ld. Advocate for the Original Complainant has relied on the decision delivered by the Hon'ble Supreme Court (Coram : Hon'ble Justice A.S. Bopanna, Hon'ble Justice Surya Kant and Hon'ble Justice N.V. Ramana, JJ) in case of [20]**TRIYAMBAK S. HEGDE Vs. SRIPAD**, wherein held that applying the preposition of law as noted above, in facts of the present case, it is clear that signature on the cheque having been admitted, a presumption shall be raised under Section 139 that the cheque was issued in discharge of debt or liability.

(8.16). The Ld. Advocate for the Accused has vehemently argued that in-fact the transaction was with regards to selling the vehicle to the complainant. There is no document on record which shows that the vehicle in question was sold to the Complainant. Infact the Vehicle stood in the name of the Accused as revealing from R.T.O. Certificate at Exh.-31. Infact an Agreement at Exh.-29 and Promissory Note at Exh.-30 shows that the Accused has taken the loan on the vehicle. Hence, the said submission of the Ld. Advocate

[20] ***TRIYAMBAK S. HEGDE Vs. SRIPAD : CrA 849-850/11, D/-23/9/21***

for the Accused is not acceptable.

(8.17). The Ld. Advocate for the Accused has vehemently argued that the Complainant is doing the business with the different names of firm at the same address / office. A person might have an office, wherein he can do different business with multiple firms names, which is neither illegal nor unlawful. Hence, the said submission of the Ld. Advocate for the Accused is not acceptable.

(8.18). The Ld. Advocate for the Accused has vehemently argued that the possession of the vehicle is with the Complainant. It is deposed by the C.W. No. 1 – Mr. Sankabhai Prabhatbhai Desai in his cross-examination at Exh.-4 that the Accused and their surety had came and kept the vehicle with the Complainant. The Ld. Advocate for the Accused has submitted that the vehicle is being seized by the Complainant. It is clearly deposed by C.W. No. 1 – Mr. Sankabhai Prabhatbhai Desai in his cross-examination at Exh.-4 that they are not issuing the Vehicle and further deposed that the Accused and their surety had came and kept the Truck with the Complainant. Hence, the said submission of the Ld. Advocate for the Accused is not acceptable.

(8.19). The Ld. Advocate for the Accused has vehemently argued that the Vehicle was sold to the Complainant, but transferring the vehicle in the name of the Complainant takes few months and for security purpose, the signature of the Accused were taken in the Loan Papers. If the vehicle would have been sold, then it would have been transferred in the name of the Complainant, but the vehicle is not in the name of the complainant. On the contrary there is hypothecation of the Complainant on the said vehicle. Under such circumstances, it is difficult to accept that the loan documents were signed for security purpose by the Accused. Hence, the said submission of the Ld. Advocate for the Accused is not acceptable.

(8.20). The Ld. Advocate for the Complainant has vehemently argued that C.W. No. 2 – Shreyans Kiritbhai Bavsi at Exh.-60 is examined, who has deposed that the Cheque at Exh.-24 was returned unpaid and have produced the relevant documents from Exh.-62 to Exh.-65 and proved that the Cheque at Exh.-24 was returned unpaid and hence, the offence punishable under Section 138 of Negotiable Instruments Act, 1881, is made out as the Accused had not paid up the Cheque amount even after issuance of Legal Notice.

(8.21). The Ld. Advocate for the Accused has vehemently argued that the C.W. No. 2 – Shreyans Kiritbhai

Bavsi at Exh.-60 has no personal knowledge and specimen signature is not done in his presence. It is but natural that the signature in the specimen card would not have been done in the presence of said Witness / Officer of the Bank as the Account would have been opened much more earlier and the Bank Officers used to get transferred regularly on periodical time and therefore, the current officer would have no personal knowledge, but has produced the document which is part and parcel of the record of the Bank and therefore, the same could be considered and taken into consideration as evidence for appreciation. Hence, the said submission of the Ld. Advocate for the Accused is not acceptable.

(8.22). The Complainant has examined C.W. No. 3 – Dhiren Kumar Rameshbhai Prajapati at Exh.-68, who is an officer of the R.T.O. Office and has produced Form No. 24 at Exh.-71 and Vehicle History Report (Form-11) at Exh.-72. Thus, it clearly shows that the vehicle is in the name of the Accused. Moreover, Certificate at Exh.-31 shows that it is hypothecated to the Complainant. Thus, the said vehicle was hypothecated with the complainant against the loan given by the Complainant to pay up the earlier loan of Sundaram Company given to Accused on their vehicle.

(8.23). The Ld. Advocate for the Accused has vehemently argued that C.W. No. 3 – DhirenKumar Rameshbhai Prajapati at Exh.-68 has no personal knowledge with regards to the said hypothecation. As we have discussed earlier, same as the bank officer, the present witness is an officer of the R.T.O., who usually got transferred on a periodical period and therefore, he may not have personal knowledge, but he has produced the documents through proper custody and from the official record of the R.T.O. and therefore, there is no reasons to disbelieve him.

(8.24). The Ld. Advocate for the Accused has vehemently argued that if the Complainant wanted to purchase the vehicle having existing finance over it, then it can be transferred only after the loan amount is paid up. It is true that if there is finance on any vehicle and the vehicle is hypothecated, then unless the said amount is being paid up, the said vehicle cannot be transferred either in the new owner's name or in any other manner. The R.T.O. Certificate at Exh.-31 shows that the said vehicle is now hypothecated in favour of the Complainant and Payment Receipt issued by the Sundaram Finance at Exh.-32 shows that the earlier loan amount is being paid up by the complainant on behalf of the Accused. Thus, though the amount was paid by the Complainant to the Sundaram Finance Company, but it was on behalf of the Accused and therefore, the loan deemed to have been given to the Accused and not to the Sundaram Finance and the hypothecation of the said vehicle is already registered in favour of the Complainant. Hence, the said submission of the Ld. Advocate for the Accused is not acceptable.

(8.25). The Ld. Advocate for the Accused has vehemently argued that the Complainant had not produced the Firm Registration Certificate. It is true that at the time of filing Complaint, the Registration Certificate was not produced by the Complainant, but the evidence shows that thereafter, the Complainant had produced the Registration Certificate at Exh.-102. Hence, the said submission of the Ld. Advocate for the Accused is not acceptable.

(8.26). The Ld. Advocate for the complainant has vehemently argued that the Accused are taking different and contrary defenses. On the one hand, the defense of the Accused is that they have sold the vehicle to the complainant and on the other hand, they take the defense that there is no amount outstanding (i.e. amount paid up) and thirdly, the defense taken is that the blank cheques are being misused. Thus, the contrary defense are not tenable. Moreover, none of the said defense is being proved by the Accused. Moreover, the Legal Notice was issued to the Accused, but the Accused has not taken any pain to give its reply and take such defense at the relevant time and now, taking contrary defense, cannot be accepted, when they are not proved. Moreover, it is not the case of the Accused that they have not signed the Agreement at Exh.-29 and Promissory Note at Exh.-30 and the Cheque at Exh.-24. It is held in the decision delivered by the Hon'ble Bombay High Court (Coram : Hon'ble Justice N. A. BRITTO, J) in case of [21]NISHITH M. P. VERLEKAR Vs. ASHPAQUE MARFANI that the **Accused stated that he had taken loan from complainant who was money lender and repaid same with interest**. However **bare self serving statement of accused not sufficient to prove that accused repaid amount**. Also complainant in cross-examination stated that **he did not have Money Lenders licence** and he had advanced amount to accused by way of financial loan. **Accused as prudent businessman would have obtained cheque from complainant at time of payment**. Accused had failed to discharge onus placed on him and the **Accused is liable to be convicted**. Under such circumstances, the defense of the Accused could not be acceptable.

[21] ***NISHITH M. P. VERLEKAR Vs. ASHPAQUE MARFANI***
: 2010 (6) ABR (DOC) 37 (BOM.) = CrA 45/08, D/- 11/08/09

(8.27). The Ld. Advocate for the Original Complainant has relied on the decision delivered by the Hon'ble Supreme Court (Coram : Hon'ble Justice Brijesh Kumar, Hon'ble Justice B.N. Kirpal and Hon'ble Justice Ruma Pal, JJ) in case of [22]**HITEN P. DALAL Vs. BRATINDRANATH BANERJEE**, wherein held that it was necessary for the appellant at least to show on the basis of acceptable evidence either that his explanation in the written statement was so probable that a prudent man ought to accept it or establish that the effect of the material brought on the record, in its totality, rendered the existence of the fact presumed, improbable. (Vide Trilok Chand Jain Vs. State of Deihi 1975 (4) SCC 761). The appellant has done neither. In the absence of any such proof the presumptions under Sections 138 and 139 must prevail.

(9.1). The legal notice dated 10/10/2017 at Exh.-26 was send to the Accused. The Complainant has produced Postal RPAD Acknowledgment Card at Exh.-28, which is showing service of legal notice for offence under Negotiable Instrument Act and on service of the summons of the Hon'ble Trial Court of the complaint, the Accused had appeared through his Ld. Advocate. The purpose of issuing notice before filing the complaint is to give

[22] ***HITEN P. DALAL Vs. BRATINDRANATH BANERJEE***
: AIR 2001 SC 3897 = 2001 (6) SCC 16 = CrA 688/95, D/- 11/7/01

opportunity to the Accused to pay the money of the cheque in question within 15 days on the receipt of the notice. Even if we accept the defense that the notice at Exh.-21 is not served on the Accused, then on service of the summons of the Court and appearing before the Court, the Accused had to pay the cheque amount immediately to wipe out the offence punishable under Section 138 of Negotiable Instruments Act. The Accused had appeared before the Hon'ble Trial Court very long back, but within the period of 15 days from his appearance, the Accused had not tendered the money due under the cheque. Thus, the intentions of the legislature for issuance of legal notice is to give opportunity to the Accused to pay the money within 15 days. In case of non receipt of legal notice, the Accused could be afforded opportunity to pay the cheque amount within 15 days from the date of service of summons / appearing in Court. In the present case even after appearing in Court through Ld. Advocate, the Accused had not paid the cheque amount within 15 days or even till today and therefore, the offence punishable under Section 138 of Negotiable Instrument Act, cannot be purged / wiped out. Hence, the submission of the learned advocate for the Accused is not acceptable.

