GJSR010038762025

Received on : 01.04.2025
Registered on : 01.04.2025
Decided on : 25.03.2026
Duration : YY. MM. DD.

IN THE COURT OF SESSIONS JUDGE, SURAT.

CRIMINAL APPEAL No. 273/2025

Exh.__________

APPELLANT (Original Accused):
Maheshkumar Zala Prop. of
Krishna Sarees,
Aged about : 42 years, Occ. Business,
Address : 1055/1056 Abhinandan Market,
Ringroad, Surat.

VERSUS

RESPONDENTS (Original Complainant):
1. Guruprasad Ramkumar Periwala Director of
Swami Syntex Pvt. Ltd.,
Aged about: 42 years, Occ. Business,
Address : 3/451, Textile Market, Ringroad,
Surat.

2. The State.

APPEARANCE :-

Shri S. S. Tiwari,	Ld. Advocate for the Appellant.
Shri D. K. Matliwala,	Ld. Advocate for Respondent No.1.

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

[1] The present Criminal Appeal preferred by the appellant - original accused under **Section 415 of the B.N.S.S.**, emanates from the Judgment passed by the Ld. trial Judge, Surat dated **04.03.2025** in **Criminal Case No. 5365/2019,** whereby the appellant has been convicted for an offence punishable under Section 138 of the N. I. Act and has been subjected to sentence of Simple Imprisonment of one year. The appellant - accused is also directed to pay an amount of Rs. 24,76,000/- to the respondent- complainant within a period of 30 days and in case of default of making payment, the accused shall have to undergo further 60 days Simple Imprisonment.

[2] While presenting the appeal, the appellant sought suspension of the execution and operation of the impugned Judgment by preferring an application under Section 389 of the Cr.P.C. (corresponding provision Section 430 of B.N.S.S.) and the Ld. 10^{th} Add. Sessions Judge allowed the said application with condition of deposit of 20% of the compensation amount, ordered by the Ld. trial

Court. It transpires from the record that the appellant has deposited 20% of compensation amount before Ld. trial Court and executed necessary bail bonds before the Appellate Court.

FACTUAL MATRIX:

[3] Without making prolix discussion, necessary set of facts as are necessary for adjudication of the present Criminal Appeal, are summarized as under. (While discussing factual aspects, the parties are referred with their original status as complainant and accused).

DETAILS OF COMPLAINT:

(A) It is the case of the complainant that complainant Guruprasad Ramkumar Periwala, the director of Swami Syntex Pvt. Ltd.. The company is engaged in the business of grey cloth. It is the say of the complainant that the accused has been doing business with the complainant since last two and a half years. It is the case of the complainant that accused used to purchase goods on credit from the complainant. According to the complainant in March, 2017, the accused placed up the requirement of goods with the complainant. Accordingly, the complainant supplied the said goods under the different bills amounting total of Rs. 24,76,000/- to the accused. It is the case of the complainant that goods were received by the accused with total satisfaction and no dispute was raised by the accused regarding the quality of the goods.

(B) It is the case of the complainant that towards the outstanding dues, the accused issued a cheque of Rs. 24,76,000/- drawn on **Dena Bank, Vishal Nagar Branch, Surat bearing No. 174859 dated 10/12/2018** to the complainant with assurance that the same would be honored, however, when the complainant deposited the said cheque with his Bank, the cheque was dishonoured with the endorsement **"Funds Insufficient"** on 11/12/2018. The complainant issued Notice under Section 138 of N.I. Act on 19/12/2018 by registered post calling upon the accused to pay the amount of cheque, however no positive reciprocation came and notice returned unserved on 21/12/2018. The complainant then was constrained to prefer the complaint under the N. I. Act.

(C) The complaint preferred by the complainant was numbered as **C.C. No. 5365/2019**. The process **/** summons of the complaint was duly served upon the accused, who caused his appearance through Advocate and his plea was recorded vide Exh. 7, where he did not plead guilty and expressed the desire to be tried. The trial of the Criminal Case was conducted by the Ld. trial Court.

PROCEEDING AND TRIAL:

[4] In order to prove his case, the complainant adduced following oral as well as documentary evidence.

:: **ORAL EVIDENCE** ::

Sr. No.	Particulars	Exhibit
1	Affidavit of the complainant.	4
2	Witness- Rajkumar Gaurishankar Prajapati	29

:: **DOCUMENTARY EVIDENCE** ::

Sr. No.	Particulars	Exhibit
1	Certified copy of the Memorandum and Articles of Association of the complainant - Company.	3/1
2	Copy of DIR Form showing entry as the third Director/ Partner of the complainant Company.	3/2
3	Copy of Board Meeting Resolution of the Directors.	3/3
4	Office copies of bills/invoices of the	3/4 to

	goods purchased by the accused	3/21
5	Original disputed cheque No. 174859	3/22
6	Cheque Return Memo	3/23
7	Statutory demand Notice	3/24
8	Original Post Receipt	3/25
9	Original returned cover of the Notice	3/26
10	Copy of the ledger account	3/27
11	Income Tax Return of complainant	3/28
12	Copy of the Sales Register of the complainant - Company	33
13	Copy of the Audit Report of the complainant - Company for accounting year 2017-18 and 2018-19	34
14	Certificate u/s 65(B) of the Indian Evidence Act	35

[5] Thereafter, the **Closing Purshis** came to be filed on behalf of the complainant at Exh. 37 and Further Statement of the accused came to be recorded under **Section 313 of the Code of Criminal Procedure**, wherein the accused stated that he is innocent and complainant has filed the false complaint on the basis of forged bills/ invoices. The accused has adduced following evidences:-

:: <u>ORAL EVIDENCE</u> ::

Sr. No.	Particulars	Exhibit
1	Witness- Rameshbhai Fogabhai Zala	41

:: <u>DOCUMENTARY EVIDENCE</u> ::

Sr. No.	Particulars	Exhibit
1	Whatsapp chat with complainant	43
2	Certificate u/s 65(B) of the Indian Evidence Act	44
3	Certified copy of receipt	45
4	Certified copy	46
5	Bill No. 486	47
6	Bill No. 492	48
7	Pendrive	49
8	Certificate u/s 65(B) of the Indian Evidence Act	50

[6] After hearing the parties and considering the evidence led by the parties, the Ld. trial Judge passed the following order.

'::આખરી હુકમ::

" 1. આ કામના આરોપી, મહેશકુમાર ઝાલા તે ક્રિષ્ના સારીઝના પ્રોપ્રાઈટર, ઉ.આ.વ.૪૨, ઠે.૧૦૫૫/૧૦૫૬, અભિનંદન માર્કેટ, રીંગરોડ, સુરત નાઓને ફોજદારી કાર્યરીતી અધિનીયમની કલમ–૨૫૫(૨) મુજબ નેગોશીયેબલ ઈન્સ્ટ્રુમેન્ટ એકટની કલમ–૧૩૮ ના ગુન્હા અંગે તકસીરવાન . ઠરાવી, ૧(એક) વર્ષની ની સાદી કેદની સજા ભોગવવાનો હુકમ કરવામાં આવે છે.

૨. વધુમાં, આરોપીએ ફોજદારી કાર્યરીતી સંહીતાની કલમ–૩૫૭(૩) મુજબ ફરીયાદીને ચેકની રકમના રૂ.૨૪,૭૬,૦૦૦/– (અંકે રૂપિયા ચોવીસ લાખ છોત્તેર હજાર પુરા) વળતર તરીકે આ હુકમની તારીખથી દિવસ–૩૦ (ત્રીસ)માં ચુકવી આપવાનો હુકમ કરવામાં આવે છે અને તેવી રકમ ચુકવવામાં કસુર કર્યો આરોપીને વધારાની સાંઈઠ (૬૦) દિવસની સાદી કેદની સજા ભોગવવાનો હુકમ કરવામાં આવે છે.

આરોપીએ અગાઉ વળતર તરીકેની કોઈ રકમ જમા કરાવેલી હોય તે રકમ હાલના વળતરના હુકમની સામે મજરે આપવાનો પણ હુકમ કરવામાં આવે છે.

