Exh.20

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IN THE HON'BLE COURT OF 3RD ADDL. SESSIONS JUDGE KHEDA AT NADIAD

Criminal Appeal No.363/2024

Appellant:~

S, Basirbhai Ismailbhai Palwala
Age: 80 Yrs., Occup.: Retired,
Residence: Bhatarvadi, Hathilahanuman,
Pa Savajipara Road, Amreli.

Versus

Respondents:~

(1) Power of Attorney Holder of
C.J. Finance Ltd.
Kamleshbhai K. Shah
Age: Adult, Occup.: Service,
Address: C.J. Finance Co. Ltd.
Motapor, Nadiad, Ta.: Nadiad. Dist.: Kheda.

(2) The State of Gujarat.

For the Appellant.	Ld. Advocate Mr. N.C. Patel
For the Respondent No.1	Ld. Advocate Mr. N.N. Shah
For the Respondent No.2	Ld. P.P. Mr. D.R. Barot

An Appeal u/S. 415 of B.N.S.S Act,
(u/S.374 of Criminal Procedure Code)

JUDGMENT

(1) The present appeal has been preferred by the present appellant/ original accused against the Judgment passed by the Ld. 3rd Additional Chief Judicial Magistrate, Nadiad in Criminal Case No.4115/2018 on 31/05/2024, under Section-138 of the Negotiable

Instrument Act for the fine of Rs.77,407/- and in default of the fine, 6 months simple imprisonment was awarded. Further, Ld. Trial Court has also ordered that, if the amount of fine deposited by the accused in the court Rs.77,407/- be given to the complainant by way of compensation hence, being aggrieved and dissatisfied by the said Judgment, the present appeal has been preferred.

(2) Notices are issued to the respondents. Respondent No.1/ original complainant is duly served and he appeared through his Ld.Advocate. For the Respondent No.2/ State appeared through Ld. Public Prosecutor.

(3) So far the short facts lead to the present appeal are that, the original complainant filed one complaint before the court of Ld. 3rd Additional Chief Judicial Magistrate, Nadiad, against the accused under Section-138 of the Negotiable Instrument Act, vide Criminal Case No.4115/2018 in the trial Court, the case of the original complainant that, the company of the complainant is a registered company under the Act, and the said company is a financial company and not a banking company and its registered office is situated at Nadiad and Corporate Office has been situated at Ahmedabad and said company is providing finance to the needy person. The accused needed finance to purchase Honda Activa 3G. For taking a loan from the complainant's institution, the complainant had to submit necessary documents. The complainant's institution had entered into a vehicle loan agreement with the accused for Rs. 50,000/-. The said loan was given on 31.01.2017 for vehicle no. AMA 0287. It was to be repaid in fixed monthly installments of Rs. 2,522/-. The accused did not pay the loan installments regularly. When the accused was asked for repayment, the accused, in order to settle the outstanding amount in his loan account, gave a cheque to the complainant. That cheque, being S.B.I. Amreli Branch cheque no. 26442 dated 29.09.2018 for Rs.77,407/- drawn on account no. 10837922044, was given with the assurance that if presented in the bank, the cheque would be honored and the money would be received. Thereby, the complainant became the holder in due course of the cheque. The cheque given by the accused was presented by the complainant at Bank of Baroda, Santhpipali, Nadiad Branch on 03.10.2018. The said cheque was returned unpaid on 05.10.2018 by S.B.I. with return memo reason no. 01 "Fund Insufficient". The bank informed the complainant about this on 06.10.2018, and the complainant did not receive the cheque amount. Thus, the accused, by giving the cheque to the complainant, breached the trust and confidence reposed in him. For violation of provisions of Section-138 of the N.I. Act, a legal notice was sent to the accused on 15/10/2018 through his advocate by R.P.A.D. The said notice was served to the accused on 20/10/2018, but despite that, the accused gave a false and vague reply. Thus, the accused has committed an offence under Section 138 of the Negotiable Instruments

Act. The complainant had sent a legal notice to the accused on 15/10/2018 through his advocate by R.P.AD. That notice was served to the accused on 20/10/2018 and it is stated in that notice that the cheque amount should be paid within 15 days of receipt of the notice. Despite that, he has not paid the cheque amount. Therefore, the present complaint against the accused has been filed under Section-138 of the Negotiable Instruments Act.

