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	DAYS	MONTH	YEAR

Exh. : 8

**BEFORE 8TH ADDITIONAL SESSIONS JUDGE
AT RAJKOT**

Criminal Appeal No.422 of 2025

Rinabha Hariyabha Manek

Adult, Occupation : Retired

Resident : Hamusar, Mithapur

Taluka : Okha Mandal

O K H A

... .. APPELLANT

V E R S U S

(1) H.D.F.C. Bank Ltd.

Power of Attorney Holder

Hardikbhai Mahendrabhai Pathak

Adult, Occupation : Service

Resident ; Akansha Building

First Floor, Gondal Road

R A J K O T

(2) The State of Gujarat

Through : District Government Pleader

R A J K O T

... .. RESPONDENTS

Appearance

Mr. R. M. Patgir, Learned Advocate for the appellant

Mr. N. B. Pujara, Learned Advocate for respondent No.1-complainant.

Mr. K. B. Dodiya, Learned A.P.P. for the respondent No.2-State.

J U D G M E N T

1. The present appeal is directed against the **judgment and order of conviction dt.16-10-2024 passed by the Learned 9th Additional Chief Judicial Magistrate, Rajkot** (herein after referred to as "Learned Trial Court") in **Criminal Case No.92/2020**, whereby the Learned Trial Court has convicted the appellant-accused under Section 138 of The Negotiable Instrument Act, 1881, (hereinafter referred to as "N. I. Act") and sentenced him for **one month simple imprisonment** and directed to pay Rs.1,06,395/- (Rupees One Lakh Six Thousand Three Hundred Ninety Five Only) as compensation to the complainant and, in default of the payment of compensation, **further one month further simple imprisonment**. Hence, filed this appeal.
2. Notice of this appeal has been served. Simultaneously, record and proceedings have been summoned.
3. Before stating the facts of the present case, it is pertinent to note that the present appellant is the accused and respondent respondent No.1 is the complainant whereas respondent No.2 is the State, hence, for the sake of convenience, appellant and respondent No.1 both are referred to as "**accused**" and "**complainant**" respectively. Further, the

respondent No.2-State is a formal party joined in this appeal.

4. Brief facts of the present case are that, the complainant is a registered Bank and engaged in the business of providing various loans and accused obtained used commercial vehicle loan from the complainant vide contract No.83335000. It is contended that, accused had not remained regular towards repayment of loan, therefore, on demand accused has given cheque No.000041 dt.01-11-2019 for unpaid loan amount of Rs.1,06,395/- drawn on Bank of Baroda and assured that on presentation, cheque would be honoured by the bank, however, said cheque was dishonoured and returned on 05-11-2019 with endorsement of "**Funds Insufficient**", thereafter, legal demand notice dt.22-11-2019 was issued to the accused which was delivered to accused on 29-11-2019, however, after service of notice, neither notice was replied nor due amount of cheque was paid by the accused, hence, present complaint was filed before the Court.
5. It is pertinent to note here that along with the appeal memo, the appellant - original accused has submitted an application **Exh.5** and sought to stay the execution, operation & implementation of the questioned order dt.16-10-2024 passed by the Learned Trial Court in **Criminal Case No.92/2020** and the same was granted by imposing certain conditions and also directed to deposit 20% of cheque amount within sixty days and thereby, released the appellant

on bail.

6. The Learned Advocate for the appellant has submitted various grounds in appeal memo which goes in following manner :

- The judgment is bad in law and contrary to the evidence and material on record.
- The Learned Trial Court has not properly appreciated evidence on record and unconstitutionally held the accused guilty despite there is no prima facie case for the offence punishable under Section 138 of N. I. Act, therefore, impugned judgment and order of sentence is liable to be dismissed.
- The complaint against appellant is of summary nature under Section 25 of The Payment and Settlement Act and triable according to provisions of Section 326 and 260 of Cr. P. C., however, entire proceedings were not concluded by one and same Judicial Magistrate. It is contended that recording of evidence by one Judicial Magistrate and passing order or delivering the judgment by another Judicial Magistrate is not curable irregularity, but is an irregularity, therefore, judgment of the Learned Trial Court is required to be set aside.
- The judgment is passed by avoiding principles of Criminal Jurisprudence and without affording opportunity of defence to the appellant, however, accused has been convicted by drawing adverse inference and presumption against accused.