૩. આરોપીને, ફોજદારી કાર્યરીતી અધિનીયમની કલમ–૩૬૩(૧) મુજબ આ હુકમની પ્રમાણિત નકલ તાત્કાલીક વિના મુલ્યે આપવાનો હુકમ કરવામાં આવે છે.
૪. ચાલુ ટ્રાયલ દરમ્યાન જો આરોપી કસ્ટડીમાં રહેલ હોય તો, ફોજદારી કાર્યરીતિ સંહિતાની કલમ ૪૨૮ મુજબ, તેવી સમયે મજરે મળવાપાત્ર રહેશે."

(The english translate version of the above Order is as under:-)

Order

"(1) The accused in this case, Maheshkumar Zala Prop. of Krishna Sarees, Age: 42 years, residing at 1055/1056, Abhinandan Market, Ring Road, Surat, is hereby held guilty for the offence punishable under Section 138 of the Negotiable Instruments Act and, in accordance with Section 255(2) of the Code of Criminal Procedure, is sentenced to undergo Simple Imprisonment for a period of one (1) year.

(2) Further, under Section 357(3) of the Code of Criminal Procedure, the accused is directed to pay compensation of ₹24,76,000/- (Rupees Twenty-Four Lakh Seventy-Six Thousand Only) to the complainant, being the cheque amount, within 30 (thirty) days from the date of this order. In default of payment of the said amount, the accused shall undergo additional Simple Imprisonment for 60 (sixty) days.

It is further ordered that if the accused has already deposited any amount towards compensation earlier, the said amount shall be adjusted against the present compensation amount.

(3) The accused shall be provided a certified copy of this judgment free of cost immediately, in accordance with Section 363(1) of the Code of Criminal Procedure.

(4) If the accused has remained in custody during the trial, the period of such detention shall be set off under Section 428 of the Code of Criminal Procedure."

[7] Being aggrieved with the said order, the appellant - accused has preferred the present appeal. Ld.

Advocate Shri S. S. Tiwari has appeared for the appellant and Ld. Advocate Shri D. K. Matliwala has appeared for the respondent No. 1. Record and the proceedings of the Criminal Case No.5365/2019 has been brought on record. Heard the Ld. Advocates appearing for the parties and perused the record.

SUBMISSIONS OF THE APPELLANT:

[8] It is contended by the Ld. Advocate for the appellant that the order passed by the Ld. trial Judge is bad, illegal, perverse and against the principles of law and same needs to be quashed and set aside. The Ld. trial Judge has overlooked the provisions of N.I. Act as well as documents produced by the appellant and has passed the order in a mechanical manner, which needs to be quashed and set aside. It is contended that the Judgment of the Ld. trial Court is based on conjunctures and surmises, which is not permissible in a criminal case, as the complainant has to prove his case beyond reasonable doubt.

[8.1] It is contended that no transaction, as averred in the complaint, has taken place between the appellant and the respondent in form of goods allegedly sold and delivered. The Ld. Advocate for the appellant has submitted that during the cross-examination of the respondent - complainant, material contradictions have been brought on record, which clearly pose serious suspicion on the case of the respondent - complainant. These aspects are summarized as under:-

- In the cross-examination at Exh. 4, it is stated by the respondent - complainant that :

> *"..........મારી ફરીયાદ માં જણાવેલ હકીકત આરોપી સાથે બે અઢી વર્ષ થી ધંધો કરુ છુ એ સાચી છે."*
>
> *"........જે તે સમયે જે.જે.એ.સી માર્કેટ ના સરનામે માલ મોકલેલ હતો.આ તમામ પેમેન્ટ ચેકથી મેળવેલુ. જેના લેઝર હું નામ.કોર્ટમાં રજુ કરીશ. તેના બીલ ચલણો હશે તો હું રજુ કરીશ. એ તમામ પેમેન્ટ ના બેંક સ્ટેટમેન્ટ હું જોઈને રજુ કરીશ."*

However, till today no such documents have been produced by the respondent - complainant, which fortifies the say of the appellant that no transaction as referred by respondent - complainant has entered into between the appellant and the respondent.

- It is contended that the bills referred to and relied upon by the respondent - complainant are not in proper sequence, inasmuch as, the bill dated 10th April bears No.

52, whereas the bill dated 06th May bears No. 284, the bill dated 17th May bears No. 172, and the bill dated 24th May bears Nos. 201 and 250. Further, the invoices dated 26th May bears No. 214, and the invoice dated 1st June bears No. 246. According to the Ld. Advocate for the appellant, this clearly indicates that the bills relied upon by the respondent -complainant are forged, fabricated and afterthought.

➢ It is contended that the bills referred and relied upon by the respondent - complainant do not depict the sign or seal of the appellant suggesting receipt of goods and said aspect has been admitted by the respondent - complainant in the cross-examination.

➢ It is submitted by the Ld. Advocate for the appellant that the actual transaction was entered into between the brother of appellant Mr. Rameshbhai and complainant of lending. As the complainant wanted compound interest from the brother of appellant, he had usrpingly stolen the cheque book of the appellant and by creating bogus bills and ledger account, launched bogus prosecution against the appellant.

➢ It is contended that in order to prove that the respondent - complainant intended to recover the amount of compound interest on the amount advanced to Mr. Rameshbhai, the appellant has examined Mr. Rameshbhai as a witness at Exh. 41. It is the say of the appellant that the Rameshbhai is not an alien to the respondent - complainant, inasmuch as the respondent - complainant has admitted in his cross-examination that he knows Rameshbhai (brother of the appellant) and had Whatsapp chats with him on mobile number. The respondent - complainant has further admitted that he had shared the settlement note of accounts with Mr. Rameshbhai through whatsapp. Mr. Rameshbhai has also been examined as a witness at Exh. 41, who on oath has stated that he had availed financial facility from the respondent - complainant and had repaid the entire amount along with the interest. However, according to the witness, the complainant had threatened him with dire consequence for non -payment of compound interest, and in support of the same, the witness has produced Whatsapp chat with the respondent - complainant. It is further submitted that witness has stated on oath that appellant does not personally know the respondent - complainant. According to the witness, as the complainant used to visit the shop of the witness, he had stolen the cheque book of the appellant, and the said cheque book has been misused by the complainant to institute a false case against the appellant. It is the say of the appellant that appellant had never purchased any goods from the respondent - complainant. It is contended that the bills produced by the respondent - complainant do not mention any GST number. It is contended that the bills relied upon by the respondent - complainant do not bear signature of either the witness or the appellant, though it mentions 'Ramesh', no other person named 'Ramesh' works in the office of the appellant. In the said set of circumstances, the appellant has raised serious doubt about the alleged transaction by cogent ocular evidence and documentary evidence.

➢ It is contended that the appellant - accused had preferred a police complaint with Singanpore Police Station dated 05.07.2022 for generating forged bills and using the same for illegal financing. It is contended that since no action was taken the appellant had preferred an application with Magistrate. Moreover, the whatsapp chat script and pendrive has been produced alongside with Section 65(b) certificate of Evidence Act, which if peruse clearly transpires that the case of the respondent - complainant clearly afterthought and manipulated, despite that the Ld. trial Court had mechanically without citing the reasons has passed the order of conviction and said order needs to be quashed and set aside and present appeal needs to be allowed.

SUBMISSIONS OF THE RESPONDENT:

[9] Per contra, the Ld. Advocate for the respondent - complainant has submitted that the present appeal is devoid of any merit and same needs to be dismissed in limine.

[9.1] It is further submitted by Ld. Advocate for the respondent - complainant that in the present case it is not in dispute that the alleged cheque duly signed by the appellant, has been provided by the respondent - complainant. No evidence is laid by the appellant that the disputed cheque is not signed by the appellant. The said cheque when presented for clearance, was not dishonoured on account of mismatch of signature but the same was returned with the endorsement 'Funds Insufficient".

