GJSK020000462023	Filed on	:	03.01.2023		
	Registered on	:	03.01.2023		
	Decided on	:	**15.06.2026**		
	Duration	:	**03**	**05**	**12**
			Years	**Months**	**Days**

In the Court of Addl. Chief Judicial Magistrate, S. K. @ Himmatnagar.

Criminal Case No. 31/2023

Exhibit : 38

Complainant : **M/s. Tractor House**
Through its Power of Attorney Holder
Najmuddin Samsuddin Harsoliya
Aged about : 35 years, Occupation : Service,
Resi. of : Boriya, N.H. No. 8, Motipura,
Ta. Himmatnagar, Dist.: Sabarkantha.

Versus

Accused :- **Sureshkumar Chhanaji Parmar**
Age : adult, Occupation : Brokerage,
Resi. of. : House No. 128, Sachodar,
Ta. Himmatnagar District – Sabarkantha.

A Private Complaint under section 138 of the Negotiable Instrument Act, 1881.

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Appearance :

Mr. M. S. Valjiwala, learned advocate for the complainant

Mr. O. R. Charan, learned advocate for the accused.

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:: J U D G M E N T ::

01. The present complaint is filed by the complainant against the accused under Section 138 of the N.I Act. Present complaint is the outcome of non-compliance and non-payment by the accused of the cheque amount from which as per the allegations in the complaint, the accused had taken delivery of 18 Tractors from the complainant for selling and as per the contract, the accused has taken responsibility of payment for the same through the cheques as mentioned in contract and the accused had executed a Sale deed in favour of complainant on dated 14.09.2022. The complainant has deposited a cheque bearing No. **000030** of **Rs.33,00,000/-** of **H.D.F.C.** Bank, **Himmatnagar** branch in his bank as assured by the accused.

02. It is alleged in the complaint that the accused had assured the complainant regarding honour of the cheque when it would be deposited in the bank. As per the instructions and assurance, complainant had deposited the said cheque on **16.11.2022** in **ICICI Bank Ltd.**, **Himmatnagar** branch. However, the said cheque was dishonored by the drawee bank stating the reason "**funds insufficient**" which makes the complainant very surprised and therefore, in compliance of Section 138(b) of the N.I. Act, 1881, the complainant has given a demand notice to the accused asking to pay the cheque amount within 15 days of receipt of notice. However, the said compliance was not made by the accused and accused failed to pay the outstanding amount to the complainant and hence, the present complaint is filed by the complainant against the accused.

03. Upon filing the present complaint and after its due verification, process was issued against the accused. Upon service of process accused was remained present before this court through his learned advocate and subsequently, the accused has filed his appearance in the court and his plea was recorded vide **Exh. 15.** The accused pleaded not guilty and hence, matter is being proceeded for the evidence of prosecution.

04. The complainant / prosecution has filed its affidavit of examination-in-chief relying upon judgment of **Hon'ble Supreme Court** in ***Mandavi Merchantile Co-op. Bank Ltd. v/s Nimesh B. Takhore*** and subsequently, affidavit of examination-in-chief was marked vide **Exh. 04**. Subsequently, the matter is came up for cross-examination of complainant by the accused. Learned advocate **Mr. S. V. Makwana** for the accused has cross-examined the complainant at **Exh. 04**, wherein he has stated that he studied upto 10^{th} standard and he has been working in this company for the last 18 years and he hold the position of Manager in this company. His duty is to explain to the customers, when the finance work comes, He has to go to the finance and give the customer information about the loan work. He has admitted that other finance companies like Mahendra Finance, Kotak Finance are present in his office. The finance companies deploy their own people. He has admitted that if the customer wants to take a loan from any bank, he himself goes to the bank. His company gives him a salary of 20,000/- as a manager. He has been working in this company since the beginning as a Manager. He has admitted that he is working as a Manager in Tractor House in Himmatnagar. He has admitted that the General Power of Attorney produced on record vide Exh. 7 in which Idar company has not mentioned. The witness voluntarily states that the company located in Idar is a sub-dealership. The name of the sub-dealership located in Idar is Maruti Tractor and its owner is Manubhai Virsangbhai Patel, Resi of Laxmipura, Ta. Khedbrahama. He has admitted that the Power of Attorney produced on record vide Exh. 7 does not mention the name of its owner located in Idar. He has admitted that the accused herein was not working in his company. He has admitted that the name of the owner of the showroom of Idar is not mentioned in the document produced on record vide Exh. 6. Thereafter, the matter is kept for further cross-examination of the complainant. But, neither accused nor his learned advocate was remained present before the Court to cross-examine the complainant, hence, this court has closed the right of cross-examination of the accused on **26.06.2024**. Therefore, when the complainant has given original evidence on record and in case of failure to cross-examine the complainant, the matter is kept for final argument as there is no need to record the further statement of the accused under Section 313 of Cr.P.C., 1973.