- That Learned Trial Court has mechanically passed the impugned judgment and order only on presumption and arbitrary to law, hence, Learned Trial Court has committed serious error of law and facts.
- That the matter has been proceeded exparte and present appellant has not been given any chance to cross-examine the complainant, defend his case nor has given chance to argue the matter and hence also the judgment of the Learned Trial Court is required to be interfered.
- There is no evidence of complainant that when and in whose presence disputed cheque was given by the appellant and presumption do not extend regarding existence of legally enforceable debt or liability, however, Learned Trial Court has committed grave error in believing the evidence to be true produced by the complainant. Also contended that there are material alteration in the disputed cheque, however, Learned Trial Court has believed disputed cheque to be valid without discussing the same in the impugned judgment.
- That there are contradiction in the evidence produced by the complainant and, therefore, such evidence cannot be considered in evidence, however, Learned Trial Court has believed the evidence of complainant to be true and thereby committed serious error of law and facts.
- On the aforesaid grounds, it has been urged to allow the present appeal and to set aside the conviction of the Learned Trial Court.

7. The Learned Advocate for the respondent No.1-complainant has submitted that Learned Trial Court has considered all the aspects of the matter and evidence produced on record. It is further submitted that despite sufficient opportunities were afforded, the appellant has neither remained present nor taken any defence for his innocent nor brought any adverse evidence on record against the evidence of complainant. It is also stated that the judgment of the Learned Trial Court is in consonance with the facts and evidences on record and the settled proposition of law and the Learned Trial Court has properly appreciated the evidences and has come to proper conclusion which does not require any kind of interference and has also urged to take note of the conduct of the appellant before this Court. Also submitted that after getting bail, appellant-accused does not remain present before this Court, present appeal is liable to be rejected.
8. The Learned A.P.P. appeared for and on behalf of respondent No.2-State has submitted that respondent No.2-State has nothing to say regarding merits or demerits of the impugned judgment and order of conviction and requested to pass appropriate order in the interest of justice.
9. I have heard the arguments of the Learned Advocate for concerned parties, taken into consideration the papers on record and considering the averments of the appeal memo as well as the contentions from the other side, following issues are arisen for my determination.

1. Does the judgment under question required interference by this Court exercising the Appellate jurisdiction?
 2. What order ?
10. My findings on the aforesaid issues are as under :
1. In the affirmative.
 2. As per final order.

REASONS

Issue No.1

11. Determination as regards factual aspect emerging from the record from the stand point of legal framework and principles governing thereof.

(A) Power of the Appellate Court in conviction appeal.

Before advertng into the assessment of the factual aspect in respect of appreciation of evidence on record, sufficiency or insufficiency of sustaining the conviction or otherwise, it is worthwhile to comprehend Powers of the Appellate Court which flows from Section 386 of Code of Criminal Procedure which reads as under:-

"386. Powers of the Appellate Court - After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may -

- (a) *in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;*
- (b) *in an appeal from a conviction -*
 - (i) *reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial; or*
 - (ii) *alter the finding, maintaining the sentence; or*
 - (iii) *with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same;*
- (c) *in an appeal for enhancement of sentence -*
 - (i) *reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a Court competent to try the offence, or*
 - (ii) *alter the finding maintaining the sentence, or*
 - (iii) *with or without altering the finding, alter the nature or the extent or the nature and extent of the sentence, so as to enhance or reduce the same;*
- (d) *in an appeal from any other order, alter or reverse such order;*
- (e) *make any amendment or any consequential or incidental order that may be just or proper:*

***Provided** that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement:*

***Provided further** that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal."*

Keeping in mind the above proposition of law, now the merits of present appeal are required to be taken into consideration.

(B) Consideration of factual aspect and its appreciation.

(i) Brief facts

That the present appellant-accused had obtained loan used commercial vehicle loan vide contract No.83335000, however, accused did not pay regular installments and on demand of due amount of loan, accused had issued a cheque No.000041 dt.01-11-2019 of Rs.1,06,395/- drawn on Bank of Baroda, Rajkot, however, said cheque was dishonoured on 05-11-2019 with endorsement "**Funds Insufficient**", hence, the respondent No.1 had issued and served a legal notice dt.22-11-2019 and, as such, appellant-accused failed to comply, the respondent No.1 had filed the complaint under Section 138 of N. I. Act within prescribed time limit. At the conclusion of the trial, it had culminated into convicting the present appellant. This is what some and substance of the

allegations.