In the above set of circumstances, the Ld. trial Court rightly raised the presumption under Section 139 of N.I. Act to the effect that, unless proved otherwise by the appellant - accused, the statutory presumption in the absence of effective rebuttal that the cheque was issued by the appellant towards a legally enforceable debt stands established..

[9.2] It is contended by Ld. Advocate for the respondent - complainant that in the present case the appellant - accused has stated about the transaction between the brother of appellant and respondent - complainant, however, the transaction relied upon by the appellant has not been impeached by material contradictions brought on record by producing independent evidence, and therefore, the Ld. trial Court has rightly passed the Judgment of conviction against the appellant.

[9.3] It is contended by the Ld. Advocate for the respondent - complainant that ab initio the respondent-complainant had objected the production of documents by the appellant, considering that Ld. trial Court below Exh. 41 had passed the order of exhibiting the document subject to prove the same. It is the say of the respondent - complainant that despite above order, the Ld. trial Court had given final exhibit to the documents which was challenged by the respondent - complainant be preferring CR.R.A. No. 67/2023.

[9.4] It is further contended by the Ld. Advocate for the respondent - complainant that documents produced by the appellant have not been duly proved by the appellant and the relevant objections in this regard are as under:-

Sr. No	Document	Exh.	Objections
1.	Whatsapp chat	43	The mobile phone of the witness is not produced before the Court. The person mentioned in the chat as Gurubhai could be any one other than the complainant also. No explanatory proof is given in this regard.
2.	Certificate u/s 65(B) of Evidence Act.	44	The said document is not proved by examining the author as the accused has not been examined hence said document cannot be considered.
3.	Receipt of certified copy	42/3	Contents not proved
4.	Certified copy	42/4	

5.	Copy of bill	42/5	
6.	Copy of bill	42/6	
7.	Pendrive containing conversation between the complainant and accused.	49	No evidence from which mobile number complainant contacted to the accused is brought to the notice of the Court. No evidence under which circumstance on which date and what time the conversation took place, has been brought to the notice of the Court.
8.	Certificate u/s 65(b) of Evidence Act.	49	Author not examined.

[9.5] It is further contended by the Ld. Advocate for the respondent - complainant that the above set of evidence even hypothetically is considered then also same fails to impeach the positive evidence of transaction of goods sold, delivered and not being paid and the cheque issued for the payment being dishonoured. Ld. Advocate for the respondent has submitted that the witness examined by the appellant also in cross-examination admitted the said aspect. Considering this Ld. trial Court has not committed any error in convicting the appellant - accused under Section 138 of N.I. Act and subjecting him sentence and compensation/fine. The above order of Ld. trial Court being judicious does not warrant any modification, intervention or reversal, hence present appeal needs to be dismissed.

[9.6] In support of his submission, Ld. Advocate for the respondent - complainant has relied upon the following Judgments:-

I. Rishikesh Behera Vs. Sahebram Patel and Ors, 2020(1) DCR 716, Orissa HC.

II. Pushpa Sanchalal Kothari Vs. Aarti Uttam Chavan, 2020 (3) DCR 492, Bombay HC.

III. Murlidhar Makhija Vs. State of Chhatisgarh, AIR Online 2023, CHH 262, Chhatisgarh HC.

IV. Bir Singh Vs. Mukesh Kumar, 2019 (0), AIJEL SC 63577.

V. Punjab Small Industries and Export Corporation Ltd., Vs. Gurinder Singh and Ors., 2021(1) DCR 113, Punjab Haryana HC.

<u>POINTS OF DETERMINATION</u>:

[10] From above discussion, following points of determinations / Issues arise for adjudicating the present Appeal.

1. Whether the Ld. Magistrate has committed grave

error by convicting the accused for the offence punishable under Section 138 of the Negotiable Instrument Act as claimed by the appellant - accused**?**

2. Whether the order of the Ld. Magistrate dated 04.03.2025 warrants any modification, intervention or reversal**?**

3. What Order **?**

:: F I N D I N G S ::

[11] My **Findings** for the aforesaid points of determination, are as under:

1. In Negative.
2. In Negative.
3. As per the final order.

:: R E A S O N S ::

POINT NOS. 1 TO 3:

[12] As the Issue Nos. 1, 2 and 3 are co-related and interconnected to each other, therefore, I answer Issue

Nos. 1 to 3 jointly as follows:

[13] For the sake of clarity, the penal provision for dishonour of cheque contained *inter alia* **Section 138 of the N. I. Act** is reproduced here:

> *"**<u>Section 138</u>**:*
> *Dishonour of cheque for insufficiency, etc., of funds in the 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 provisions of this Act, be punished with imprisonment for [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both.*
>
> *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."

[14] It is held by the Hon'ble Apex Court in case of **S. M. S. Pharmaceuticals Limited vs. Neeta Bhalla** reported in **2005 (8) SCC 89** as under:

".....Sec. 138 is the charging section creating criminal liability in case of dishonour of a cheque and its main ingredients are -

(i) Issuance of a cheque.

(ii) Presentation of the cheque

(iii) Dishonour of the cheque

(iv) Service of statutory notice on the person sought to be made liable, and

(v) Non-compliance or non-payment in pursuance of the notice within 15 days of the receipt of the notice."

[15] Further, it is held in case of **Hiten P.Dalal Versus Bratindranath Banerjee** reported in **2001(6) SCC 16** in paragraph - 21 that:

"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/s. 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.(1958 CriLJ 232)"

[16] In this regard, it would be apt to peruse the provision contained in **Section 139 of the N. I. Act.**

> "***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."*

[17] It is also held in the case of **Kumar Exports Versus Sharma Carpets reported in 2009 (2) SCC 513** as under:

> *" The use of the phrase "until the contrary is proved" in Section 118 of the Act and use of the words "unless the contrary is proved" in Section 139 of the Act read with definitions of "may presume" and "shall presume" as given in Section 4 of the Evidence Act, makes it at once clear that presumptions to be raised under both the provisions are rebuttable. When a presumption is rebuttable, it only points out that the party on whom lies the duty of going forward with evidence, on the fact presumed and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over. The accused in a trial under Section 138 of the Act has two options. He can either show that consideration and debt did not exist or that*

under the particular circumstances of the case the non-existence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. Apart from adducing direct evidence to prove that the note in question was not supported by consideration or that he had not incurred any debt or liability, the accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on to the complainant. The accused may also rely upon *presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arising under Sections 118 and 139 of the Act. The accused has also an option to prove the non-existence of consideration and debt or liability either by letting in evidence or in some clear and exceptional cases, from the case set out by the complainant, that is, the averments in the complaint, the case set out in the statutory notice and evidence adduced by the complainant during the trial. Once such rebuttal evidence is adduced and accepted by the court, having regard to all the circumstances of the case and the preponderance of probabilities, the evidential burden shifts back to the complainant and, thereafter, the presumptions under Sections 118 and 139 of the Act will not again come to the complainant's rescue."*

[18] Further, in the case of ***Bir Singh Versus Mukesh Kumar*** reported in ***2019 (4) SCC 197*** the Hon'ble Supreme Court has observed as under:

"36. The proposition of law which emerges from the judgments referred to above is that the onus to rebut the presumption under Section 139 that the cheque has been issued in discharge of a debt or liability is on the accused and the fact that the cheque might be post dated does not absolve the drawer of a cheque of the penal consequences of Section 138 of the Negotiable Instruments Act.

37. A meaningful reading of the provisions of the

Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. It is immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer. If the cheque is otherwise valid, the penal provisions of Section 138 would be attracted.

38. If a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque. 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.

39. It is not the case of the respondent-accused that he either signed the cheque or parted with it under any threat or coercion. Nor is it the case of the respondent-accused that the unfilled signed cheque had been stolen. The existence of a fiduciary relationship between the payee of a cheque and its drawer, would not disentitle the payee to the benefit of the presumption under Section 139 of the Negotiable Instruments Act, in the absence of evidence of exercise of undue influence or coercion. The second question is also answered in the negative.

40. Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under Section 139

> *of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt."*

[19] The cumulative effect of the above discussion is that, the Negotiable Instrument Act contains reverse onus clause/provision in Section 139, whereupon the proof of foundational level of fact i.e. proof of execution of cheque. The Court has to presume that impugned cheque is issued for discharge of legal debt/liability and said presumption is rebuttable and the accused is bound to rebut the said presumption, failing which, the Court can make inference that the fact of issuance of cheque towards the legal debt and liability is proved. Thus, upon initial burden of proof of execution of the cheque, the onus shifts upon the accused to rebut the statutory presumption. It is mandatory that the accused by evidence or circumstances raises serious doubt in the case of the complainant. However, it needs to be noted that standard of proof upon onus being shift upon the accused are not as strict as that for complainant that is "Beyond Reasonable Doubt" but are relatively lenient that is "Preponderance of Probability". The said aspect has been duly explained by the Hon'ble Apex Court in case of ***Rangappa Vs. Sri Mohan in Criminal Appeal No. 1020 of 2010, decided on 07.05.2010,*** wherein, it is held as under :-

> *"9. Ordinarily in cheque bouncing cases, what the courts have to consider is whether the ingredients of the offence enumerated in Section 139 of the Act have been met and if so, whether the accused was able to rebut the statutory presumption contemplated by Section 139 of the Act.*
>
> *30. The proviso appended to the said section provides for compliance with legal requirements before a complaint petition can be acted upon by a court of law. Section 139 of the Act merely raises a presumption in regard to the second aspect of the matter. Existence of legally recoverable debt is not a matter of presumption under Section 139 of the Act. It merely raises a presumption in favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability.*
>
> *31. The courts below, as noticed hereinbefore, proceeded on the basis that Section 139 raises a presumption in regard to existence of a debt also. The courts below, in our opinion, committed a serious error in proceeding on the basis that for proving the defence the accused is required to step into the witness box and unless he does so he would not be discharging his burden. Such an approach on the part of the courts, we feel, is not correct.*
>
> *32. An accused for discharging the burden of proof placed upon him under a statute need not examine himself. He may discharge his burden on the basis of the materials already brought on record. An accused has a constitutional right to maintain silence. Standard of proof on the part of the accused and that of the prosecution in a criminal case is different.*
>
> *...*
>
> *34. Furthermore, whereas prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of the accused is `preponderance of probabilities'. 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 he relies.*

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. "

[20] Before delving into discussion of the evidence of the present case, it will be apt to refer the Judgment of the Hon'ble Apex Court in the case of ***Sanjabij Tari Versus***

Kishore S.Borcar reported in ***2025 (0) AIJEL-SC 75934,*** issuing directions to the Court for making purposive interpretation:-

> *"11. Having heard learned counsel for the parties, this Court is of the view that it is essential to first outline the scope and intent of Chapter XVII (Sections 138 to 148) of NI Act which has been inserted by Act 66 of 1988 w.e.f. 1st April 1989.*
>
> *12. The Statement of Objects and Reasons of Act 66 of 1988 states, .to enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in case of bouncing of cheques due to insufficiency of funds in the accounts or for the reason that it exceeds the arrangements made by the drawer, with adequate safeguards to prevent harassment of honest drawers.*
>
> *13. The provisions contained in Chapter XVII provide that where any cheque drawn by a person for the discharge of any liability is returned by the bank unpaid for the reason of the insufficiency of the amount of money standing to the credit of the account on which the cheque was drawn or for the reason that it exceeds the arrangements made by the drawer of the cheque with the banker for that account, the drawer of such cheque shall be deemed to have committed an offence. In that case, the drawer, without prejudice to the other provisions of the said Act, shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to twice the amount of the cheque, or with both.*
>
> *14. Consequently, this Court is of the view that the intent behind introducing Chapter XVII is to restore the credibility of cheques as a trustworthy substitute for cash payment and to promote a culture of using cheques. Further, by criminalizing the act of issuing cheques without sufficient funds or for other specified reasons, the law promotes financial discipline, discourages irresponsible practices and allows for a more efficient and timely resolution of disputes compared to the previous pure civil remedy which was found to involve the payee in a long-drawn out process of litigation."*

[21] In the present case, the complainant has been able to prove that the mandatory precursors mentioned in

Section 138 of N.I. Act for launch of criminal prosecution are complied. Following details in this regard are important:-

Date of Cheque:	10/12/2018
Date of Dishnour of cheque:	11/12/2018
Date of issuance of Notice:	19/12/2018

(No amount of notice being paid by appellant nor any reply to the notice being given so after 15 days from the date of dispatch of notice the complainant has filed the complaint and no issue in this regard has been raised by the appellant.)

Execution of Cheque:-

[22] Though the appellant-accused has taken the contention that the cheque does not bear his signature, no plausible explanation in this regard has been brought on record either by way of direct or independent evidence, nor has any credible doubt been raised from the circumstances. The Ld. trial Court was right in observing that the appellant - accused has neither examined any handwriting expert as a witness nor produced any report of the expert. Further, the appellant has not stepped into the witness box to depose in support of his contention. No endevour has also been made on behalf of the appellant to form an opinion of Court regarding the signature on the cheque under Section 73 of Evidence Act by providing specimen signature of appellant-accused. Most importantly, when the disputed cheque was presented before the Bank, it was not dishonoured on the ground of mismatch or difference in signature, but the same was returned with the endorsement "Funds Insufficient". In the above set of circumstances, the plea of the appellant - accused that the disputed cheque has not been signed by him is vague and unsupported by any substantive evidence and hence the same is discarded. At this juncture, it will be profitable to refer the Judgment of the Hon'ble Apex Court in the case of ***Ajitsinh Chehuji Rathod Versus State Of Gujarat*** reported in ***2024 (0) AIR(SC) 787***, wherein, it is held that :-

> *"**11.** Furthermore, as per the cheque return memo of the Bank dated 26th February, 2018, the reason for the cheque being returned unpaid is clearly recorded as "funds insufficient and account dormant".*
>
> ***15.** Certified copy of a document issued by a Bank is itself admissible under the Bankers Books Evidence Act, 1891 without any formal proof thereof. Hence, in an appropriate case, the certified copy of the specimen signature maintained by the Bank can be procured with a request to the Court to*

compare the same with the signature appearing on the cheque by exercising powers under Section 73 of the Indian Evidence Act, 1872 .

***16.** Thus, we are of the view that if at all, the appellant was desirous of proving that the signatures as appearing on the cheque issued from his account were not genuine, then he could have procured a certified copy of his specimen signatures from the Bank and a request could have been made to summon the concerned Bank official in defence for giving evidence regarding the genuineness or otherwise of the signature on the cheque.*

***17.** However, despite having opportunity, the accused appellant did not put any question to the bank official examined in defence for establishing his plea of purported mismatch of signature on the cheque in question and hence, we are of the firm opinion that the appellate Court was not required to come to the aid and assistance of the appellant for collecting defence evidence at his behest. The presumptions under the NI Act albeit rebuttable operate in favour of the complainant. Hence, it is for the accused to rebut such presumptions by leading appropriate defence evidence and the Court cannot be expected to assist the accused to collect evidence on his behalf.*

***18.** The appellant had sought for comparison of the signature as appearing on the cheque through the handwriting expert by filing an application before the trial Court which rejected the same vide order dated 13th June, 2019. The said order was never challenged and had thus attained finality."*

***FACTUM OF THE TRANSACTION INVOLVED IN THE CASE**:-*

[23] In the present case, it is the say of the respondent - complainant that the appellant - accused had expressed his requirement for the goods in the year 2017, pursuant to which the respondent - complainant supplied the same to him. According to the respondent, along with the goods, invoices/bills (produced at Exh. 3/4 to 3/21) were also issued. Further, the respondent - complainant has produced at Exh. 3/27, the statement of account of the appellant - accused as maintained in the ledger account of the respondent - complainant. Moreover, the respondent - complainant has also produced the sale register at Exh. 33, and the audit reports for the accounting years 2017-18 and 2018-19 at Exh. 34. In order to prove the computerized data at Exh. 35, a certificate u/s 645(B) of Evidence Act has also been produced.