(9.2). It is the case of the Appellant / Accused that there was no sufficient time given to the Accused in their defense in the Trial Court. On going through the record of the case before the Trial Court, it reveals that whole necessary opportunity was given to the Accused, but Accused had neither wished to step into witness-box nor examined any of their witness. The Ld. Advocate for the Accused has cross-examined the witnesses of the complainant at great length and further statement of Accused was recorded, but the Accused had chosen not to step into witness-box to prove their defense. All these opportunities were given, but the Accused had chosen not the avail the said opportunities and therefore, it cannot be accepted that Accused did not get sufficient time for their defense. Hence, the said submission of the Learned Advocate for the Accused is not acceptable.

(9.3). It is the case of the Appellant / Accused that cheque was not given for discharge of liability. The legal liability under the cheque at Exh.-24 is corroborated by deposition of complainant at Exh.-4. The evidence clearly shows that the cheque in question was given for legal debt and was returned unpaid for Funds Insufficient. The Accused has not brought on record as to the cheque was given for purpose other than one stated in complaint and therefore the said defense of the Accused is not tenable in eyes of law.

(10.1). The Ld. Advocate for the Accused has relied on the decision delivered by the Hon'ble Gujarat High Court (Coram : Hon'ble Justice Mr. R. S. Gag, J) in case of [23]**RAVJIBHAI PRABHUDAS PATEL Vs. ADDITIONAL COLLECTOR COMPETENT AUTHORITY, U.L.C.** wherein held that when adverse inference could be drawn.

(10.2). The Ld. Advocate for the Accused has relied on the decision delivered by the Hon'ble Gujarat High Court (Coram : Hon'ble Justice Ms. Bela M. Trivedi, J) in case of [24]**M/s. BAJAJ FINANCE LIMITED Vs. POOJA NARAYAN KHETAN** wherein held that the Accused can raise probable defense even if no reply to notice is given.

(10.3). The Ld. Advocate for the Accused has relied on the decision delivered by the Hon'ble Bombay High Court (Coram : Hon'ble Justice Mr. Shrihari P. Davare, J) in case of [25]**GHANSHYAM KISAN UKIRADE Vs. SOU SUMAN KRISHNA PAWAR** wherein held that even if no reply to notice is given, defense could be made out from cross-examination of complainant.

[23] ***RAVJIBHAI PRABHUDAS PATEL Vs. ADDITIONAL COLLECTOR COMPETENT AUTHORITY, U.L.C. : 2007 (2) GLR 1690 (GUJ.) = SCA 5460/99, D/- 1-5-07***

[24] ***M/s. BAJAJ FINANCE LIMITED Vs. POOJA NARAYAN KHETAN : 2021(2) GLR 1757 (GUJ) = M.Cr.Appln. 18429/20, D/- 2-2-21***

[25] ***GHANSHYAM KISAN UKIRADE Vs. SOU SUMAN KRISHNA PAWAR : 2011(2) CRIMES 725 (BOM.) = Cr.Appln, 4188/09, D/- 29/7/10***

(10.4). Moreover, the Complainant had already proved his complaint beyond reasonable doubt and the Accused has not rebutted the same and therefore submission of Learned Advocate for the Accused is not acceptable that Accused have not committed any offence. Moreover, the admitted facts are not required to be proved in view of Section 58 of Indian Evidence Act, 1872.

(10.5). The Ld. Advocate for the Accused has relied on the decision delivered by the Hon'ble Karnataka High Court (Coram : Hon'ble Justice Mr. Pradeep D. Waingankar, J) in case of [26]**L. RAJU Vs. GURAPPA REDDY** wherein held that existence of debt or liability was to be established by cogent and convincing evidence.

(10.6). The Ld. Advocate for the Accused has relied on the decision delivered by the Hon'ble Gujarat High Court (Coram : Hon'ble Justice Mr. R. P. Dholaria, J) in case of [27]**KESHAVLAL PRABHUDAS PATEL Vs. ASHOKBHAI BACHUBHAI MAGANBHAI PATEL** wherein held that where the complainant had failed to prove that cheque was issued for legally enforceable debt, whereas in present case legal

[26] ***L. RAJU Vs. GURAPPA REDDY***
: 2015(4) CRIMES 430 (KARN.) = Cr.A. 13/10, D/- 9-7-15

[27] ***KESHAVLAL PRABHUDAS PATEL Vs. ASHOK BACHU MAGAN PATEL***
: 2020(2) GLR 1573 (GUJ.) = Cr.A. 24/07, D/- 13-9-19

debt of amount as stated in Cheque in question is duly proved by oral evidence of complainant and hence, the said authority will not be helpful to Accused in present case.

(10.7). The Ld. Advocate for the Accused has relied on the decision delivered by the Hon’ble Gujarat High Court (Coram : Hon’ble Justice Mr. D. H. Waghela, J) in case of [28]**SURESHCHANDRA CHANDRASHANKAR JOSHI Vs. STATE OF GUJARAT** wherein held that it is to be proved beyond reasonable doubt that debt was legally recoverable on the date of cheque in question.

(10.8). The Ld. Advocate for the Accused has relied on the decision delivered by the Hon’ble Gujarat High Court (Coram : Hon’ble Justice Dr. A. P. Thaker, J) in case of [29]**MAHESH BHANU VACHHANI Vs. STATE OF GUJARAT** wherein held that the Appellant Court to look into evidence adduced and to arrive at an independent conclusion as to whether proved beyond reasonable doubt or not and should give it's own reason for decision.

(10.9). The Ld. Advocate for the Accused has relied on the decision delivered by the Hon’ble Bombay

[28] ***SURESHCHANDRA CHANDRASHANKAR JOSHI Vs. STATE OF GUJARAT : 2010(1) GLR 601 (GUJ) = Cr.A. 1118/09, D/- 7-10-09***

[29] ***MAHESH BHANU VACHHANI Vs. STATE OF GUJARAT : 2021(1) GLH 389 (GUJ.) = Cr.A. No.2070/05, D/- 21/7/20***

High Court (Coram : Hon’ble Justice Mr. Abhay M. Thipsay, J) in case of [30]**MEERA S. CHIPLUNKAR Vs. ASHALATA RAWJI KONDKAR** wherein held that criminal case shall be proved beyond reasonable doubt and prosecution must succeed on it's own merits.

(10.10). The Ld. Advocate for the Accused has relied on the decision delivered by the Hon’ble Kerala High Court (Coram : Hon’ble Mrs. Justice K. Hema, J) in case of [31]**KAMALAMMAL Vs. C. K. MOHANAN & Anr.**, wherein held that issuance of blank cheque cannot give rise to presumption that implied authority is given to holder of cheque to fill it up towards discharge of debt etc.

(10.11). The Ld. Advocate for the Complainant has relied on the decision delivered by the Hon’ble Gujarat High Court (Coram : Hon’ble Justice D. H. Waghela, J) in case of [32]**HITENBHAI PAREKH PROPRIETOR, PAREKH ENTERPRISES Vs. STATE OF GUJARAT**, wherein held that **blank cheque** bearing signature of drawer delivered to payee. In such cases, “**there is an implied authority of the person receiving such cheque to complete it by filing the blanks**”. Amount so filled in would be

[30] *MEERA S. CHIPLUNKAR Vs. ASHALATA RAWJI KONDKAR*
: 2017(1) CRIMES 349 (BOM.) = Cr.A. 888/2005, D/- 2-7-15

[31] *KAMALAMMAL Vs. C. K. MOHANAN & Anr.*
: 2007 Cri.L.J. 3124 = Cr.A. 275/01, D/- 18/07/06

[32] *HITENBHAI PAREKH PROPRIETOR, PAREKH ENTERPRISES Vs. STATE OF GUJARAT*
: 2010(5) GLR 4136 = Cr.A. 1189/09, D/- 6/10/09

the amount intended to be paid by the drawer.

(10.12). It is relevant at this stage to refer the provision made under Section 20 of Negotiable Instrument Act, 1881, which is reproduced here-in-below :

Section 20 of Negotiable Instrument Act, 1881 :

(***Inchoate stamped instruments***) :-

Where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments, then in force in India, and either **wholly blank** or having **written thereon an incomplete negotiable instrument**, he thereby **gives prima facie authority** to the holder thereof **to make or complete**, as the case may be, upon it a negotiable instrument, **for any amount specified therein** and not exceeding the amount covered by the stamp. The person so signing **shall be liable** upon such instrument, in the capacity in which he signed the same, to any holder in due course for such amount:

Provided that no person other than a holder in due course shall recover from the person delivering the instrument any thing in excess of the amount intended by him to be paid thereunder.

(10.13). The Ld. Advocate for the Complainant has relied on the decision delivered by the Hon'ble Supreme Court (Coram: Hon'ble Justice J. Rohinton Fali Nariman and Hon'ble Justice Ms. Indu Malhotra, JJ) in case of [33]**T.P. MURGAN (D) THRO' LRs. Vs. BOJAN**, wherein held that under Section 139 of the Negotiable Instruments Act, 1881, **once a cheque has been signed and issued** in favour of the holder, there is **statutory presumption** that **it is issued in discharge of a legally enforceable debt or**

[33] ***T. P. MURGAN (D) THRO' LRs. Vs. BOJAN : CrA 950/18, D/- 31/7/18***

liability but this presumption is a rebuttable one, if the issuer of the cheque is able to discharge the burden that it was issued for some other purpose. In the present case, the Appellant has failed to produce any credible evidence to rebut the statutory presumption.