(ii) **Arguments**

(a) **For appellant**

The Learned Advocate for the appellant has submitted that initially affidavit of chief-examination of witness Hardikbhai Mahendrabhai Pathak was filed on 30-12-2019, however, no copy of documents and affidavit of chief-examination of the witness Hardikbhai were provided to the appellant. It is further argued that though earlier affidavit of chief-examination of witness Hardikbhai Mahendrabhai Pathak was submitted on 30-12-2019 and copy of which was also not provided to appellant till 21-04-2022 and though cross-examination of said witness was pending, however, complainant again submitted affidavit of chief-examination of another witness Pratikbhai Gunavantbhai Parmar on 12-03-2024 and again copy of which was not provided to appellant, but on the same day, application **Exh.32** for exhibiting the documents was filed by the complainant. It is also argued that without providing copy of the affidavit of chief-examination of the witness of complainant submitted on 12-03-2024, complainant filed

an application **Exh.33** to close the right of appellant for cross-examining the witness of complainant and same was granted by the Learned Trial Court and right of appellant to cross-examine the witness of complainant was closed on 08-04-2024. He has vehemently argued that without providing copy of affidavit of chief-examination of the witness of complainant, right of accused to cross-examine the witness of complainant was closed on 08-04-2024, therefore, appellant was not afforded opportunity to cross-examine the witness of complainant. Not only that, right of appellant to record his further statement was also closed on 03-07-2024, however, record reveals that Learned Trial Court had recorded further statement of appellant earlier on 23-09-2022 when trial was going on. Thus, it transpires that without providing copies of documents and opportunity to cross-examine the witness Pratikbhai Gunvantbhai Parmar of complainant, further statement of appellant was forcefully recorded by the Learned Trial Court on 23-09-2022 i. e. on the date on which plea of appellant was recorded which apparently affects the fundamental rights of

appellant. Further argued that even appellant has taken a defence in his further statement that vehicle was seized by the complainant and sold out by complainant and recovered the due amount of loan and misused the cheque issued by appellant for security purpose at the time of obtaining loan, however, Learned Trial Court has not cared to look after defence of appellant and also not given any findings for not considering or believing such defence of appellant. Therefore, the Learned Trial Court has concluded trial of **Criminal Case No.92/2020** and convicted the appellant without proper appreciation of evidence and defence of appellant as well as without affording opportunity to cross-examine the witness of complainant. Hence, appellant had not got chance to defend himself and without giving any opportunity to the appellant, the judgment under challenge had been passed. Lastly it is submitted that appellant was suffering from chronic kidney disease and continuously under medical treatment and despite probable defence proved by the appellant, Learned Trial Court has erroneously convicted the appellant, therefore, Learned Advocate for the

appellant has argued that if this appeal is not allowed and matter is not remanded back then appellant cannot get opportunity of his defence, hence, urged to allow the appeal and remand back the case to the Learned Trial Court. In support of his submissions, Learned Advocate for the appellant has produced medical treatment papers of appellant which reflects that appellant was suffering chronic kidney disease in the year 2022 and was under medical treatment.

(b) **For the respondent No.1-complainant**

The Learned Advocate for the respondent No.1-original complainant has stated that the complainant is a bank and accused had obtained used commercial vehicle loan and also executed contract No.83335000, however, he did not pay the loan amount and on demand, he had given a cheque of Rs.1,06,395/- of Bank of Baroda, Rajkot, accepting his liability and said cheque was returned with the endorsement of '**Funds Insufficient**' and argued that judgment of the Learned Trial Court is in consonance with settled principles of law and facts and the present appellant had tried willfully to delay the proceedings by not remaining present and

the reasons cited in appeal memo are not correct and has urged to uphold the judgment of Learned Trial Court.

For the respondent No.2-State

(c) The Learned A. P. P. for respondent No.2-State has argued that the judgment is proper and does not require any interference.

(d) **Appreciation of evidence**

Being the first Appellate Court and Court of fact, it is the bounden duty as such to De Novo the task of evaluating the evidence need to be performed. Keeping in focus, let us evaluate entire evidence once again from all perspectives including the facts suggested by the appellant to be taken as drawbacks going to the extent of displacing entire decision under question. Let us first recite the oral as well as documentary evidence led by the prosecution.