Besides, the respondent - complainant has been examined in person at Exh. 4, who has been extensively cross-examined. The cumulative effect of documentary and oral evidence establishes the proof of sale of goods by the respondent- complainant to the appellant - accused to the tune of Rs. 24,76,000/-.

[24] Against the above evidence, the appellant has attempted to create doubt by contending that the respondent - complainant is not actually engaged in the business of textiles and that no actual transaction of goods sold and delivered has taken place between the appellant and the respondent. The above submission of the appellant loses the spirit primarily in view of the fact that the respondent - complainant has produced at Exh. 3/1, the Memorandum and Articles of Association of the respondent - Company. A perusal of the same reveals that the object of incorporation of the respondent Company includes :

> *"A. MAIN OBJECTS TO BE PURSUED BY THE COMPANY ON ITS INCORPORATION ARE:-*
>
> *1. To carry on business as manfacturers, producers, processors, embrodiers, weavers, makers, investors, convertors, importers, exporters, traders, buyers, sellers, retailers, wholesalers, suppliers, indenters, packers, movers, preservers, stockists, agents, sub-agents, merchants, distributors, consigners, jobers, brokers, concessionaires, or otherwise deal in all kind of textile goods, synthetic goods, sarees, dress materials, fabrics, clothing and wearing apparel of every kind, nature and discreption including shirts, bush-shirts, pajama suits, suits, foundation garments, ladies dresses, brassieres, knee caps, coats, panties, vests, underwears, socks, stockings, sweaters,*

nighties, hosiery goods of every kinds, nature and description for men, women and children."

[25] A careful perusal of the aforesaid clause clearly indicates that the respondent - Company is a private limited company. The Memorandum of Association is statutorily and mandatorily required to be prepared and registered with the Registrar of Companies before a certificate of incorporation is issued to the Company. Moreover, a company cannot carry on any business not mentioned in its Memorandum of Association. In the present case, the Memorandum of Association of the respondent Company overtly mentions that its main object is to carry on the business of textiles. No evidence has been brought on record before the Ld. trial Court or before this Court, suggesting respondent Company has engaged in any activity other than that for which it was incorporated. In the said set of circumstances, it is established that the Company has been incorporated for the purpose of carrying on textile business.

[26] Further, it is stated by the appellant that the so called bills produced at Exh. 3/4 to 3/21 are forged and afterthought. In this regard, the Ld. Advocate for the appellant has referred the sale register produced at Exh. 33 and submitted that, *ex facie,* the said bills raise suspicion, as the same are not in serial order or in ascending sequence having regard to the period of the transactions. It is further submitted that none of the invoices bear the signature of appellant - accused and they only show signature of one Mr. Rameshbhai. The witness, Mr. Rameshbhai Fogabhai Zala, examined on behalf of the appellant (at Exh. 41), has denied the said signature.

[27] The respondent - complainant, in his ocular evidence and during cross-examination, has explained the above issue. The same also stands clarified upon perusal of the sale register produced by the respondent - complainant at Exh. 33, wherein, apart from the appellant, details of transactions entered into with the respondent - complainant have been mentioned. Moreover, in the audit report produced at Exh. 34, under the details of debtors of the Company, the particulars of the appellant - Company are reflected, depicting an outstanding amount of Rs. 24,76,000/-. No serious doubt about this document is brought to the notice of Court by the appellant.

[28] Besides above, it is also noteworthy that witness examined on behalf of appellant - accused, Mr. Rameshbhai Fogabhai Zala at Exh. 41, has stated that:-

> *"6.આ કામના આરોપી મહેશભાઈ ઝાલાએ સદર કામના ફરિયાદી ગુરુપ્રસાદ પેરીવાલ પર સિંગણપોર પોલીસ સ્ટેશનમાં તા. ૦૫/૦૭/૨૦૨૨ ના રોજ સી.આર.પી.સી. 154 મુજબ ખોટા બીલો ઉપજાવવા તથા તેનો ઉપયોગ કરવા અંગેની પોલીસ ફરિયાદ કરેલ. જેની નકલ આ કામે નિશાની– ૯ થી રજુ કરેલ છે. સદર પોલીસ ફરિયાદ અંગે પોલીસ કર્મચારી દ્વારા અનિવાર્ય પગલા ન લેવાતા મહેશભાઈ ઝાલાએ નામદાર કોર્ટમાં 156(3) દાખલ કરેલ છે. સદર 156(3) ના ફરિયાદની નકલ આ કામે નિશાની–૧૦ થી રજુ કરેલ છે."*

[29] The present Court, with the assistance of the CIS, has obtained the status of the Criminal Enquiry relied upon by the appellant and it transpires that said complaint came to be dismissed under Section 203 of Cr.P.C by the Add. Chief Judicial Magistrate, Surat, vide order dated 15.06.2024. In the above set of circumstances, no order passed by any competent authority suggesting that the bills relied upon by the respondent - complainant are bogus or fabricated has been brought on record. Further, in the cross-examination, it is admitted by the witness of appellant (Exh. 41) that the complaint in the present case was filed in the year of 2019. It is also admitted that in the year 2019, the appellant had not preferred any complaint against the complainant. It is further admitted that even after receipt of summons, the appellant did not lodge any complaint before the Police. Per contra, it is admitted that five complaints have been registered against the appellant and the said witness at Salabatpura Police Station and Varachha Police Station.

[30] In the above set of circumstances, no credible doubt has been raised with regard to invoices/bills issued by the respondent - complainant or the ledger accounts maintained by the respondent- complainant. Therefore, there is sufficient reason to believe that the cheque issued by the appellant - accused to the tune of Rs. 24,76,000/- pertains to the value of goods sold and delivered by the respondent to the appellant - accused.

[31] Another contention taken by the appellant -

accused is that his cheque book was misused, having been stolen by the respondent - complainant. At Exhibit 41 the above witness has further stated that :-

> *"૩. .... જે બાબતે મળવા ગુરુપ્રસાદ પેરીવાલ હમોની દુકાને અવાર–નવાર આવતા તે સમયગાળાદરમ્યાન ગુરુપ્રસાદ પેરીવાલ મોકા પરસ્ત માણસ તરીકે મોકાનો ફાયદો ઉઠાવી હોના ભાઈ મહેશભાઈ ઝાલાની ચેકબુક ઉઠાવી/ચાઉમારી લીધેલ છે. અને સદર ચેકબુકનો દુરૂપયોગ કરી મહેશભાઈ ઝાલા પર ખોટા કેસો કરેલ છે. મહેશભાઈ ઝાલા દ્વારા ક્યારેય પણ ફરિયાદી કંપની સ્વામી સિન્ટેક્ષ પ્રા. લિ. પાસેથી કોઈ માલ લીધેલ નથી કે કોઈ પણ જાતનો ધંધાકીય વ્યવહાર કરેલ નથી."*

However, the above contention is not fortified by any proof suggesting any positive action on the part of the appellant - accused. No complaint in this regard is lodged with police station or any other authority. No intimation for stop payment has been given to the bank concering the cheque book. No letter mentioning inter alia the requisition of return of cheque book from respondent - complainant has been brought on record. The said defence is raised for the first time at the time of leading evidence on behalf of accused and, therefore, the same cannot be assigned the greater value in view of the ratio laid down by the Hon'ble Apex Court in the case of ***K.N.Beena Versus Muniyappan*** reported in ***2001 (0) AIJEL-SC 13395 ,*** wherein, it is held that :-

> *"6. In our view the impugned Judgement cannot be sustained at all. The Judgement 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/s. Bratindranath Banerjee reported in (2001) 6 SCC 16 has also taken an identical view.*
>
> *7. 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 21.05.1993 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."*

[32] Further, it is held in the case of ***Rajesh Jain Vs. Ajay Singh*** reported in ***2023 (0) AIJEL-SC 72588,*** as under:-

"54. Nothing significant has been elicited in the cross-examination of complainant to raise any suspicion in the case set up by the complainant. Other than some minor inconsistencies, the case of the complainant has been consistent throughout as can be noticed from a perusal of the complainant, demand notice and affidavit evidence. In fact, the signature on the cheque having not been disputed, and the presumption under Section 118 and 139 having taken effect, the complainant's case stood satisfied every ingredient necessary for sustaining a conviction under Section 138. The case of the defense was limited only to the issue as to whether the cheque had been issued in discharge of a debt/liability. The accused having miserably failed to discharge his evidential burden, that fact will have to be taken to be proved by force of the presumption, without requiring anything more from the complainant.