(10.14). The Ld. Advocate for the Complainant has relied on the decision delivered by the Hon'ble Supreme Court (Coram: Hon'ble Justice Mrs. R. Banumathi and Hon'ble Justice Mrs. Indira Banerjee, JJ) in case of [34]**BIR SINGH Vs. MUKESH KUMAR**, wherein held that if a **signed blank cheque** is voluntarily presented to the payee towards some payment, the **payee may fill up the amount and other particulars** and this in itself would not invalidate the Cheque and the onus would still be on the **Accused to prove that the Cheque was not in discharge of a debt or liability** by adducing evidence and **if the Cheque is otherwise valid, the penal provisions would be attracted**.

(10.15). It is relevant to reproduce the provision of presumption made under **Section 118, 119 and 139 of Negotiable Instrument Act, 1881** and are as follow :

Section 118 of N.I. Act :

[34] ***BIR SINGH Vs. MUKESH KUMAR : 2019(1) G.L.H. 338 = CrA 230/2019, D/- 6/2/19***

(**Presumptions as to negotiable instruments)** :

Until the contrary is proved, the **following presumptions shall be made** : -
(**a**) **of consideration**; that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration ;
(**b**) **as to date**; that every negotiable instrument bearing a date was made or drawn on such date ;
(**c**) **as to time of acceptance**; that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity ;
(**d**) **as to time of transfer**; that every transfer of a negotiable instrument was made before its maturity;
(**e**) **as to order of endorsements**; that the endorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;
(**f**) **as to stamp**; that a lost promissory note, bill of exchange or cheque was duly stamped ;
(**g**) **that holder is a holder in due course**; that the holder of a negotiable instrument is a holder in due course: provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an SP offence or fraud or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him.

Section 119 of N.I. Act :

(**Presumption on proof of protest**) :

In a suit upon an instrument which has been dishonoured, the Court shall, on proof of the protest, presume the fact of its dishonour, unless and until such fact is disproved.

Section 139 of N.I. Act :

(**Presumption in favour of holder**) :

It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability.

(10.16). Even the legal presumption as to negotiable instrument is raised under Section 118 of the Negotiable Instrument Act, 1881. When presumption is raised under Section 118 of Negotiable Instrument Act, 1881, the defense as to date, place, time, will have no merits. The decisions delivered in case of [35]**KAMLA S. Vs. VIDHYADHARAN M.J.**, [36]**C. ANTONY Vs. K.G. RAGHAVANWAIR**, will not assist to Accused looking the facts of present case.

(10.17). The Ld. Advocate for the Original Complainant has relied on the decision delivered by the Hon'ble Supreme Court (Coram : Hon'ble Justice Ms. Indu Malhotra and Hon'ble Justice Ajay Rastogi, JJ) in case of [37]**SUMETI VIJ Vs. M/s. PARAMOUNT TECH FAB INDUSTRIES**, wherein held that there is a presumption of consideration on proof of issuance of cheque and onus shifts to Accused to rebut presumption that cheque is not issued for discharge of any debt or liability and considering that, Accused not led any evidence in support of his defense, he failed to rebut presumption under Section 139 of N.I. Act and the conviction was confirmed.

(10.18). The Ld. Advocate for the Accused has submitted

[35] ***KAMLA S. Vs. VIDHYADHARAN M.J. : 2008(1) GLR 423 (SC)***
[36] ***C. ANTONY Vs. K.G. RAGHAVANWAIR : 2001(10) SRJ 470***
[37] ***SUMETI VIJ Vs. M/s. PARAMOUNT TECH FAB INDUSTRIES : 2021(3) GLR 2536 = Cr.A. 292/21, D/- 9/3/21***

that signed blank cheque was given as security cheque. The Ld. Advocate for the Complainant has relied on the decision delivered by the Gujarat High Court (Coram : Hon'ble Justice S. G. Shah, J) in case of [38]**ALOKBHAI PRAVINCHANDRA DESAI Vs. JAYENDRABHAI BHOGILAL THAKKAR**, wherein the defense of issuing cheque as security, was rejected.

(10.19). The Ld. Advocate for the Accused has relied on the decision delivered by the Hon'ble Kerala High Court (Coram : Hon'ble Justice K.P. Jyothindranath, J) in case of [39]**K. ASHOK NAIR Vs. C.V. VICHITHRAN**, wherein the products of the complainant's firm was supplied to the parties and the liability to collect the amount lies upon the commission agent. It was held that there is nothing to show that the said amount was actually received by the respondent / Accused and there is a legal liability to pay the said amount. In present case, legal liability is already proved, which is not rebutted by any reliable evidence. Being different facts & circumstances, the said authority will not be helpful to the Accused in light of facts of present case.

(10.20). The Ld. Advocate for the Original Complainant

[38] ***ALOKBHAI PRAVINCHANDRA DESAI Vs. JAYENDRABHAI BHOGILAL THAKKAR : 2016(3) Cr.LR 876 = 2017(1) GLH 288 = Cr.R.A. 101/16, D/- 23/09/16***

[39] ***K. ASHOK NAIR Vs. C.V. VICHITHRAN : 2018 JW (Ker) 796 = Cr.A. 2084/05, D/- 3/1/18***

has relied on the decision delivered by the Hon'ble Supreme Court (Coram : Hon'ble Chief Justice N. V. Ramana, Hon'ble Justice Surya Kant and Hon'ble Justice A. S. Bopanna, JJ) in case of [40]**TRIYAMBAK S. HEGDE Vs. SRIPAD**, wherein observed that keeping all aspects in view, the case put forth by the respondent does not satisfy the requirement of rebuttal even if tested on the touchstone of preponderance of probability. Therefore, in the present facts, it cannot be held that the presumption which had arisen in favour of the appellant had been successfully rebutted by the respondent herein.

(10.21). The Ld. Advocate for the Accused has relied on the decision delivered by the Hon'ble Supreme Court (Coram : Hon'ble Justice R. V. Raveendran and Hon'ble Justice J. M. Panchal, JJ) in case of [41]**KUMAR EXPORTS Vs. SHARMA CARPETS**, wherein held that when contrary not proved by respondent, presumption stood rebutted.

(10.22). The Ld. Advocate for the Accused has relied on the decision delivered by the Hon'ble Delhi High Court (Coram : Hon'ble Justice V. K. Jain, J) in case of [42]**S. K. JAIN Vs. VIJAY KALRA**, wherein held that to rebute the statutory presumption, an

[40] *TRIYAMBAK S. HEGDE Vs. SRIPAD : Cr.A. 849/11 & 850/11, D/- 23/09/21*
[41] *KUMAR EXPORTS Vs. SHARMA CARPETS*
: AIR 2009 SC 1518 = 2009(2) SCC 513 = Cr.A. 2045/08, D/- 16/12/08
[42] *S. K. JAIN Vs. VIJAY KALRA : 2014 (1) DCR 547 : Cr.A. 1011/13 D/- 6/3/14*

Accused is not expected to prove his defense beyond reasonable doubt.

(10.23). The Ld. Advocate for the Accused has relied on the decision delivered by the Hon'ble Supreme Court (Coram : Hon'ble Justice D. Y. Chandrachud and Hon'ble Justice M. R. Shah, JJ) in case of [43]**ANSS RAJASHEKAR Vs. AUGUSTUS JEBA ANANTH**, situation of failure of Complainant to establish source of funds alleged to be utilized for disbursal of loan to Accused, is explained. In the said case, presumption under Section 139 of Negotiable Instrument Act, 1881, was duly rebutted and there was an absence of a legally enforceable debt, whereas in present case, the facts are different and therefore it is not helpful to Accused in present case.

(10.24). The Ld. Advocate for the Accused has relied on the decision delivered by the Hon'ble Gujarat High Court (Coram : Hon'ble Justice A. L. Dave, J) in case of [44]**ZUBEDABAI ABDULBHAI Vs. GANGARAM MOTIRAM**, wherein held that when the evidence of execution is not believed or accepted, no question of drawing presumption and the arguments regarding presumption under

[43] ***ANSS RAJASHEKAR Vs. AUGUSTUS JEBA ANANTH***
: AIR 2019 SC 942 = Cr.A. 95/19, D/- 18/01/19

[44] ***ZUBEDABAI ABDULBHAI Vs. GANGARAM MOTIRAM***
: 2000 (0) GLHEL-HC 214081 = 2001(2) GCD 1326 = S.A. 284/84, D/- 30/06/2000

Section 118 of N.I. Act cannot be accepted and burden of proof lies on the shoulder of complainant. In present case, it is admitted that the cheque in question bears the signature of the Accused and therefore, such defense is not tenable and hence, the said authority will not be helpful to the Accused in present case.