05. The complainant has orally argued and has fortified his arguments with his original documents and the facts stated in the complaint and affidavit of examination-in-chief and prayed to this court to allow his complaint and pass necessary orders seeking the conviction of accused. *Per contra,* there is no argument on the accused side. The documentary evidences produced by complainant on records are :

DOCUMENTARY EVIDENCE :

Sr. No.	Name of the Witness	Exhibit No.
01.	Copy of Form G – Register of Firms	06
02.	Copy of General Power of Attorney	07
03.	Copy of ledger account for the period of 01.04.2021 to 26.11.2022	08
04.	Copy of deed in regard to sell tractors	09
05.	Original cheque bearing No. 000030	10
06.	Cheque return memo	11
07.	O/c copy of notice dated 24.11.2022	12
08.	Postal receipt	13
09.	Envelope	14

Thereafter, the learned advocate for the complainant has tendered the closing pursis vide **Exh. 30**.

06. Following point of determination has arise for my decision:-

Point of Determination

1) *Whether the complainant proves that cheque given by the accused in discharge of the legally enforceable debt and other liability were dishonored upon presentation in the bank for payment and the accused person, despite being served with the statutory notice, did not make the payment of the legally enforceable debt within prescribed period and thereby committed the offence under section 138 of the Negotiable Instruments Act ?*

2) What Order ?

07. My decision on the above mentioned points of determination is as follows :-

1) In Affirmative

2) As per Final Order

- : Reasons for the Decision :-

08. Before adverting to the discussion and conclusion, I may add the relevant provisions of Section 118 and 139 of the Negotiable Instrument Act, 1881 in addition to Section 138 of this Act which may assist this court in fair and just determination of the present case.

"***Section 118 :- Presumptions as to negotiable***

instruments; *(a) of consideration; (b) as to date; (c) as to time of acceptance; (d) as to time of transfer; (e) as to order of indorsements; (f) as to stamp; (g) that holder is a holder in due course. Until the contrary is proved, the following presumptions shall be made (a) that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration (b) that every negotiable instrument bearing a date was made or drawn on such date (c) that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity (d) that every transfer of a negotiable instrument was made before its maturity (e) that the indorsements appearing upon a negotiable instrument were made in the order in which they appear thereon (f) that a lost promissory note, bill of exchange.*

Section 139 : 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."*

09. So, after going through the above provisions, it is clear that there is a presumption in favour of the complaint i.e. payee or holder regarding the consideration, date, amount, etc. for which the accused has to rebut the same by cross-examining the complainant or filing some documents explaining the facts which rebut these presumptions against the complainant. However in this matter, accused failed to avail the opportunity of cross-examination. He has confer a right under Section 137 of the Indian Evidence Act, 1872 which is called to be a very valuable and only right conferred to the accused. Therefore in this case, after determining the relevant documents relied by the complainant, presumptions under Section 118 of the N.I. Act persists in favour of the complainant and to be termed as once rebuttable. Therefore, I would like to allow the present case filed by the complainant.

10. Another right is again given to the accused under Section 139 of the N.I. Act which is a regular presumption in favour of the complainant though it can be rebut by the accused cross-examining or by leading some evidence, so as to disprove the documents relied by the complainant. However, accused has also not taken any active participation in the case proceedings and failed to opt the right of cross-examination and the right of defence also and therefore constraint this court to pass the judgment against him.