55. As rightly contended by the appellant, there is a fundamental flaw in the way both the Courts below have proceeded to appreciate the evidence on record. Once the presumption under Section 139 was given effect to, the Courts ought to have proceeded on the premise that the cheque was, indeed, issued in discharge of a debt/liability. The entire focus would then necessarily have to shift on the case set up by the accused, since the activation of the presumption has the effect of shifting the evidential burden on the accused. The nature of inquiry would then be to see whether the accused has discharged his onus of rebutting the presumption. If he fails to do so, the Court can straightaway proceed to convict him, subject to satisfaction of the other ingredients of Section 138. If the Court finds that the evidential burden placed on the accused has been discharged, the complainant would be expected to prove the said fact independently, without taking aid of the presumption. The Court would then take an overall view based on the evidence on record and decide accordingly.

56. At the stage when the courts concluded that the signature had been admitted, the Court ought to have inquired into either of the two questions (depending on the method in which accused has chosen to rebut the presumption): Has the accused led any defense evidence to prove and conclusively establish that there existed no debt/liability at the time of issuance of cheque? In the absence of rebuttal evidence being led the inquiry would entail: Has the accused proved the *nonexistence of debt/liability by a preponderance of probabilities by referring to the particular circumstances of the case?*

57. The perversity in the approach of the Trial Court is noticeable from the way it proceeded to frame a question at trial. According to the trial Court, the question to be decided was 'whether a legally valid and enforceable debt existed qua the complainant and the cheque in question (Ex. CWI/A) was issued in discharge of said liability/debt'. When the initial framing of the question itself being erroneous, one cannot expect the outcome to be right. The onus instead of being fixed on the accused has been fixed on the complainant. Lack of proper understanding of the nature of the presumption in Section 139 and its effect has resulted in an erroneous Order being passed.

58. Einstein had famously said:

"If I had an hour to solve a problem, I'd spend 55 minutes thinking about the problem and 5 minutes thinking about solutions".

Exaggerated as it may sound, he is believed to have suggested that quality of the solution one generates is directly proportionate to one's ability to identify the problem. A well-defined problem often contains its own solution within it.

60. Coming to the finding of High Court, we find again, there has been fundamental error in the approach with which the High Court has proceeded to consider the evidence on record. In paragraph 6 of the impugned order, the High Court finds that the complainant has proved the issuance of cheque, which means that the presumption would come into immediate effect. In paragraph 13, it rightly observes that the burden is on the accused to rebut such presumption. In the very next paragraph, it finds that the accused has rebutted the presumption by putting questions to the complainant and explaining the circumstances under section 313 Cr.P.C.

61. There is no elucidation of material circumstances/basis on which the Court reached such conclusion. It notes the allegation made in the complaint that the complainant had given the loan on 01.03.2014 and on several dates thereafter.

Based on this averment, the High Court rather shockingly concludes that: "If the complainant had given loans on various dates, he must have maintained some document qua that, because it was not a one-time, loan but loan along with interest accrued on the principal, which made the amount to Rs.6,95,204/-." Therefore, according to the High Court, 'the burden was primarily on the complainant to prove the debt amount'.

62. The fundamental error in the approach lies in the fact that the High Court has questioned the want of evidence on part of the complainant in order to support his allegation of having extended loan to the accused, when it ought to have instead concerned itself with the case set up by the accused and whether he had discharged his evidential burden by proving that there existed no debt/liability at the time of issuance of cheque."

[33] Considering above, as such there is no rebuttal to the presumption raised u/s 139 of N.I. Act upon execution of cheque being proved by the appellant - accused and hence, the Ld. trial Court was justified in passing order of conviction against the appellant and subjecting him to sentence and compensation.

[34] On behalf of appellant frail effort has also been made by producing whatsapp chat and pendrive containing conversation between the appellant and the respondent to suggest that the actual transaction between the parties is of lending and not for goods sold and delivered.

[35] At the first instance above electronic record has not been produced by the appellant - accused himself but by his cousin brother witness- Mr. Rameshbhai, who has stated in examination-in-chief affidavit at Exh. 41 that :-

> *"૨.સદરહુ ફરિયાદી ગુરુપ્રસાદ પેરીવાલને હમો અંગત રીતે ઓળખીએ છીએ. સદર કામના કરિયાદી ચેક ડિસ્કાઉન્ટ તેમજ ફાઈનાન્સનું કામ કરતા હતા. સદર કામના ફરિયાદી ગુરુપ્રસાદ પેરીવાલ વ્યાજે ધીરવાનું કામ કરતા. હમોએ સુંદર ફરિયાદી ગુરુપ્રસાદ પેરીવાલ પાસેથી નાણાં વ્યાજે લીધેલ અને સદર તમામ નાણાં વ્યાજ સહીત ચૂકવી આપેલ, તેનો તમામ હિસાબ નીલ થય ગયેલ છે. ત્યારબાદ પણ વ્યાજનું વ્યાજ કાઢીને હમોને ધમકીઓ આપતા હતા. હમોએ આ કામના ફરિયાદી સાથે કરેલ છેલ્લા વ્યવહારની વોટ્સ અપ ચેટ આ કામે નિશાની-૧ થી રજુ કરેલ છે, સદર ચેટ મુજબ તા. ૦૫/૦૩/૨૦૧૮ ના રોજ હમોના મોબાઈલ નં. ૯૮૨૫૩૪૮૫૭૨ પર ગુરુપ્રસાદ પેરીવાલએ પોતાના મોબાઈલ નં. ૯૩૭૪૭૦૬૩૫૪ થી વ્યાજ સાથેના હિસાબની ચિઠ્ઠી મોકલેલ. સદર ચિઠ્ઠીમાં ફરિયાદી પોતાના સ્વહસ્તે/ સ્વઅક્ષરે હમોને ધીરેલ નાણાંની રકમ, વ્યાજની રકમ તેમજ તારીખો દર્શાવેલ છે. સદર ચિઠ્ઠીમાં આ કામના ફરિયાદીએ પોતાના કોડ વર્ડ માં ૧૨ લાખ અને ૨.૫ લાખ પાપ) લખેલ છે, તેમજ તેની પર દૈનિક રીતે ગણેલ વ્યાજની રકમ લખેલ છે. ત્યારબાદ તા. ૧૫/૦૩/૨૦૧૮ 71) ના રોજ હમોએ ચેકો(વ્યાજ પેટે)ના ફોટા ગુરુપ્રસાદ પેરીવાલને વોટ્સ અપ કરેલ. સદર સ્ક્રીનશોટની પ્રિન્ટ સાથે ઈન્ડિયન એવીડન્સ એક્ટની કલમ અન્વયે 65-B નું સર્ટિફિકેટ આ કામે નિશાની-૨ થી રજુ કરેલ છે.*

> *"..........સદર કામના આરોપી મહેશભાઈ ઝાલાની ફરીયાદી ગુરુપ્રસાદ પેરીવાલ સાથે થયેલ વાતચીતની સ્ક્રીપ્ટ તથા પેઈનડ્રાઈવ અને તેનું 65-8 સદર 156 (3) ની ફરિયાદ માં મહેશભાઈ ઝાલા દ્વારા રજુ કરવમાં આવેલ છે, જેની નકલ આ સાથે નિશાની-૧૧,૧૨ અને ૧૩ થી રજુ કરેલ છે. સદર વાતચીત દરમ્યાન સદરહુ કામના ફરિયાદી ગુરુપ્રસાદ પેરીવાલએ મહેશભાઈને*