(4) After filing of the complaint, the verification was recorded and the trial Court has taken cognizance and issued the summons to the accused, then accused appeared through his advocate and his plea was recorded and he pleaded no guilty and thereafter the original complainant submitted his Examination-in-Chief vide Ex.04, and he was thoroughly cross-examined by the Ld.Advocate for the accused, and thereafter the complainant closed his evidence.

(5) Thereafter the Further Statement of the accused was recorded under Section-313 of the Criminal Procedure Code, and in the Further Statement the accused stated that he did not want to give deposition and he stated that make arrangement for the installments and also he has to sale his house and if his house has been sold then he can repay the money and after hearing the submissions of Ld. Advocates of both the parties, the Ld. Trial Court has passed an order against the accused under Section-138 of the Negotiable Instrument Act, and after hearing the accused ordered to deposit fine of

Rs.77,407/- and in default of fine, six months simple imprisonment is awarded; and the Ld. Trial Court has also passed the order that, after deposited the amount of Rs.77,407/- by way of fine the same amount be given to the complainant as the compensation; and the said Judgment is passed on 31/05/2024 by the court of Ld. 3rd Additional Chief Judicial Magistrate, Nadiad, and being aggrieved and dissatisfied by the said Judgment the present appeal has been preferred.

(6) Heard Ld. Advocate for the present appellant/ original accused, Ld. Advocate for the present respondent No.1/original complainant and Ld. Public Prosecutor for the Respondent No.2 - State.

(7) Ld. Advocate for the appellant has submitted that, the Judgment passed by the Ld. Trial Court is against the settled principles of law and against the evidence produced in the trial Court, hence the Judgment passed by the Ld. Trial Court is required to be set-aside. Further, Ld.Advocate has submitted that the complainant has given his deposition at Ex.4, which is not as per the complaint and debt of the accused has not been proved and the Ld. Trial Court has not given opportunity to cross-examined the complainant and without hearing the appellant and passed an ex-parte order. The complainant has produced evidence vide Exh.8 to Exh.14, which are not duly proved hence, case of the complainant has not been proved further as per Exh.10 the notice has been given for debt, which has not been proved and respondent no.1 has also seized the vehicle of the accused but that fact has not been mentioned in his complaint, hence, Ld.Trial Court has not considered the evidence on record hence, order passed by the Ld. Trail Court is required to be set aside.

(8) On the other hand, Ld.Advocate for the respondent No.1 has submitted that, the Judgment passed by the Ld. Trial Court is just and proper, does not require any interference, hence the present appeal is required to be dismissed with costs.

(9) Ld.PP for the respondent No.2 - State has argued that, the order passed by the Ld. Trial Court is just and proper and necessary order be passed.

(10) Heard the arguments of the Ld. Advocate for the appellant and respondents. After hearing the rival submissions of the parties, after perusing the record & proceedings of the Trial Court and after perusing the Judgment passed by the Trial Court following points come before this Court, for the consideration:~

(1) Whether the appellant proves that Judgment passed by the Ld. Trial Court is against the settled principles of law and requires to be set aside?

(2) What order ?

(11) My findings to the above Points are as under :~

(1) In the negative.

(2) As per the final order.