(10.25). The Ld. Advocate for the Accused has relied on the decision delivered by the Hon'ble Gujarat High Court (Coram : Hon'ble Justice V. P. Patel, J) in case of [45]**D.M. FINANCE (PARTNERSHIP FIRM) JAYESH D. THAKKAR Vs. STATE OF GUJARAT**, wherein held that initial burden of proof is on Complainant to proves that cheques have been issued for discharge of any debt or other liability and the Complainant has to prove only that cheques are drawn by Accused and the Court has to presume case of Complainant under Section 139 of N.I.Act unless the contrary is proved. However, such presumption is rebuttable in nature and burden is on Accused to lead the evidence to rebut such presumption. Complainant has initially proved the cheque was drawn by Accused in aid of presumption under Section 118(a), 139 of N.I.Act and shifted onus on Accused. The Accused has relied upon cross examination of Complainant, documentary evidence produced by Complainant

[45] ***D.M. FINANCE (PARTNERSHIP FIRM) JAYESH D. THAKKAR Vs. STATE OF GUJARAT : 2000(0) AIJEL-HC 242203 = 2020(4) GLR 3204 = Cr.A. 2602/09, D/- 29/05/20***

and oral and documentary evidence produced on his behalf and shifted burden again on Complainant. But in present case, the presumption raised under Section 118(a), 139 of Negotiable Instrument Act, is not rebutted by Accused and therefore, such defense is not tenable and hence, the said authority will not be helpful to the Accused in present case.

(10.26). The Ld. Advocate for the Accused has relied on the decision delivered by the Hon'ble Gujarat High Court (Coram : Hon'ble Justice Bankim N. Mehta, J) in case of [46]**MANISH KUMAR RAMESHCHANDRA SHAH Vs. STATE OF GUJARAT**, wherein held that if the Accused is able to raise an probable defense which creates doubt about the existence of a legally recoverable debt or liability, the prosecution can fail. The Accused can rely upon the materials submitted by the complainant in order to raise such defense. If the Accused is able to rebut the presumption and raise probable defense the burden shifts on the complainant to prove the existence of a legally recoverable debt and the cheque was given towards discharge of such debt. The Ld. Advocate for the Accused has relied on the decision delivered by the Hon'ble Gujarat High Court (Coram : Hon'ble Justice Bankim N. Mehta, J) in

[46] ***MANISH KUMAR RAMESHCHANDRA SHAH Vs. STATE OF GUJARAT : ACR 2012(I) 285 GUJ = Cr.A. 572/98, D/- 2/3/12***

case of [47]**DILAWARSINH MODUBHA ZALA Vs. STATE OF GUJARAT**, wherein held that complainant failed to prove that cheque in question was given towards discharge of existing recoverable debt. Accused was able to rebut presumption under Section 139 and raise probable defense. The Ld. Advocate for the Accused has relied on the decision delivered by the Hon'ble Gujarat High Court (Coram : Hon'ble Justice Bankim N. Mehta J) in case of [48]**KAPADVANJ PEOPLES CO-OPERATIVE BANK Ltd. Vs. JAYANTIBHAI TALASAJI MARAWADI & Anr.**, wherein held that it is difficult to ascertain that what amount was outstanding and the Accused was able to raise probable defense that there was no legal enforceable debt on the day of issuance of the cheque. It is further held that if the Accused is able to raise probable defense with regard to existence of a legally recoverable debt or liability, the burden shifts on the prosecution to prove that the cheque in question was given towards legally recoverable debt or liability. In present case, the Accused has not rebutted the presumption raised under Section 118 & 139 of Negotiable Instrument Act, 1881, as revealing from evidence on record and hence, the said authorities will not be helpful to the Accused in present case.

[47] *DILAWARSINH MODUBHA ZALA Vs. STATE OF GUJARAT : 2012 Cr.L.J. (NOC) 495 GUJ = Cr.A. 2086/10, D/- 12/1/12*

[48] *KAPADVANJ PEOPLES CO-OPERATIVE BANK Ltd. Vs. JAYANTIBHAI TALASAJI MARAWADI & Anr. : ACR 2012(I) 271 GUJ = Cr.A. 2344/09, D/- 1/3/12*

(10.27). The Ld. Advocate for the Complainant has relied on the decision delivered by the Hon'ble Gujarat High Court (Coram : Hon'ble Justice S. G. Shah, J) in case of [49]**INDRAVADAN NAVNEETLAL SHETH Vs. STATE OF GUJARAT** wherein held that practically when petitioner has failed to prove any cogent and reliable evidence, so as to rebut statutory presumption, only because he has put forward some defense and probabilities, it would not rescue him from the conviction. Thereby, it seems that practically only probable defense under Section 138 may be non-issuance of cheque or lost cheque found by the Complainant & thereby no relationship between the parties or any other similar defense, so as to believe that Accused has never issued an cheque in favour of the Complainant to clear any legal debt, which is never pleaded or proved by the petitioner.

(10.28). When the legal presumption under Section 118, 119 and 139 of Negotiable Instrument Act, 1881, is raised and the Accused has failed to rebut the said presumption, as in present case, then the onus of proof does not shift back to Complainant and hence the decisions delivered in the case of [50]**K. PRAKASAN Vs. P.K. SUNDARAN**, [51]**M.S.**

[49] ***INDRAVADAN NAVNEETLAL SHETH Vs. STATE OF GUJARAT : 2017(1) GLR 266 = Cr.R.A. No. 542/11, D/- 29/7/16***

[50] ***K. PRAKASAN Vs. P.K. SUNDARAN : 2008(1) GLJ 362***

[51] ***M.S. NARAYANA MENON Vs. STATE OF KERALA : 2006(3) CRIMES 117***

NARAYANA MENON Vs. STATE OF KERALA, [52]**SURYALAXMI COTTON MILLS Vs. RAJVIR INDUSTRIES LTD.**, will not assist the case of Accused. It is held in decision delivered in case of [53]**GIRISH NATVAR PATEL Vs. STATE OF GUJARAT**, when the presumption under Section 139 of Negotiable Instrument Act, 1881, can be raised. It is held in decision delivered in case of [54]**A. V. MURTHY Vs. B. S. NAGABASAVANNA** that presumption as to negotiable instruments of consideration is in favour holder.

(10.29). The Hon'ble Allahabad High Court has held in it's decision delivered in case of [55]**SHAMSUL ISLAM Vs. 16th ADDL. DISTRICT JUDGE, KANPURNAGAR** that there is presumption that the amount was due and it was for the Accused to prove that the debt was already discharged as provided by Section 139 of Negotiable Instrument Act, 1881. The Hon'ble Supreme Court of India has held in it's decision delivered in case of [56]**K. N. BEENA Vs. MUNIYAPPAM** that under Section 139 of Negotiable Instrument Act, 1881, the Court has to presume, in a complaint under Section 138 of Negotiable Instrument Act, 1881

[52] *SURYALAXMI COTTON MILLS Vs. RAJVIR INDUSTRIES LTD. : 2008(1) CRIMES 165*

[53] *GIRISH NATVAR PATEL Vs. STATE OF GUJARAT : 2006(1) GLR786=2006(1) GLH530=2006 Cr.L.J. 3378*

[54] *A. V. MURTHY Vs. B. S. NAGABASAVANNA : 2002(2) SCC 642 = AIR 2002 SC 985 = 2002 Cr.L.J. 1479*

[55] *SHAMSUL ISLAM Vs. 16th ADDL. DISTRICT JUDGE, KANPURNAGAR : 2002 Cr.L.J. 4564 (ALL.)*

[56] *K. N. BEENA Vs. MUNIYAPPAM : 2001 Cr.L.J. 4745 (S.C.) = (2001)8 SCC 458 = 2002 SCC (Cr.) 14*

that the cheque had been issued for a debt or liability. There is therefore no requirement that the Complainant must specifically allege in the complaint that there was a subsisting liability. The burden of proving that there was no existing debt or liability was on the respondents and this they have to discharge in the trial. The said ratio is also laid down in the decision delivered in cases of [57]**M.M.T.C. LTD. Vs. MEDCHL CHEMICALS AND PHARMA (P) LTD.** and [58]**STEEL AUTHORITY OF INDIA LTD. Vs. B.D. AGGARWAL & SONS LTD.**

(10.30). The Hon'ble Andhra Pradesh High Court has held the ratio in it's decision delivered in case of [59]**M. G. BROTHERS AUTOMOBILES LTD. Vs. B. MASTHAN REDDY** that once issuance of cheque is admitted, it is for the drawer to rebut presumption under Section 139 of N.I. Act by proving that the said cheque was not issued towards a legally enforcible liabilities. The Hon'ble Madras High Court has held the ratio in it's decision delivered in case of [60]**RAGHUNATHAN Vs. SELVARAJAN** that the burden of proving that a cheque has not been issued for a debt or liability is on the Accused.

[57] *M.M.T.C. LTD. Vs. MEDCHL CHEMICALS AND PHARMA (P) LTD. : AIR 2002 SC 182=(2002)1 SCC 234=2002 CrLJ 266*

[58] *STEEL AUTHORITY OF INDIA LTD. Vs. B.D. AGGARWAL & SONS LTD. : 2002 Cr.L.J. 382 (P.&H.)*

[59] *M. G. BROTHERS AUTOMOBILES LTD. Vs. B. MASTHAN REDDY : 2006(1) D.C.R. 375 = Cr.A. No. 323/01 Dt. 09/11/2005*

[60] *RAGHUNATHAN Vs. SELVARAJAN : 2003(3) D.C.R. 615 = 2002 Cr.L.J. 3848*

The Hon'ble Andhra Pradesh High Court has held the ratio in it's decision delivered in case of [61]**<u>N. NASINGARAO Vs. SRINIVASA CHARY</u>** that when the Complainant is examined after several years, certain discrepancies in his cross-examination cannot be taken as circumstances to rebut presumption under Section 139 of Negotiable Instrument Act, 1881 and it is proper to conclude that cheque is supported by legally enforceable debt owned by Accused to Complainant.