કહેલ કે, "મને શું હું તો એક ખૂણામાં બેસીને બીલ બનાવી નાખી, અને ચેક ભરી દઈ. તમે ફસાય જશો, પૂરી જીંદગી તમારી જેલમાં કાપવી પડશે. વધુમાં મહેશભાઈને કહેલ કે, રમેશભાઈને એમ કે હું વધારે ચાલક છું, પણ હું(ગુરુપ્રસાદ પેરીવાલ) એના કરતા વધારે બળવાન છું મારી(ગુરુપ્રસાદ પેરીવાલ) પાસે ૫૦ માણસો છે."*

[36] In the examination-in-chief affidavit itself it is stated by the witness that complainant and accused do not know each other personally only due to the transaction of money lending between the witness and the respondent - complainant, the respondent - complainant came to the shop of witness and usurpingly had stolen the cheque book of the appellant- accused and the same is misused. Against this, it is admitted in the cross-examination :-

> *"........એ વાત ખરી છે કે ફરીયાદીએ મારી વિરૂધ્ધ કોઈ ફરીયાદ કરેલ નથી."*
>
> *"..............તમારી સરતપાસમાં જે વોટસએપ વાળા ચેકોનો ઉલ્લેખ છે તે હાલની ફરીયાદ સબંધેના છે સાહે જણાવે છે કે મે ગુરુપ્રસાદ પાસેથી વ્યાજે નાણા લીધેલા હતા અને તેના ચેકો આપેલા તેની હકીકત મારી સરતપાસમાં લખેલ છે. એ વાત ખરી છે કે ફરીયાદીએ મારા પોતાના કોઈ જ ચેકોની ઉઠાંતરી કરેલ નથી."*

[37] In the above set of circumstances, when a proposed defence is taken by a party and he fails to adduce the evidence which he alone is best able to produce, an adverse inference needs to be drawn under Section 114(g) of

Evidence Act, which reads as under:-

"Section 114 Court may presume existence of certain facts

The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

(g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;

At this juncture it will be profitable to refer the Judgment of the Hon'ble Apex Court in the case of ***Iswarbhai C.Patel Versus Harihar Behera*** reported in ***1999 (0) AIR(SC) 1341***, wherein, it is held that :-

*""**18.** As early as in 1927, the Privy Council in Sardar Gurbaksha Singh V/s. Gurdial Singh, AIR 1927 PC 230, took note of a practice prevalent in those days of not examining the parties as a witness in the case and leaving it to the other party to call that party so that the other party may be treated as the witness of the first party. Their Lordships of the Privy Council observed as under :-*

"Notice has frequently been taken by this Board of this style of procedure. It sometimes takes the form of a manoeuvre under which counsel does not call his own client, who is an essential witness, but endeavours to force the other party to call him, and so suffer the discomfiture of having him treated as his, the other party's, own

witness.

This is thought to be clever, but it is a bad and degrading practice. Lord Atkinson dealt with the subject in Lal Kunwar V/s. Chiranji Lal (1910) ILR 32 All 104), calling it "a vicious practice, unworthy of a high -toned or reputable system of advocacy."

19. *They further observed as under :-*

"But in any view her non-appearance as a witness, she being present in Court, would be the strongest possible circumstance going to discredit the truth of her case."

20. *Their Lordships also took note of the High Court finding which was to the following effect :-*

"It is true that she has not gone into the witness box, but she made a full statement before Chaudhri Kesar Ram, and it does not seem likely that her evidence before the Subordinate Judge would have added materially to what she had said in the statement.

21. *They observed :-*

"Their Lordships disapprove of such reasoning. The true object to be achieved by a Court of justice can only be furthered with propriety by the testimony of the party who personally knowing the whole circumstances of the case can dispel the suspicions attaching to it. The story can then be subjected in all its particulars to cross-examination."

22. *This decision has since been relied upon practically by all the High Courts. The Lahore High Court in Kirpa Singh V/s. Ajaipal Singh, AIR 1930 Lahore 1, observed as under :-*

"It is significant that while the plaintiffs put the defendant in the witness-box they themselves had not the courage to go into the witness-box. Plaintiffs were the best persons to give evidence as to the "interest" possessed by them in the institution and their failure to go into the witness-box must in the circumstances go strongly against them."

23. *This decision was also relied upon by the Bombay High Court in Martand Pandharinath Chaudhari V/s. Radhabai Krishnarao Deshmukh, AIR 1931 Bombay 97, which observed as under :-*

"It is the bounden duty of a party personally knowing the facts and circumstances, to give evidence on his own behalf and to submit to cross-examination and his non-appearance as a witness would be the strongest possible circumstance which will go to discredit the truth of his case."

24. *The Lahore High Court in two other cases in 1934, namely, Bishan Das V/s. Gurbakhsh Singh, AIR 1934 Lahore 63 (2) and Puran Das Chela V/s. Kartar Singh, AIR 1934 Lahore 398 took the same view.*

25. *A Division Bench of the Patna High Court in Devji Shivji V/s. Karsandas Ramji, AIR 1954 Patna 280, relying upon the decision of the Privy Council in Sardar Gurbakhsh Singh V/s. Gurdial Singh (AIR 1927 PC 230) (supra) and the Madhya Pradesh High Court in Gulla Kharagjit Carpenter V/s. Narsingh Nandkishore Rawat, AIR 1970 Madh Pra 225 have also taken the same view. The Madhya Pradesh High Court also relied upon the following observation of the Calcutta High Court in Pranballav Saha V/s. Sm. Tulsibala Dassi, AIR 1958 Cal 713 :-*

"The very fact that the defendant neither came to the box

herself nor called any witness to contradict evidence given on oath against her shows that these facts cannot be denied. What was prima facie against her became conclusive proof by her failure to deny."

26. *The Allahabad High Court in Arjun Singh V/s. Virender Nath, AIR 1971 All 29, held that :-*

"the explanation of any admission or conduct on the part of a party must, if the party is alive and capable of giving evidence, come from him and the Court would not imagine an explanation which a party himself has not chosen to give."

27. *It was further observed that :-*

"If such a party abstains from entering the witness box it must give rise to an inference adverse against him.

28. *A Division Bench of the Punjab & Haryana High Court also in Bhagwan Dass V/s. Bhishan Chand, AIR 1974 Punj & Har 7, drew a presumption under Sec. 114 of the Evidence Act that if a party does not enter into the witness box, an adverse presumption has to be drawn against that party.*

29. *Applying the principles stated above to the instant case, it would be found that in the instant case also the appellant had abstained from the witness box and had not made any statement on oath in support of his pleading set out in the written statement. An adverse inference has, therefore, to be drawn against him. Since it was specifically stated by respondent No. 2 in his statement on oath that it was at the instance of the appellant that he had issued the cheque on the account of respondent No. 1 in the Central Bank of India Ltd., Sambalpur Branch, and* *the appellant, admittedly, had encashed that cheque, an inference has to be drawn against the appellant that what he stated in the written statement was not correct. In these circumstances, the High Court was fully justified in decreeing the suit of respondent No. 1 in its entirety and passing a decree against the appellant also."*

[38] Further, it is held by the Hon'ble High Court of Gujarat in the case of ***Nikunjbhai Chandrakant Boomia Versus Atulbhai Chhotabhai Parmar*** reported in ***2018 (0) AIJEL-HC 239009***, wherein, it is held as under:-

"5. It thus appears that issuance of the cheques was not disputed by the parties. The case therefore rested on presumption under Section 138 of N.I.Act that there existed a debt or other liability and that the cheque was received towards the discharge of debt or such other liability. In the light of the said presumption, in absence of the dispute as regards issuance of the cheque in question by the accused, the accused was required to prove the facts pleaded by him or atleast probabilise them. He examined the witness Exh.47 for that purpose who reiterated the story pleaded by the accused as above. However, except making certain oral statements pointing out that the cheque in question was issued by the respondent No.1- accused towards consideration of the proposed purchase, which failed, no documents like the agreement evidencing the said transaction, though in existence, according to the witness, were brought on record. The document was thus withheld which would lead to an adverse inference against the respondent No.1- accused that had they been brought on record, the evidence contrary to what the

respondent No.1- accused claims would have come on record. Thus, in the opinion of this court, the accused could not make his case good by necessary evidence and the presumption under Section 139 of N.I.Act was not rebutted. In the opinion of this court, therefore the respondent No.1- accused is liable to be convicted for the offence punishable under Section 138 of N.I.Act."