R E A S O N S

Point No. 1 :~

(12) So far, the short facts of the case are already been narrated above. Now, it is required to consider that, all the ingredients, as per Section-138 of the Negotiable Instrument Act, are satisfied or not. In the present case in hand is concerned, in the trial Court the original complainant has given his deposition by filing Examination-in-Chief at Ex.04, original cheque has been produced vide Ex.08, cheque return memo issued by the accused banker is produced vide Ex.09, copy of the notice is produced vide Ex.10 and original cover which was returned by the Postal Department with an endorsement 'refused' is produced vide Ex.11. So, the cheque produced vide Ex.08 is of Rs.77,407/- issued by the accused in the name of the complainant dated 29/09/2018, the said cheque was deposited by the complainant in the bank, but it was returned unpaid with an endorsement 'funds insufficient' on 05/10/2018; and the said intimation by the complainant bank to the complainant was given in 06/10/2018; and after the intimation from the complainant bank, the complainant issued legal notice through advocate on 15/10/2018. So, as per the provisions of the Negotiable Instrument Act, after the intimation of dishonour of the cheque, within 30 days notice was issued, and the said notice was refused by the accused and the present complaint was filed in the trial Court on 27/11/2018. So, primafacie the Section-138(a), 138(b) & 138(c) has been complied with and the complaint is filed by the complainant within the time limit.

(13) Now, the only question is pertaining to – whether the accused has issued the cheque towards the legally enforceable debt or not ? In the present case in hand is concerned, the only defence taken by the accused is that the complainant has seized his vehicle and used blank cheque of the accused, was misused by the complainant. So, there is no dispute regarding the signature of accused on the original cheque. Even the signature on the cheque is not disputed. The court can draw the presumption as provided under Section-139 of the Negotiable Instrument Act. It is also settled principles of law that, the said presumption can be rebutted by the accused; and once the signature is admitted on the cheque, then it is required to be presumed that, the cheque in question was drawn for the consideration, and the holder of the cheque received the same in discharge of the existence debt. Thereafter, the onus be shifted on the accused to establish the probable defence to rebut the presumption.

(14) In this regard, it is profitable to peruse the Judgment of the Hon'ble Apex Court in the case of "***Rangappa v/s. Sri Mohan***" reported in ***"2010(11) SCC 441***". The Hon'ble Apex Court has summarized the principles relating to the presumption under Section-118 & 139 of the Negotiable Instrument Act, and rebuttal of the said presumption, in para – 14, which is as under:~

> ***14. In light of these extracts, we are in agreement with the respondent-claimant that the presumption mandated by Section 139 of the act does indeed include the existence of a legally enforceable debt or***

liability. To that extent, the impugned observations in Krishna Janardhan Bhat (supra) may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant. Section 139 of the act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the accused/defendant cannot be expected to discharge an unduly high standard or proof. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of 'preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own.

(15) It is profitable to peruse the Judgment of Hon'ble Apex Court in the case of "**Basalingappa v/s. Mudibasappa**, **Criminal Appeal No. 636 of 2019 (Arising Out of SLP(Criminal) No. 8641 of 2018), Decided on : 09-04-2019**" has held in para-23 as under :~

23. We having noticed the ratio laid down by this Court in above cases on Sections 118(a) and 139, we now summarise the principles enumerated by this Court in following manner:-

(i). Once the execution of cheque is admitted Section 139 of the act mandates a presumption that the cheque was for the discharge of any debt or other liability.

(ii). The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.

(iii). To rebut the presumption, it is open for the accused to rely on evidence led by him or accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely.

(iv). That it is not necessary for the accused to come in the witness box in support of his defence, Section 139 imposed an evidentiary burden and not a persuasive burden.

(v). It is not necessary for the accused to come in the witness box to support his defence.

(16) Considering the principles laid down by the Hon'ble Apex Court, and considering the facts, there is specific case of the original complainant in the trial Court that, he lent Rs.77,407/- to the accused. The complainant's institution had entered into a vehicle loan agreement with the accused for Rs. 50,000/-. The said loan was given on 31.01.2017 for vehicle no. AMA 0287. It was to be repaid in fixed monthly installments of Rs. 2,522/-. Even in the complaint, the cheque number has been mentioned by the complainant, even in the notice produced in the trial Court vide Ex.10, this cheque number has been mentioned, and even in the Examination-in-Chief, this cheque number has been mentioned by the complainant in his deposition produced vide Ex.04. In this regard, it is required to consider the cross-examination has not been carried out by the Ld. Advocate for the accused. The Ld.Advocate for the Complainant has stated that the cheque produced vide Ex.8 the amount, date and name have been written by the accused.