(10.31). The Hon'ble Bombay High Court has held the ratio in it's decision delivered in case of [62]**<u>GOA HANDICRAFTS, RURAL & SMALL SCALE INDUSTRIES DEVELOPMENT CORPORATION LTD. Vs. M/s. SAMUDRA ROPES PVT. LTD. & ORS.</u>** that it is upon the Accused to rebut the presumption beyond reasonable doubt. The Hon'ble Madras High Court has held the ratio in it's decision delivered in case of [63]**<u>D. CHANDRASEKARAN Vs. M. MUTHUKUMARASAMY</u>** that mere denial or rebuttal by Accused through his notice is not at all sufficient, qua the presumption raised under Section 118 & 139 of N.I. Act. The Hon'ble

[61] *N. NASINGARAO Vs. SRINIVASA CHARY : 2011 A.C.D.281 (A.P.) = Cr. Appeal No. 234/07 Dt. 21/07/10*

[62] *GOA HANDICRAFTS, RURAL & SMALL SCALE INDUSTRIES DEVELOPMENT CORPORATION LTD. Vs. M/s. SAMUDRA ROPES PVT. LTD. & ORS. : 2006(1) D.C.R. 45 = Cr.Appeal No. 13/2004 Dt. 29/06/2005 (Panaji Bench)*

[63] *D. CHANDRASEKARAN Vs. M. MUTHUKUMARASAMY : 2006(2) D.C.R. 161 = Cr.R.C. No. 372/05 to 374/05 Dt. 21/03/06*

Karnataka High Court has held the ratio in it's decision delivered in case of [64]<u>**DR. B.V. SAMPATHKUMAR Vs. Ms. DR. K.G.U. LAKSHMI**</u> that when once issue of cheque is proved, a presumption under Section 139 of N.I. Act would arise. The Hon'ble Kerala High Court has held the ratio in it's decision delivered in case of [65]<u>**R. SIVARAMAN Vs. STATE OF KERALA**</u> that Court has to presume that cheque had been issued for a debt or liability and burden of proving that cheque had not been issued in discharge of a debt or liability is on Accused unless rebutted. The Hon'ble Gujarat High Court has held the ratio in it's decision delivered in case of [66]<u>**GIRISH NATVAR PATEL Vs. STATE OF GUJARAT**</u> and in case of [67]<u>**PRAJAPATI OIL INDUSTRY Vs. STATE OF GUJARAT**</u> that burden lies upon the Accused to rebut presumption by cogent and convincing evidence. The Hon'ble Supreme Court of India has held the ratio in it's decision delivered in case of [68]<u>**M/s. KUMAR EXPORTS Vs. M/s. SHARMA CARPETS**</u> that presumption under Section 118 & 139 of Negotiable Instrument Act, 1881, is that cheque was for discharge of debt / liability. The Hon'ble Supreme Court of India has

[64] *DR. B.V. SAMPATHKUMAR Vs. Ms. DR. K.G.U. LAKSHMI : 2006(2) D.C.R. 665 = Cr.Appeal No. 1115/99 Dt. 03/02/2006*

[65] *R. SIVARAMAN Vs. STATE OF KERALA : 2006(2) D.C.R. 514 = Cr.A. No. 465/00 Dt. 26/05/06*

[66] *GIRISH NATVAR PATEL Vs. STATE OF GUJARAT : 2006(1) D.C.R. 594 = Cr.Appeal No. 732/04 Dt. 25/11/05*

[67] *PRAJAPATI OIL INDUSTRY Vs. STATE OF GUJARAT : 2004(1) GLH 365 = 2004(2) GCD 1475*

[68] *M/s. KUMAR EXPORTS Vs. M/s. SHARMA CARPETS : 2011 A.C.D. 427 (SC) : Cr.Appeal No. 2045/08 Dt.16/12/08*

held the ratio in it's decision delivered in case of [69]**K. R. INDIRA Vs. Dr. G. ADINARAYANA** that the burden will be on the Accused to disprove the presumptions under Section 138 and 139 of Negotiable Instrument Act, 1881. Unless the burden is disproved by oral and documentary evidence, the statutory presumption as proved under Sections 118, 138 and 139 of Act, the Accused cannot escape from the criminal liability. The Hon'ble Supreme Court of India has held the ratio in it's decision delivered in case of [70]**HITEN P. DALAL Vs. BRATINDRANATH BANERJEE** that the presumption under Section 118 and 139 of Negotiable Instrument Act, 1881 that the Accused issued the cheque and the negotiable instrument for consideration and in the discharge of a legally recoverable debt can be drawn. It is on the Accused to rebut these presumptions. The Hon'ble Supreme Court of India has held the ratio in it's decision delivered in case of [71]**M/s. ELECTRONIC TRADE & TECHNOLOGY DEVELOPMENT CORPORATION LTD. Vs. M/s. INDIAN TECHNOLOGISTS & ENGINEERS (ELECTRONICS) PVT. LTD.** that it is for the Accused to show that there is no existing or subsisting debt or liability in respect of the cheque issued and the burden of proof of non-existence of

[69] *K. R. INDIRA Vs. Dr. G. ADINARAYANA : 2003 SCC (Cri) 2002*
[70] *HITEN P. DALAL Vs. BRATINDRANATH BANERJEE : 2001 (6) SCC 16*
[71] *M/s. ELECTRONIC TRADE & TECHNOLOGY DEVELOPMENT CORPORATION LTD. Vs. M/s. INDIAN TECHNOLOGISTS & ENGINEERS (ELECTRONICS) PVT. LTD. : AIR 1996 SC 2339*

such debt or liability is on the Accused. The Hon'ble Supreme Court of India has held the ratio in it's decision delivered in case of [72]**RANGAPPA Vs. MOHAN** that existence of legally recoverable debt or liability is matter of presumption under Section 139 of Negotiable Instrument Act, 1881 and the presumption mandated by Section 139 of Negotiable Instrument Act, 1881, includes the existence of legally enforceable debt or liability.

(10.32). The Hon'ble Karnataka High Court has held the ratio in it's decision delivered in case of [73]**L. MOHAN Vs. V. MOHAN NAIDU** that the Court has to presume that the cheque has been issued for discharging the debt or liability and if Accused claim that he had paid up the amount than the Accused must prove the same. The Accused has neither proved that there was no existing debt or liability at the time of presentation of the cheque nor brought any evidence on record showing that there was sufficient fund in his account when the cheque in question was presented for honouring.

(10.33). The Ld. Advocate for the Complainant has vehemently argued that the ingredients of the offence punishable under Section 138 of Negotiable Instruments Act, 1881, is that the cheque was given and the same is dishonoured and

[72] *RANGAPPA Vs. MOHAN : 2011 A.C.D. 7 (SC) =Cr.Appeal no. 1020/10 Dt. 7/5/10*
[73] *L. MOHAN Vs. V. MOHAN NAIDU : 2004(2) D.C.R. 605 = 2004 Cr.L.J. 3177*

there is no payment of cheque amount even on issuance of notice. The Ld. Advocate for the Complainant has submitted that all the ingredients of Section 138 of Negotiable Instrument Act, 1881, is being complied with and therefore, the Ld. Trial Judge has correctly held the Accused guilty for the offence punishable under Section 138 of Negotiable Instrument Act, 1881.

(10.34). The Ld. Advocate for the Accused has relied on the decision delivered by the Hon'ble Calcutta High Court (Coram : Hon'ble Justice Pratibha Bonnerjea, J) in case of [74]**TRADERS SYNDICATE Vs. UNION OF INDIA**, wherein held that when no cross-examination preferred on the point, the Court can hold that defendant accepts plaintiff's case on the point in entirely. No dispute on the point can be raised in argument. In present case, there is neither defense nor cross-examination as the Accused had not signed the cheque in question and therefore, such defense is not tenable and hence, the said authority will not be helpful to the Accused in present case.

(10.35). The Ld. Advocate for the Accused has relied on the decision delivered by the Hon'ble Supreme Court (Coram : Hon'ble Justice V. Ramaswami and Hon'ble Justice G. K. Mitter and Hon'ble

[74] ***TRADERS SYNDICATE Vs. UNION OF INDIA***
: AIR 1983 Calcutta 337 = Suit No. 831/68, D/- 21/07/82

Justice C. A. Vaidialingam, JJ) in case of [75]**BAIDYANATH PRASAD SRIVASTAVA Vs. STATE OF BIHAR**, wherein held that it has committed breach of proviso to Section 342-A by commenting on failure of Accused to give evidence and by drawing a presumption against him, both of which were illegal under Clause (b) of proviso to Section 342-A of Criminal Procedure Code. It was matter of offence punishable under Section 467 of I.P.C. and not under Section 138 of N.I.Act, where there is statutory presumption under Section 118 and 139 of N.I. Act and hence the same will not be helpful to Accused in present case.

(10.36). The Ld. Advocate for the Accused has relied on the decision delivered by the Hon'ble Gauhati High Court (Coram : Hon'ble Justice C. R. Sarma, J) in case of [76]**RUMI HAZARIKA Vs. ANIRBAN HATIKAKOTY**, wherein held that when the Complainant has failed to prove the version of complaint under Section 138 of N.I. Act, drawing adverse inference against Complainant is just and proper. In present case, the Complainant has proved the required ingredients of Section 138 of Negotiable Instrument Act, 1881 and hence, the said authority will not be helpful to the Accused in

[75] ***BAIDYANATH PRASAD SRIVASTAVA Vs. STATE OF BIHAR***
: 1968 Cr.L.J. 1650 Cr.A. 47/66, D/- 30/04/68

[76] ***RUMI HAZARIKA Vs. ANIRBAN HATIKAKOTY***
: 2015 (4) GLT 884 = 2016(2) DCR 182 = Cr.A. 87/08, D/- 12/10/15

present case.