During the trial, the deposition of the witness Hardikbhai of respondent No.1 was recorded vide **Exh.4** and documentary evidences were produced vide **Exh.12 to Exh.17** while no documentary or oral evidence had been produced by present appellant before the Learned Trial Court.

- (C) **Brief narration of the testimonial collection and evaluation of the same and constitution of alleged offence vis-a-vis the legal ingredients thereof and proof of guilt or otherwise.**

The present respondent No.2, who is the original complainant examined witness Hardikbhai Mahendrabhai Pathak vide **Exh.4** and he has deposed as per the complaint and has stated that the present appellant though having issued the cheque voluntarily against legal enforceable debt, has not cared to keep sufficient balance in the account and as per the instruction and assurance, the cheque was deposited but returned unpaid and though the notice was served, the same had not been complied with and so had urged to convict the present appellant.

The respondent No.2 has also examined witness Pratikbhai Gunavantbhai Parmar vide **Exh.31** who has also stated similar facts to that of witness Hardikbhai examined vide **Exh.4**.

However, it is pertinent to note that affidavit of chief-examination of witness Hardikbhai Mahendrabhai Pathak produced vide **Exh.4** was submitted on 30-12-2019 and present appellant had, on being served with summon, appeared before Learned Trial Court and his plea was recorded on 23-09-2022 vide **Exh.11** and as he had not admitted the guilt, the matter was proceeded further. It reveals that copy of affidavit of chief-examination produced vide **Exh.4** on 30-12-2019 was provided to

appellant on 21-04-2022, but before this witness was cross-examined by the appellant, the complainant has sought permission to replace witness Pratikbhai Gunvantbhai Parmar in place of witness Hardikbhai Mahendrabhai Pathak vide **Exh.29** dt.12-03-2024 which was granted by the Learned Trial Court and subsequently complainant produced affidavit of chief-examination of witness Pratikbhai Gunvantbhai Parmar vide **Exh.31** on 12-03-2024, but no copy of affidavit of chief-examination produced vide **Exh.31** on 12-03-2024 has been provided to the appellant. Further, record reveals that right to cross-examine the witness of complainant was closed on 08-04-2024 and though complainant has replaced the witness, the Learned Trial Court has not considered the affidavit of chief-examination of replaced witness Pratikbhai Gunvantbhai Parmar, but Learned Trial Court has considered the affidavit of chief-examination of earlier witness Hardikbhai Mahendrabhai Pathak produced at **Exh.4** on 30-12-2019 despite the fact that before closing the right of appellant to cross-examine the witness of complainant on 08-04-2024, the witness of complainant was replaced and no copy of affidavit of replaced witness is provided to the appellant. Thus, it appears that despite complainant has replaced its witness to prove the complaint and affidavit of chief-examination of replaced witness is produced vide Exh.31, but copy of such affidavit of chief-examination of replaced witness is not

provided to appellant and despite such fact, Learned Trial Court has placed reliance on the affidavit of chief-examination of earlier witness. It further reveals from the record that plea of appellant was recorded vide **Exh.11** on 23-09-2022 and on the same day, further statement of appellant was also recorded despite the fact that after plea of appellant, trial was not commenced. It is surprised to note that despite further statement of appellant was recorded vide **Exh.18** on 23-03-2022, at the instance of complainant, right of further statement of appellant was closed by the Learned Trial Court by order dt.03-07-2024 passed below **Exh.36**. Further, appellant has specifically taken a defence in his further statement that vehicle purchased on loan was seized and sold out by complainant and recovered the due amount of loan, however, misused the cheque given for security purpose and complainant has neither produced evidence in this regard nor denied the defence of appellant. Further, according to statement of account produced with complaint, there is outstanding due amount of Rs.2,01,196/- as on 31-10-2019 however, disputed cheque is of only Rs.1,06,395/- alleged to have issued on 01-11-2019 by the appellant towards outstanding due amount of loan. Thus, outstanding due amount shown in the statement of account differs from the cheque amount and there is no satisfactory explanation in this regard from the complainant.