11. Though there is a slight difference between Sections 118 and 139 of the N.I. Act. It is called two presumptions. One under Section 118 i.e, called statutory presumption and other is under Section 139 of the act though both called rebuttable presumption, presumption which can be rebutted by the accused as mentioned above. However, the accused has not attempted to place anything on record of this court upon which the court may presume against the complainant and therefore, when the light of proceedings are not availed by the accused, present complaint is required to be allowed by considering and by presuming the facts in favour of the complainant. So far as burden of proving is concerned, there is a provision under the Indian Evidence Act, 1872 to prove the case as unlike the offence under IPC where strict proof is required to prove the case beyond reasonable doubt. In the case under Section 138 of

N.I. Act, preponderance of probabilities word replace the earlier. It is also required to be mentioned that the preponderance of probabilities can be attributed only by cross-examining the complainant in first part and by examining the accused at the stage of defence not only on facts but also on documents. However in this matter, accused failed to avail the facility provided under the N.I. Act as well as under The Constitution Act, 1951.

12. I would like to go with the original documents referred and accepted as above and considering the cheque in question was given against legally enforceable debt which is deposited in the bank for honour and returned unpaid with the endorsement **"funds insufficient"** and subsequently, statutory notice was given to accused at the correct address which were served to the accused and the accused failed to make the payment within time prescribed in the notice. Hence, the complaint. Therefore, I am of the opinion that to convict the accused, main three elements under the N.I. Act are : cheque deposited, cheque return endorsement and statutory notice and non payment of the cheque amount.

13. Therefore, the complainant succeeds in fulfilling the above statutory elements which are necessary and required to prove the case against the accused. I would like to rely upon one judgment of the **Hon'ble Supreme Court** in case of ***M.S. Narayan Menon V/s State of Kerala*** **(2006) 6 SCC 39** wherein the Hon'ble Supreme Court has explained the principle of presumptions in detail by referring provisions under Section 118 and Section 139 of N.I. Act. In the said judgment, Hon'ble Supreme Court has also explained the proof of determination under which, accused can rebut the presumption which is given in favour of the complainant and therefore, it would appropriate to quote very relevant paras which is useful to high light the sequence of the present case and to match the facts of the present case. <u>The relevant para is from 29 to 32 which read as under:</u>

> "***<u>Para 29</u>***. *Presumptions both under Sections 118(a) and 139 of the Act are rebuttable in nature.*
> ***<u>Para 30.</u>*** *What would be the effect of the expressions 'May Presume', 'Shall Presume' and 'Conclusive Proof'*

has been considered by this Court in Union of India (UOI) v. Pramod Gupta (D) by L.Rs. and Ors., [(2005) 12 SCC 1] in the following terms: "........It is true that the legislature used two different phraseologies "shall be presumed" and "may presumed" in Section 42 of the Punjab Land Revenue Act and further more although provided for the mode and manner of rebuttal of such presumption as regards the right to mines and minerals said to be vested in the Government vis-a-vis the absence thereof in relation to the lands presumed to be retained by the landowners but the same would not mean that the words "shall presume" would be conclusive. The meaning of the expressions "may presume" and "shall presume" have been explained in Section 4 of the Evidence Act, 1872, from a perusal whereof it would be evident that whenever it is directed that the court shall presume a fact it shall regard such fact as proved unless disproved. In terms of the said provision, thus, the expression "shall presume" cannot be held to be synonymous with "conclusive proof" ...."

Para 31. *In terms of Section 4 of the Evidence Act whenever it is provided by the Act that the Court shall presume a fact, it shall regard such fact as proved unless and until it is disproved. The words 'proved' and' disproved' have been defined in Section 3 of the*

*Evidence Act (the interpretation clause) to mean :- "**Proved** - A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.*

Disproved - *A fact is said to be disproved when, after considering the matters before it the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.*

Para 32*. Applying the said definitions of 'proved' or 'disproved' to principle behind Section 118(a) of the Act, the Court shall presume a negotiable instrument to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied* *upon."*