(10.37). The Ld. Advocate for the Accused has relied on the decision delivered by the Hon'ble Calcutta High Court (Coram : Hon'ble Justice Anil K. Sen and Hon'ble Justice Prabir Kumar Majumdar, JJ) in case of [77]**HIMJIT CONSTRUCTION Vs. TARUN SARKA**, wherein held that where there exists obligation on the party to produce documents, the non-production can very well justify the Court to raise an adverse inference even though such evidence had not been specifically called for by the opposite party. The Ld. Advocate for the Accused has relied on the decision delivered by the Hon'ble Supreme Court (Coram : Hon'ble Justice J. C. Shah and Hon'ble Justice V. Ramaswami and Hon'ble Justice G. K. Mitter, JJ) in case of [78]**GOPAL KRISHNAJI KETKAR Vs. MOHAMED HAJI LATIF & Ors.**, wherein held that when a party in possession of best evidence, which would throw light on the issue in controversy withholding it, the Court ought to draw an adverse inference against him notwithstanding that onus of proof does not lie on him and the party cannot rely on abstract doctrine of onus of proof or on the fact that he was not called upon to produce it. In present case, the

[77] ***HIMJIT CONSTRUCTION Vs. TARUN SARKA***
: AIR 1985 Calcutta 200 = A.F.A.D No. 215/83, D/-22/02/84

[78] ***GOPAL KRISHNAJI KETKAR Vs. MOHAMED HAJI LATIF & Ors.***
: AIR 1968 SC 1413 = C.A. 954/65, D/- 19/04/68

Complainant has produced required document to prove commission of offence and hence, the said authorities will not be helpful to the Accused in present case.

(10.38). The Ld. Advocate for the Accused has relied on the decision delivered by the Hon'ble Gujarat High Court (Coram : Hon'ble Justice Bankim N. Mehta, J) in case of [79]**DILAWARSINH MODUBHA ZALA Vs. STATE OF GUJARAT & Ors.**.The Hon'ble Bombay High Court has held the ratio in it's decision delivered in case of [80]**SANTAM FINANCERS & REAL ESTATE PVT. LTD. Vs. SHRI DEVAPA A. SARVI** that presumption is rebuttable by Accused either by leading evidence or bringing facts on record in cross-examination which could make the case of Complainant improbable and burden of proof is on drawer to prove that cheque issued towards security and not for encashment. In said case, the Accused was able to rebut the presumption, wherein the facts of the present case, does not establish the rebuttal of presumption. The Ld. Advocate for the Accused has relied on the decision delivered by the Hon'ble Karnataka High Court (Coram : Hon'ble Justice Mohamed Anwar, J.) in case of [81]**B. P. VENKATESULU Vs. K. P.**

[79] *DILAWARSINH MODUBHA ZALA Vs. STATE OF GUJARAT & Ors. : 2012 Cr.L.J. (NOC) 495 (GUJ) = Cr.A. 2086/10, D/- 12/1/12*

[80] *SANTAM FINANCERS & REAL ESTATE PVT. LTD. Vs. SHRI DEVAPA A. SARVI : 2005(2) D.C.R. 65*

[81] *B. P. VENKATESULU Vs. K. P. MANI NAYAR*

<u>MANI NAYAR</u>, but the same will not helpful to the Accused as in the present case the presumption raised in not rebutted.

(10.39). The Ld. Advocate for the Complainant has relied on the decision delivered by the Hon'ble Supreme Court (Coram : Hon'ble Justice K. T. Thomas and Hon'ble Justice S. N. Variava, JJ) in case of [82]**<u>K. N. BEENA Vs. MUNIYAPPAN & Anr.</u>**, wherein held that **<u>conviction cannot be set aside</u>** on the **<u>ground of not proving</u>** that **<u>cheque was given for any debt or liability</u>** and the **<u>burden to prove non-consideration for dishonoured cheque is on the Accused</u>**.

(10.40). The Ld. Advocate for the Complainant has relied on the decision delivered by the Hon'ble Supreme Court (Coram: Hon'ble Justice J. Chelameswar and Hon'ble Justice Pinaki Chandra Ghose, JJ) in case of [83]**<u>T. VASANTHAKUMAR Vs. VIJAYAKUMARI</u>**, wherein controversy was with respect to Section 139 of Negotiable Instrument Act, 1881, as to whether Complainant has to prove existence of a legally enforceable debt before the presumption under Section 139 of the Act, starts operating and burden shifts to the Accused. It is being held that **since the cheque as well as the**

: 2001(1) ALD Cri 544 = 2001 104 CompCas 348 Kar = 2001 CrLJ 745 = D/- 28/11/00

[82] ***K. N. BEENA Vs. MUNIYAPPAN & Anr. : 2001 DCR 47 = CrA 1066/01, D/- 18/10/01***

[83] ***T. VASANTHAKUMAR Vs. VIJAYAKUMARI***
: 2015(8) SCC 378 = AIR 2015 SC 2240 = CrA 728/15, D/- 28/4/15

signature has been accepted by the Accused-Respondent, the **presumption** under Section 139 of Negotiable Instrument Act, 1881, **would operate**. Thus, the **burden was on the Accused to disprove** the **cheque or the existence of any legally recoverable debt or liability**.

(10.41). As discussed above, such defense is not tenable, in view of above discussed authority. From the deposition of witness, it is crystal clear that the cheque in question was deposited in bank and was returned for the reason – **Funds Insufficient**. The said oral deposition also get corroboration from cheque return memo, which also shows that cheque was returned unpaid for the reason – Funds Insufficient. It is proved facts that Accused had issued the cheque in question and having his signature there in the cheque. It is well settled that when the cheque is returned unpaid for the reason – Funds Insufficient, then it falls within the purview of offence punishable under Section 138 of Negotiable Instruments Act, 1881.

(10.42). The Ld. Advocate for the Complainant has relied on the decision delivered by the Hon'ble Supreme Court (Coram : Hon'ble Justice Abhay Manohar Sapre and Hon'ble Justice Dinesh Maheswari, JJ) in case of [84]**ROHIT JIVANLAL PATEL Vs.**

[84] ***ROHIT JIVANLAL PATEL Vs. STATE OF GUJARAT & Anr.***
: AIR 2019 SC 1876 = 2019(1) Crimes 291 = CrA 508/19, D/- 15/3/19

STATE OF GUJARAT & Anr., wherein Accused had not denied his signature on the cheques in question and cheques had been drawn in favour of the Complainant on a bank account maintained by the Accused and cheques were presented to the Bank concerned within their validity period and were returned unpaid for the reason of either the balance being insufficient or the account being closed. It is held that **all the basic ingredients of Section 138 as also of Section 118 and 139 of Negotiable Instruments Act, 1881, satisfied** and presumption arises that the **cheques were drawn for consideration** and the **holder of the cheques i.e. Complainant, received the same in discharge of an existing debt**.

(10.43). The Ld. Advocate for the Complainant has relied on the decision delivered by the Hon'ble Supreme Court (Coram : Hon'ble Justice K.T. Thomas and Hon'ble Justice M.B. Shah, JJ) in case of [85]**NEPC MICON LTD. Vs. MAGMA LEASING LTD.**, wherein held that Account Closed would be offence under Section 138 of Negotiable Instrument Act, 1881, as there was insufficient or no fund to honour the cheque in 'that account' – Dishonour of cheque by a bank on ground that account is closed would be covered by the phrase "**amount of money standing to the credit of that**

[85] *NEPC MICON LTD. Vs. MAGMA LEASING LTD.*
: AIR 1999 SC 1952= 1999(4) SCC 253=1999 CrLJ 2883=1999 DCR 16 (SC)=CrA 481/99, 29/4/99

<u>account is insufficient to honour the cheque</u>". It is held in decision delivered in case of [86]**<u>HASHMIKANT M. SETH Vs. STATE OF GUJARAT</u>** that in view of statement and object of the Act it would amount to an offence when cheque is returned with endorsement – "Account Closed" / "Stopped Payment".

(10.44). The Complainant has deposed on oath by filing affidavit of examination-in-chief. Issue is whether it is admissible in view of provision of Section 145 of Negotiable Instrument Act, 1881. Answer is in affirmative in light of following decision of the Hon'ble Gujarat High Court and the Hon'ble Supreme Court of India. The Hon'ble Gujarat High Court has held the ratio in it's decision delivered in case of [87]**<u>SHUBH LAXMI ENTRPRISES Vs. VIPUL S. LASKRI</u>** that the Accused chose to examine himself on oath by filing affidavit, which the Court had granted and there was no illegality in the order. The contention was negatived that Section 145 of Negotiable Instrument Act, 1881, permits only Complainant to give evidence by affidavit. The Hon'ble Supreme Court of India has held the ratio in it's decision delivered in case of [88]**<u>M/s. MANDVI CO-OP. BANK LTD. Vs.</u>**

86 *HASHMIKANT M. SETH Vs. STATE OF GUJARAT : 2004(2) GLH 783 = 2005(1) GLR 638 = 2004 Cr.L.J. 3628*

87 *SHUBH LAXMI ENTRPRISES Vs. VIPUL S. LASKRI : 2004(4) GLR 3309*

88 *M/s. MANDVI CO-OP. BANK LTD. Vs. NIMESH B. THAKORE : 2011 A.C.D. 105 (SC) = Cr.Appeal No. 72/10 Dt. 11/1/10*

NIMESH B. THAKORE that person giving evidence on affidavit under provision of Section 145 of Negotiable Instrument Act, 1881, can only be subjected to cross-examination as to facts stated in affidavit and it is not open to any party to insist that before cross-examination, he must first depose in examination-in-chief.