(17) So, from the settled principles of law, mere denial is not going to rebut the presumption. It is also the settled principles of law that, once the initial presumption under Section-139 has been rebutted by the accused, in that circumstances only, the accused can question the capacity of the complainant to lend the amount; and even the accused can ask for the documentary evidence pertaining to the lending this amount. As discussed above, in the present case in hand is concerned, no probable defence has been taken by the accused. Further, the accused remained absent for the time of cross-examination and so many opportunities have been given to cross-examine the complainant but accused remained absent hence, his right has been closed to cross-examined the complainant. Hence, his arguments advanced regarding no any opportunity has been given to cross-examine the complainant by the Trial Court is not at all acceptable. Further, Ld. Trial Court has also observed that in the further statement of the accused, which has been taken on 29/11/2022, wherein he has clearly stated that he does not want to give examination in chief on oath and also not want to examine the witness in defense. In particular, the accused has stated in his FS that if he was allowed to arrange for installments and he has to sell the house, if it is sold, he can pay the current amount and Ld. Trial Court has rightly considered that the accused is only prolonging the case. As per the defence of the accused that, the complainant has seized his vehicle but no evidence has been adduced by the accused to raise the probability that, the vehicle has been seized by the complainant. So, the Ld. Trial Court has rightly come to the conclusion that, the accused has miserably failed to rebut the presumption under Section-138 of the Negotiable Instrument Act, regarding the lending of money or the legally enforceable debt is concerned, the amount has been paid by the complainant to the accused by way of agreement as loan, and the said has not been questioned by the accused.

(18) Considering these, from the facts and evidence produced in the trial Court, it has been established that, the original complainant has lent the money to the accused; and the Ld. Trial Court has drawn the presumption under Section-138 of the Negotiable

Instrument Act in favour of the complainant; and no probable defence has been put-forward; so I am in total agreement with the Ld. Trial Court that, the presumption under Section-138 of the Negotiable Instrument Act is not rebutted by the accused; even the signature on cheque is admitted, not in dispute; hence the findings given by the Ld. Trial Court is just and proper and I do not find any reason to interfere with the findings given by the Ld. Trial Court.

(19) As discussed above, the presumption under Section-138 of the Negotiable Instrument Act is not rebutted by the accused; legally enforceable debt is duly proved and Ld.Advocate for the accused has not produced any evidence to prove his case. Hence, as discussed above, I do not find any reason to interfere with the findings given by the Ld. Trial Court, hence I answer Point No.1 in the negative and pass the following order in the interest of justice:-

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

[1] Criminal Appeal No.363/2024 is hereby dismissed.

[2] The Judgment passed by the Ld. 3rd Additional Chief Judicial Magistrate, Nadiad in Criminal Case No.4115/2018 on 31/05/2024, under Section-138 of the Negotiable Instrument Act for the fine of Rs.77,407/- (Rupees Seventy Seven Thousand Four Hundred and Seven Only) and in default of the fine, 6 months simple imprisonment was awarded is hereby confirmed.

[3] The bail bonds of appellant – original accused hereby stands cancelled.

[4] Consequently, the appellant – original accused is directed to surrender before the Ld. 3rd Additional Chief Judicial Magistrate, Nadiad and if the appellant fails to appear before the learned trial court, the trial court shall have the discretion to issue an arrest warrant against the accused and take such legal action as may be necessary to enforce its order.

[5] The appeal is disposed of accordingly.

[6] The appellant to bear his costs as well as the costs of the respondent.

[7] Record and proceedings be sent back to the Learned Trial Court along with copy of this order for necessary action and implementation.

Pronounced in the open Court on 20th Day of June, 2026.

Date:20/06/2026
Place: Nadiad

(MUKESHKUMAR JAYANTILAL BRAHMBHATT)
3rd Additional Sessions Judge
Kheda at Nadiad
Code No.GJ00754