14. Thereafter, I would like to rely upon the two judgments of the **Hon'ble Supreme Court** in the case of ***K.N.Beena V/s Muniyappan and Anr*** **reported in AIR 2001 SUPREME COURT 2895** and particularly para 6 and 7 which are read as under*;*

> "***<u>Para 6</u>***. *In our view the impugned Judgment cannot be sustained at all. The Judgment erroneously proceeds on the basis that the burden of proving consideration for a dishonoured cheque is on the complainant. It appears that the learned Judge had lost sight of Sections 118 and 139 of the Negotiable Instruments Act. Under Section 118, unless the contrary was proved, it is to be presumed that the Negotiable Instrument (including a cheque) had been made or drawn for consideration. Under Section 139 the Court has to presume, unless the contrary was proved, that the holder of the cheque received the cheque for discharge, in whole or in part of a debt or liability. Thus in complaints under Section 138, the Court has to presume that the cheque had been issued for a debt or liability. This presumption is rebuttable. However, the burden of proving that a cheque had not been issued for a debt or liability is on the accused.*

*This Court in the case of **Hiten P. Dalal v. Bratindranath Banerjee reported in (2001) 6 SCC 16** has also taken an identical view.*

***<u>Para 7</u>**. In this case admittedly the 1st Respondent has led no evidence except some formal evidence. The High Court appears to have proceeded on the basis that the denials/ averments in his reply dated 21st May, 1993 were sufficient to shift the burden of proof onto the Appellant/Complainant to prove that the cheque was issued for a debt or liability. This is an entirely erroneous approach. The 1st respondent had to prove in the trial, by leading cogent evidence, that there was no debt or liability. The 1st respondent not having led any evidence could not be said to have discharged the burden cast on him. The 1st respondent not having discharged the burden of proving that the cheque was not issued for a debt or liability, the conviction as awarded by the Magistrate was correct. The High Court erroneously set aside that conviction.*"

15. The another refer judgment is of the Hon'ble Supreme Court (Three Judge Bench) in the case of ***Hiten P. Dalal V/s Bratindranath Banerjee*** **reported in AIR 2001 SUPREME COURT 3897 :: 2001 AIR SCW 3861** in which the Hon'ble Supreme Court has explained the relevancy of different provision regarding the adverse presumption specifically Section 102, 104, 114 of the Indian Evidence Act, 1872 which are related with the burden to prove and its presumption. It may be proper to quote the relevant paras of the above judgments so as to compare with the case on hand and also so that in case of proving the case what would be considered and what could not be considered and what are the methods to be opted by the parties as well as by the court adjudicating its relevancy. The relevant para are from Para 20 to 23 which read as under ;

> "***Para 20*** *; The appellant's submission that the cheques were not drawn for the 'discharge in whole or in part of any debt or other liability' is answered by the third presumption available to the Banks under Section 139 of the Negotiable Instruments Act. This section provides that "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." The effect of these presumptions is to place the evidential burden on the appellant of proving that the cheque was not received by the Bank towards the discharge of any liability.*

Para 21; *Because both Sections 138 and 139 require that the Court "shall presume" the liability of the drawer of the cheques for the amounts for which the cheques are drawn, as noted in* ***State of Madras v. A. Vaidyanatha Iyer, AIR 1958 SC 61****, it is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption had been established. "It introduced an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused" (ibid). Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the Court "may presume" a certain state of affairs. Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact.*

Para 22. *In other words provided the facts required to form the basis of a presumption of law exists, no discretion is left with the Court but to draw the* *statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when, "after considering the matters before it the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists". Section 3 : Evidence Act. Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the Court in support of the defence that the Court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the 'prudent man.'*

Para 23. *Judicial statements have differed as to the quantum of rebutting evidence required. In* ***Kundan Lal Rallaram v. Custodian****, Evacuee Property, Bombay,* ***AIR 1961 SC 1316****, this Court held that the presumption of law under Section 118 of Negotiable Instruments Act could be rebutted, in certain circumstances, by a presumption of fact raised under Section 114 of the Evidence Act. The decision must be limited to the facts of that case. The more authoritative view has been laid down in the subsequent decision of the Constitution Bench in*