12. On going through the judgment under challenge, it

transpires that right of appellant to cross-examine the complainant was closed on 08-04-2024 vide **Exh.33** and matter was adjourned to 05-06-2024 for hearing of application **Exh.32** and on 05-06-2024, application **Exh.32** was granted and evidence of complainant were exhibited and then matter was adjourned to 02-07-2024 for further statement of appellant-accused, however, record reflects that Learned Advocate for the complainant submitted application **Exh.36** to close the right of further statement of appellant and the Learned Trial Court has ordered to close the right of further statement of accused vide **Exh.36** dt.03-07-2024. Here it is surprise to note that according to proceeding of dated 05-06-2024, matter was adjourned to 02-07-2024 then how and why application **Exh.36** of complainant for closing the right of further statement of accused was taken on record on 03-07-2024. Not only that, but it further appears that plea of accused was recorded on 23-09-2022 and further statement of accused was also recorded on the same day i. e. on 23-09-2022 vide **Exh.18** and despite such fact, right for further statement of accused was also closed by order dt.03-07-2024 below **Exh.36**. Thus, it seems that present appellant could not get opportunity to cross-examine the complainant and defence raised by the appellant in his further statement seems to have not been considered by the Learned Trial Court. In the aforesaid circumstances, it is crystal clear that the appellant had got no chance to cross examine the witness

of complainant and to prove his defense and put forward his contentions.

Thus no such opportunity to cross-examine the witness of complainant appears to have been afforded to the appellant and thereby appellant has not got any chance to contest the matter on merits or to put forward his contentions in aid of his defense. So, it transpires that he has got no chance to cross-examine the witness of complainant despite he has raised substantial defence that his vehicle was seized and sold out by the complainant and recovered due amount of loan and then misused the cheque issued by him for security purpose at the time of obtaining loan. Further, such defence of appellant seems to be considerable force when statement of account reflects different outstanding due amount than disputed cheque. Hence, considering the principle of natural justice and to see to it that the matter is decided on merits and both the parties are required to be given equal opportunities, so it is fit case to remand the matter back to the Learned Trial Court for deciding the same on merits by giving opportunity to both the parties and so, the provisions of Section 386 (1) of Cr. P. C. is required to be exercised and judgment of Learned Trial Court is required to be set aside and it would be proper and appropriate to direct the Learned Trial Court to decide the said matter afresh and hence, interference is required to be made in the judgment of Learned Trial Court.

13. So, on the basis of discussion made herein above and considering the judgment under challenge, to see to it, the matter is decided meritoriously after giving chance to both the parties and to see to it that right of neither of the parties is jeopardize, it is required to be remanded back to Learned Trial Court.

14. **Summing-up**

Having considered the reasons assigned in the forgoing paragraphs and considering the ultimate analysis of entire evidence on record and reasons assigned in the foregoing part of this judgment, final conclusion as regards recording of conviction of the appellant is required to be set aside. So this is a fit case in which the appellate jurisdiction is required to be exercised and the matter is required to be remanded back to Learned Trial Court under Section 386 (1) of Cr. P. C. for deciding the same on merits after giving chance to both the parties. On the basis of discussion made in aforesaid part of this judgment, the point for determination No.1 is held in the affirmative.

Point No.2

16. On the basis of the discussion made herein above and considering the answer given to point No.1, point for determination No.2 is held as final order and in this background, the following final order is passed.

ORDER

1. This Criminal Appeal No.422/2025 **stands allowed.**
2. The judgment and order of conviction passed by the

Learned Trial Court recording conviction of accused - appellant herein in **Criminal Case No.92/2020** dt.16-10-2024 stands set aside.

3. It is hereby directed to the Learned Trial Court to give chance to the present appellant to cross examine the complainant and then after, for all the other proceedings.
4. Both the parties are directed to co-operate Learned Trial Court in proceeding further in the trial of present case.
5. The appellant is hereby directed not to seek any adjournment without any genuine reasons and to remain present regularly before Learned Trial Court.
6. Both the parties and their Learned Advocates are directed to remain present before Learned Trial Court on 20-04-2026 without fail.
7. The amount deposited by the appellant, if any, in this appeal as per order passed below **Exh.5**, the said be returned back to him after due verification.
8. Parties to bear their own cost.
9. Record and proceedings be sent back to the concerned Learned Trial Court along with copy of this order for necessary action and implementation.

Signed and pronounced in the open court today on this 24th day of March, 2026.

Place : R A J K O T

Date : 24-03-2026

[SALIM ABDULLA GALARIA]

8th Additional Sessions Judge

R A J K O T

Unique ID Code No.GJ00731

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