(10.45). The Ld. Advocate for the Accused had taken defense that cheque in question is undated / post dated cheque. Such defense has no merits as cheque become due only date stated on cheque. The Hon'ble Supreme Court of India held in it's decision delivered in case of [89]**ASHOK YESHWANT BADAVE Vs. SURENDRA MADHAVRAO NIGHOJAKAR** that post dated cheque becomes a cheque within the meaning of Section 138 of Negotiable Instrument Act, 1881, on the date which is written thereon and the 6 months' period has to be reckoned for the purposes of proviso (a) to Section 138 of Negotiable Instrument Act, 1881, from the said date. It is held in the decision delivered in case of [90]**SHRI ISHAR ALLOYS STEELS LTD. Vs. JAYASWALS NECO LTD.** and [91]**GEETA Vs. STATE OF U.P.** that in post-dated cheque the six month period for presentation has to be reckoned from the date

[89] *ASHOK YESHWANT BADAVE Vs. SURENDRA MADHAVRAO NIGHOJAKAR : AIR 2001 SC 1315 : 2001 CrLJ 1674*

[90] *SHRI ISHAR ALLOYS STEELS LTD. Vs. JAYASWALS NECO LTD. : AIR 2001 SC 1161*

[91] *GEETA Vs. STATE OF U.P. : 2007 Cr.L.J. 2222*

written on cheque and post-dated cheque becomes a cheque under the Act on the date which is written on the said cheque and till that date it is only a bill of exchange.

(10.46). Now if the Accused had paid any amount in the present Complaint, then he would never make mistake of not taking in writing that the amount is being paid-up and to take the original Cheque in question back in his custody. The original cheque in question is produced from the custody of the Complainant. Thus, it is clear that the cheque which was issued by the Accused was towards the discharging of the liability under cheque, which was returned unpaid for the reason – Funds Insufficient and inspite of issuing of legal notice, the Accused had not paid the amount of cheque, which constitute the offence punishable under Section 138 of Negotiable Instruments Act, 1881 and the Hon'ble Trial Court has not made any error in convicting the Accused and imposing sentence upon him and therefore, it does not require any interference by this Court.

(10.47). The Ld. Advocate for the Accused has relied on the decision delivered by the Hon'ble Supreme Court (Coram : Hon'ble Justice Kailesh Gambhir, J) in case of [92]**VEENA RANI CHHABRA Vs.**

[92] ***VEENA RANI CHHABRA Vs. MANJU ROHIDA***
: 2008 Legal Eagel (DCR) 339 = Cr.M.C. 933/05, D/- 16/09/08

MANJU ROHIDA wherein held that in criminal trials, the guilt of Accused has to be proved beyond any shadow of doubt. It is further held that admission on the part of the respondent in her reply may be of some benefit to the appellant in a civil case, but the same cannot be help the appellant so far as criminal case is concerned. The Ld. Advocate for the Accused has relied on the decision delivered by the Hon'ble Karnataka High Court (Coram : Hon'ble Justice B. V. Pinto, J) in case of [93]**H.P. MOODALAPPA V/s. CHOWRAPPA**, wherein held that if the Court entertains a doubt, which is of legal nature, normally criminal Courts would not tend to convict the Accused person or rather it would give benefit of doubt to the Accused. In present case, the Complainant has proved the required ingredients of Section 138 of Negotiable Instrument Act, 1881, beyond reasonable doubt and hence, the said authority will not be helpful to the Accused in present case.

(10.48). The Ld. Advocate for the Accused has relied on the decision delivered by the Hon'ble Bombay High Court (Coram : Hon'ble Justice Manish Pitale, J) in case of [94]**SANJAY YADHAVRAOJI MAKODE VS. SUHAS PRAKASHJI DHOTE**,

[93] ***H.P. MOODALAPPA V/s. CHOWRAPPA : 2012 Cr.L.J. 804 = Cr.A. 1415/04, D/- 10/3/11***

[94] ***SANJAY YADHAVRAOJI MAKODE VS. SUHAS PRAKASHJI DHOTE : 2018 JW (Bom) 1354 = Cr.Appln. No. 346/17, D/- 10/7/18***

wherein held that it is trite law that when two views are possible, the one accrues in favour of Accused must be adopted. In present case, legal presumption is not rebutted and the defense of Accused is not supported by any oral or documentary evidence. Being different facts & circumstances, the said authority will not be helpful to the Accused in light of facts of present case.

(10.49). The Ld. Advocate for the Complainant has relied on the decision delivered by the Hon'ble Punjab & Haryana High Court (Coram : Hon'ble Justice Gurdev Singh, J) in case of [95]**GURDEV SINGH Vs. M/s. PUNJAB AGRICULTURAL TRADERS**, wherein held that when the cheque was issued by the Accused in discharge of legally enforceable debt, which on presentation to his banker was dishonored on account of insufficient funds in his account and he failed to pay the amount of that cheque to the Complainant inspite of issuance of legal statutory notice, then the offence punishable under Section 138 of Negotiable Instrument Act, 1881, is committed.

(10.50). The Ld. Advocate for the Complainant has relied on the decision delivered by the Hon'ble Delhi High Court (Coram : Hon'ble JusticeA. K. Pathak,

[95] ***GURDEV SINGH Vs. M/s. PUNJAB AGRICULTURAL TRADERS***
: 2012(1) Crimes 585 = Cr.Rev. 67/06, D/- 10/3/11

J) in case of [96]**<u>THE JAMMU & KASHMIR BANK Vs. ABISHEK MITTAL</u>**, wherein held that it is thus, clear that for whatever reasons if a cheque is drawn on an account maintained by a drawer with its bank in favour of any person for the discharge of "any debt or other liability", the ingredients of offence under Section 138 of the Negotiable Instrument Act, gets attracted in case the cheque is returned dishonored for insufficiency of funds and the cheque amount remains unpaid within the statutory period, despite service of notice. Legislature has been careful enough to record not only discharge in whole or in party of any debt but the same also includes other liability as well. The words '<u>any</u>' and '<u>other liability</u>' used in the Section assumes importance in the sense that if a cheque is issued by a person to discharge any debt or other liability of another person, it would attract the penal consequences under Section 138 of the Act. It is further held that the Section138 of Act provides that a person guilty for the offence be punished with **imprisonment** for a term which may be **<u>extended to two years</u>** or with **fine** which may extend to **<u>twice the amount of cheque</u>** or **with both**.

(10.51). The Ld. Advocate for the Complainant has relied on the decision delivered by the Hon'ble Supreme Court (Coram : Hon'ble Justice Ranjana Prakash

[96] *THE JAMMU & KASHMIR BANK Vs. ABISHEK MITTAL : 2012(1) DCR 189 = Cr.A. 294/11, D/- 26/12/05*

Desai and Hon'ble Justice Aftab Alam, JJ) in case of [97]**R. MOHAN Vs. A. K. VIJAYAKUMAR**, wherein held that order to pay compensation may be enforced by awarding sentence in default, for offence punishable Section 138 of Negotiable Instruments Act, 1881 and order passed by Magistrate, awarding sentence in default of payment of compensation under Section 357(3) of Cr.P.C., was restored.

(10.52). The Ld. Advocate for the Complainant has relied on the decision delivered by the Hon'ble Supreme Court (Coram : Hon'ble Justice R. V. Raveendran & Hon'ble Justice R. M. Lodha, JJ) in case of [98]**R. VIJAYAN Vs. BABY & Anr.**, wherein held that the **Courts should in all cases of conviction, uniformly levy fine upto twice the cheque amount and direct payment of compensation to complainant equal to cheque amount plus 9% simple interest**.

(10.53). Inspite of above authorities, the Ld. Magistrate imposed lesser sentence. The Negotiable Instrument Act, 1881, is a Special Act, which will always override the provision made in general act / code – Criminal Procedure Code. The Ld. Magistrate is bound to impose sentence of

[97] ***R. MOHAN Vs. A. K. VIJAYAKUMAR***
: 2012(8) SCC 721 = 2013(1) GLR 222 = Cr.A. 883/12, D/- 3/07/12

[98] ***R. VIJAYAN Vs. BABY & Anr.***
: AIR 2012 SC 528 = 2012(1) SCC 260 = 2012(2) GLR 1353 = Cr.A. 1902/11, D/- 11/10/11

imprisonment / fine / award compensation on conviction under Section 138 of Negotiable Instrument Act, 1881, considering above referred authorities more particularly of [99]**R. VIJAYAN Vs. BABY & Anr.**, delivered by the Hon'ble Supreme Court. It is equally true that this appeal is not for enhancement of sentence and therefore, the Appellate Court should not pass order in this appeal, for enhancement of sentence of imprisonment or fine or compensation.

(10.54). Now, let us travel through the provision of Section 138 & 142 of Negotiable Instrument Act, 1881, to see when cause of action arose to file complaint under Section 138 of Negotiable Instrument Act, 1881 and time-limit to file complaint for offence punishable under Section 138 of Negotiable Instrument Act, 1881:

Section 138 of Negotiable Instrument Act, 1881 :

Dishonour of cheque for insufficiency, etc., of funds in 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 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 extend to two year, or with fine which may extend to twice the amount of the cheque, or with both:

[99] *R. VIJAYAN Vs. BABY & Anr.*
: AIR 2012 SC 528 = 2012(1) SCC 260 = 2012(2) GLR 1353 = Cr.A. 1902/11, D/- 11/10/11

Provided that nothing contained in this section shall apply unless-

> **(a)**. the **cheque** has been, **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**;
>
> **(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**.

Clause (b) of Section 142 of Negotiable Instrument Act, 1881 :

> **(b).** such complaint is made within one month of the date on which the cause of action arises under Clause (c) of the proviso to Section 138 of Negotiable Instrument Act, 1881.