Dhanvantrai Balwantrai Desai v. State of Maharashtra, AIR 1964 SC 575*, where this Court reiterated the principles enunciated in* ***State of Madras v. Vaidyanath Iyer (supra)*** *and clarified that the distinction between the two kinds of presumption lay not only in the mandate to the Court, but also in the nature of evidence required to rebut the two. In the case of discretionary presumption if drawn may be rebutted by an explanation which "might reasonable by true and which is consistent with the innocence" of the accused. On the other hand in the case of a mandatory presumption "the burden resting on the accused person in such a case would not be as light as it is where a presumption is raised under S. 114 of the Evidence Act and cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one. The words 'unless the contrary is proved' which occur in this provision make it clear that the presumption has to be rebutted by 'proof' and not by a bare explanation which is merely plausible. A fact is said to be proved when its existence is directly established or when upon the material before it the Court finds its existence to be so probable that a reasonable man would act on the supposition*

> *that it exists. Unless, therefore, the explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted ...." [See also V.D. Jhingan v. State of Uttar Pradesh, AIR 1966 SC 1762; Sailendranath Bose v. State of Bihar AIR 1968 SC 12 92 and Ram Krishna Bedu Rane v. State of Maharashtra (1973) 1 SCC 366].*"

16. Therefore, relying upon the all judgments herein above, I am of the view that the accused has not rebutted the presumption in his favor and also not rebut the burden which is lying in favour of the complainant and make himself liable for the judicial consequence in terms of the punishment as he had been given an ample and just opportunity to raise the preponderance of probability however he had not avail every right confer to him by the different applicable law as discussed above.

17. It is in the knowledge of this court that the trial of the criminal offence should be try in presence of the accused or his pleader as far as possible if exemption is granted to accused, perhaps most of the cases under the negotiable instrument act (cheque bounce cases) are on the verge of cross examination of the complainant wherein accused did not appear and take the opportunity granted to him. It is also notice that it may be the tendency of the accused to remained absent after the recording of the plea as he even not appeared with the appearance bail also and delay the proceeding inspite of several issuance of process. Therefore when this kind of situation arise in the court specially having the large number of pendency of the negotiable instrument act cases, the court has no option but to proceed the case and pronounce the judgment in absence of accused as uncontested to reduce the pendency of this kind of cases.

18. Therefore, discussing the above facts and law related to the present case on hand, I am giving the answer of Issue/Question No.1 in the affirmative and so far as question No.2 is concerned, final order would be passed accordingly. As far as the quantum of punishment is concerned, it is on record that the present case is tried as summons based and through the N.I. Act, maximum punishment is of two years and hence it is not required to hear the quantum of punishment and to the effect where in this matter, the accused has not remained present in the court and also not taken part in proceedings in spite of just and enough opportunity accorded by the court and hence the following order:

:: FINAL ORDER ::

01. The complaint is allowed.

02. Present accused **Sureshkumar Chhanaji Parmar, resident of : House No. 128, Sachodar, Ta. Himmatnagar, District Sabarkantha,** is hereby convicted under section 255(2) of the Code of Criminal Procedure, for the offence punishable under section 138 of the Negotiable Instruments Act.

03. He is sentenced to undergo simple imprisonment of **02 (two) years** and ordered to pay compensation of **Rs.33,00,000/- (Rupees Thirty Three Lakhs only)** to the complainant. In default, he shall undergo further simple imprisonment of **06 (six) months**.

04. The bail and bonds shall stand canceled.

05. Copy of judgment shall be given to the accused free of cost in accordance with Section 363 of Cr.P.C. Period of imprisonment / detention undergone during investigation, inquiry or trial be set off from the sentence awarded to the accused as per Section 428 of Cr.P.C.

06. Necessary warrant be issued against the accused to comply present imprisonment as the accused is not present at the time of pronouncement of judgment.

Signed and pronounced in open court today on 15th day of June, 2026.

Place : Himmatnagar
Date : 15.06.2026

(Ms. Jyotsna Vinubhai Parmar)
Addl. Chief Judicial Magistrate
S. K. @ Himmatnagar.
Judge Code GJ01021

*PARIJITSINH