(10.55). The summary of provisions made in clause (a), (b) and (c) of proviso to Section 138 and Clause (b) of Section 142 of Negotiable Instrument Act, 1881, with relevant fact of present case, are as follow :

Sr. No.	**Section**	**Provision**	**Details as per Fact of present Case**	**Compliance of provision**
(1)	138(a)	Cheques have been presented to the bank within a period of six	➢ Cheque date : 06/10/2017	YES

		months or within the period of its validity.		
(2)	138(b)	Demand notice within thirty days of the receipt of information regarding the return of the cheques as unpaid.	• Date of dishonour : 07/10/2017 • Date of Demand Notice : 10/10/2017	YES
(3)	138(c)	drawer of cheques fails to make the payment of cheque amount, within fifteen days of the receipt of the said notice.	• Date of deemed service of notice : 11/10/2017 • 15 days payment period : 11/10/2017 to 25/10/2017	YES
(4)	142(b)	Complaint is made within one month of the date on which the cause of action arises under Clause (c) of the proviso to Section 138 of Negotiable Instrument Act, 1881.	• 30 Days period : 26/10/2017 to 24/11/2017 • Date of complaint : 09/11/2017	YES

(10.56). Thus, the provisions made in clause (a), (b) and (c) of proviso to Section 138 and Clause (b) of Section 142 of Negotiable Instrument Act, 1881, in light of facts of present case is duly complied with.

(10.57). The facts and alleged offence is not under the clouds of doubt and evidences are coming forth on the record to believe the guilt of Accused and no reasonable doubt is created with regards to the alleged offence committed by the present Accused and in light of the such facts, the Accused is not entitled to get benefit of doubt, but on the contrary due to sufficient evidences on record, the Accused is liable to be convicted. The proved facts on record of this Case, clearly proves the guilt of Accused beyond reasonable doubt and Accused cannot be acquitted or else it will be mockery of law. Based on oral as well as documentary evidences on record, it does prove beyond reasonable doubt that the Accused has committed an offence punishable under Section 138 of the Negotiable Instrument Act, 1881. It is held in a decision delivered in case of [100]**DALMIA CEMENT (BHARAT) LTD. Vs. GALAXY TRADERS & AGENCIES LTD.** that efforts to defeat the objectives of law by resorting to innovative measures and methods are to be discouraged.

(10.58). Merely because there is minor contradiction, the whole evidence of Complainant which otherwise inspire confidence of Court, could not be thrown away. On the contrary, there is clear admission on the part of the Accused that the cheque in question was signed and issued. The Hon'ble Gujarat High Court has held the ratio in it's decision delivered in case of [101]**JYANTILAL KUBERDAS SHARMA Vs. STATE OF GUJARAT** that the Court has to search truth while appreciating evidence and proof beyond reasonable doubt is only guideline but is

[100] *DALMIA CEMENT (BHARAT) LTD. Vs. GALAXY TRADERS & AGENCIES LTD. : AIR 2001 SC 676=2001 SCC(Cr.) 1103*
[101] *JYANTILAL KUBERDAS SHARMA Vs. STATE OF GUJARAT : 2007(1) G.L.R. 99*

not full and complete standard. While appreciating evidences, confidence of the Court is built up that Accused is guilty of alleged offence, he can not be acquitted on ground of proof beyond reasonable doubt because it will be mockery of criminal justice.

(10.59). The Hon'ble High Court of Gujarat held in it's decision delivered in case of [102]**ASHOK SOMALAL THAKKAR Vs STATE OF GUJARAT** that even when major portion of evidence of a witness is found unreliable, the remaining part of evidence if inspired confidence and sufficient to prove the guilt of the Accused, the conviction can be based there upon. It is duty of the Court to separate the grain from the chaft and to find in each case as to what extent the evidence is acceptable. The doctrines of FALSUS IN UNO, FALSUS IN OMNIBUS merely involves the question of weightage in a given set of circumstances and not to mandatory rules of evidence, it has to apply in each case as to what extent the evidence is worthy of acceptance and merely because in some respects the Court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of rule that it must be disregarded in all respects. The testimonies of

[102] ***ASHOK SOMALAL THAKKAR Vs STATE OF GUJARAT : 2007(2) G.L.H. 520 = 2007(3) G.L.R. 2114***

witnesses as well as documentary evidences in present case do inspire confidence of this Court that offence is committed by Accused and it could be relied. When the testimony of Complainant is natural and credit-worthy and delivery of cheque by Accused to Complainant for discharge of legal debt is not doubtable, it could not be discarded merely on grounds of doubt.

(10.60). The Gujarat High Court has held in the case of [103]**KARUBHAI Vs. STATE OF GUJARAT** that there are no strict rules for the reliability of the witnesses but one has to take decision after appreciation of over all evidence on record and several factors are required to be considered like demeanor of the witnesses, the statements recorded before the court, enmity between the parties etc. and thereafter, the appreciation is to be done. On appreciating evidence in the present case, the alleged offence is proved beyond reasonable doubt against the Accused and the Complainant has proved the case beyond reasonable doubt qua the Accused as reflected from the records.

(10.61). The Hon'ble Supreme Court of India has held the ratio in it's decision delivered in case of [104]**BINAYKUMARSINH Vs. STATE OF BIHAR**

[103] *KARUBHAI Vs. STATE OF GUJARAT : 2007[1] G.L.H. 411*
[104] *BINAYKUMARSINH Vs. STATE OF BIHAR : A.I.R. 1997 S.C. 322*

that deposition of even one witness is sufficient to convict the Accused.

(10.62). The Hon'ble Gujarat High Court has held the ratio in it's decision delivered in case of [105]**M.S. RAGHUNATHAN Vs. RAJESH SHAH & Co.** that object of introducing the provision is to enhance credibility of the negotiable instrument and to inculcate faith in the efficacy in banking operation.

(10.63). As per the provision of the Indian Evidence Act, it is a bounded duty and the law casts the burden of proof to prove the case beyond reasonable doubt on the Complainant and once the Complainant discharged his said burden of proof as in present case and proved the alleged offence beyond reasonable doubt, it is for the Accused to prove contrary to it and onus of proof is shifted on Accused to prove his innocence, but the Accused in present case has miserably failed to prove so. Under such circumstances, no doubt regarding the alleged offence punishable under Section 138 of the Negotiable Instrument Act, 1881, is committed by the Accused arises. It is the settled principles of criminal justice that let one hundred Accused be acquitted but one innocent should not be convicted. But it is also equally true that no guilty

[105] ***M.S. RAGHUNATHAN Vs. RAJESH SHAH & Co. : 2005(2) GLR 1750 = 2005(1) GCD 573***

person shall escape from hands of law or else it will amount to mockery of law. Taking into consideration the provision the criminal jurisprudence and the Indian Evidence Act, if the oral as well as documentary evidences of the present case are appreciated, then based on the said evidences, the Accused deserves to be convicted for the offence punishable under Section 138 of the Negotiable Instrument Act, 1881 and the said evidences could be said to be sufficient. Thus, when the alleged offence punishable under Section 138 of the Negotiable Instrument Act, 1881, is proved beyond reasonable doubt and evidences are sufficient to convict the Accused, then it will be just, proper, reasonable and legal to convict him. Considering facts and circumstances of the case and the dictum laid down by the Hon'ble Apex Court and various Hon'ble High Courts of India in the decision referred here-in-above, this Court is of the view that the Accused has committed offence punishable under Section 138 of the Negotiable Instrument Act, 1881.

(10.64). All the these issues are being already discussed at length and answered by the Ld. Trial Judge. When the Court is having concurrent view, then the said reasoning are not required to be repeated and this Court concur with the finding arrived at by the Ld. Trial Judge and therefore, the said reasoning are not repeated again.

(10.65). In view of the above discussion, there remains no doubt that Accused had committed the offence punishable under Section 138 of Negotiable Instruments Act, 1881 and the Ld. Trial Judge has correctly recorded the conviction and imposed the reasonable sentence and therefore, it does not require any interference by this Court, but deserves to be confirmed and hence, I answer the **POINT No. 1 & 2** in **NEGATIVES** and answer the **POINT No. 3** by passing following FINAL ORDER :

-: F I N A L O R D E R :-

- **The appeal is hereby dismissed.**
- **The Judgment and Order dated 10/01/2025 passed in Criminal Case No. 7006/2017, by Hon'ble 7th Addl. Chief Judicial Magistrate, Jamnagar, is hereby confirmed.**
- **The stay granted earlier, is hereby vacated forthwith. The Accused shall immediately surrender before the Hon'ble Trial Court. If the Accused fails to surrender immediately, then the Hon'ble**

Trial Court shall issue arrest / sentence warrant immediately qua Appellate / Accused, to undergo the sentence of imprisonment as ordered by it.

- Yadi, alongwith the Copy of this Judgment and Order as well as the Record and Proceeding of Criminal Case No. 7006/2017, is ordered to be sent back to the concerned Hon'ble Magistrate, forthwith.

- The amount, if any deposited by Accused in the Hon'ble Trial Court or in the Hon'ble Sessions Court, Jamnagar & are yet if not withdrawn by Complainant, then it shall be paid to Original Complainant, with interest of Fixed Deposit if any, but shall be disbursed only, subject to any order if passed in future, by the Hon'ble High Court of Gujarat, in proceeding challenging this order.

- It is ordered to provide the copy of this Judgment and Order immediately to the Appellant – Convict, free of cost.

- The Appellant / Accused shall pay cost of

this appeal of Rs. 16,500/- to the Respondent No. 1 / Original Complainant.

*Signed, pronounced and declared in the open Court on this 3rd day of **August, 2026**, at Jamnagar.*

Date : 03/08/2026
Place : Jamnagar

(RASIKKUMAR V. MANDANI)
3rd Additional Sessions Judge
Jamnagar. (Code : GJ00715)

// KY(f)+AMS(R)+sf //