In the present case, the respondent - complainant himself has not stepped into the witness box. The grievance has been raised by witness in respect to his transaction with complainant for which admittedly no complaint has been filed. As discussed above, neither the witness nor the appellant has successfully challenged the alleged act of the respondent - complainant by initiating any independent proceeding. Therefore, such evidence fails to inspire confidence.

[39] Moreover, the Ld. trial Court has rightly held that the document produced at Exhs. 43, 42/11 and 49, have not been duly proved. No details have been brought on record in the evidence of the witness as to how the above referred documents are relevant in the context of the present case. Furthermore, the transcript produced at Exh.

42/11 reflects a conversation between the appellant, the respondent and one Mr. Bhaveshbhai, however, no detail have been provided as to who Mr. Bhaveshbhai is. It has also not been explained how the recording of the said conversation was made, as is evident from Exh. 41-affidavit, nor has the date of such recording been disclosed. In the said set of circumstances, merely for the reason that the electronic record is supported with a Certificate under Section 65(b) of the Evidence Act, the content thereof cannot be accepted as gospel truth. Additionally, even in Exh. 50 (Certificate), the details of the device used such as the mobile number, manufacturer, etc. have not been mentioned. The date on which the recording was made is also not mentioned. Notably, the certificate is dated 23.05.2022, i.e., nearly three years after filing of the complaint. In the said set of circumstances, the said document fail to impeach the positive evidence adduced by the respondent - complainant, and there is no effective rebuttal of the statutory presumption raised against the appellant - accused.

[40] At this juncture, it will be profitable to refer the Judgment of the Hon'ble Apex Court in the case of ***Rohitbhai Jivanlal Patel Versus State Of Gujarat*** reported in ***2019 (0) AIJEL-SC 63830***, wherein, it is held that :-

> *"16. On the aspects relating to preponderance of probabilities, the accused has to bring on record such facts and such circumstances which may lead the Court to conclude either that the consideration did not exist or that its nonexistence was so probable that a prudent man would, under the circumstances of the case, act upon the plea that the consideration did not exist. This Court has, time and again, emphasized that though there may not be sufficient negative evidence which could be brought on record by the accused to discharge his burden, yet mere denial would not fulfil the requirements of rebuttal as envisaged under Section 118 and 139 of the NI Act. This court stated the principles in the case of Kumar Exports (supra) as follows:*
>
> > *"20. The accused in a trial under Section 138 of the Act has two options. He can either show that consideration and debt did not exist or that under the particular circumstances of the case the non-existence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the nonexistence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is*

probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. Apart from adducing direct evidence to prove that the note in question was not supported by consideration or that he had not incurred any debt or liability, the accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on to the complainant. The accused may also rely upon presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arising under Sections 118 and 139.

21. The accused has also an option to prove the non-existence of consideration and debt or liability either by letting in evidence or in some clear and exceptional cases, from the case set out by the complainant, that is, the averments in the complaint, the case set out in the statutory notice and evidence adduced by the complainant during the trial. Once such rebuttal evidence is adduced and accepted by the court, having regard to all the circumstances of the case and the preponderance of probabilities, the evidential burden shifts back to the complainant and, therefore, the presumptions under Sections 118 and 139 of the Act will not again come to the complainant's rescue."

17. In the case at hand, even after purportedly drawing the presumption under Section 139 of the NI Act, the Trial Court proceeded to question the want of evidence on the part of the complainant as regards the source of funds for advancing loan to the accused and want of examination of relevant witnesses who allegedly extended him money for advancing it to the accused. This approach of the Trial Court had been at variance with the principles of presumption in law. After such presumption, the onus shifted to the accused and unless the accused had discharged the onus by bringing on record such facts and circumstances as to show the preponderance of probabilities tilting in his favour, any doubt on the *complainant's case could not have been raised for want of evidence regarding the source of funds for advancing loan to the accused-appellant. The aspect relevant for consideration had been as to whether the accused-appellant has brought on record such facts/material/circumstances which could be of a reasonably probable defence."*

[41] Moreover, the Hon'ble Apex Court in the case of **Kishan Rao Versus Shankargouda** reported in ***2018 (0) AIJEL-SC 62414.***, has held as under:-

*"**14.** Now, we proceed to examine order of the High Court in the light of the law as laid down in the above mentioned cases. The High Court itself in paragraph 40 has given its reasons for setting aside the order of conviction, it has observed that though perception of a person differs from one another with regard to the acceptance of evidence on record but in its perception and consideration, the accused has been successful in creating doubt in the mind of the Court with regard to the existence of the debt or liability. It is relevant to notice what has been said in paragraph 40 of the judgment which is to the following effect:*

"40. In view of the above said "facts and circumstances, though perception of a person differs from one another with regard to the acceptance of evidence on record but in my perception and consideration, the accused has been successful in creating doubt in the mind of the Court with regard to the existence of the debt or liability particularly with reference to the alleged transaction dated 25.12.2005 as alleged by the complainant. Hence, in my opinion the High Court has full power to interfere with such judgment of the Trial Court as subject matter exactly falls within the parameters of Section 397 of the Code and also guidelines of the Apex Court as noted in the above said decisions. Therefore, I am of the considered opinion the Trial Court and the First Appellate Court have committed serious error in merely proceeding on the basis of the presumption under Section 139 of the Act and

also on the basis that, the accused has not proved his defence with reference to the loss of cheque etc. Hence, I answered the point in the affirmative and proceeded to pass the following:

ORDER

The revision petition is hereby allowed. Consequently, the judgment and sentence passed by the III-Addl. Civil Judge (Jr.Dn.) & JMFC, Kalaburagi in C.C.No.1362/2006 which is affirmed by Fast Track Court - 1 at Kalaburagi in Cr.A.No.46/2009 are hereby set aside. Consequently, the accused is acquitted of the charges levelled against him under Section 138 of N.I.Act. If any fine amount is deposited by the accused/petitioner, the same is ordered to be refunded to him...."

15. *The High Court has not returned any finding that order of conviction based on evidence on record suffers from any perversity or based on no material or there is other valid ground for exercise of revisional jurisdiction. 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 funds. We are of the view that the judgment of High Court is liable to be set aside on this ground alone.*

16. *Even though judgment of the High Court is liable to be set aside on the ground that High Court exceeded its revisional jurisdiction, to satisfy ourselves with the merits of the case, we proceeded to examine as to whether there was any doubt with regard to the existence of the debt or liability of the accused.*

17. *Section 139 of the Act, 1881 provides for drawing the presumption in favour of holder. Section 139 is to the following effect:*

"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."

18. *This Court in Kumar Exports vs. Sharma Carpets, 2009 (2) SCC 513, had considered the provisions of Negotiable Instruments Act as well Evidence Act. Referring to Section 139, this Court laid down following in paragraphs 14, 15, 18 and 19:*

"14. Section 139 of the Act 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.

15. Presumptions are devices by use of which the courts are enabled and entitled to pronounce on an issue notwithstanding that there is no evidence or insufficient evidence. Under the Evidence Act all presumptions must come under one or the other class of the three classes mentioned in the Act, namely, (1) "may presume" (rebuttable), (2) "shall presume" (rebuttable), and (3) "conclusive presumptions"(irrebuttable). The term "presumption" is used to designate an inference, affirmative or disaffirmative of the existence of a fact, conveniently called the "presumed fact" drawn by a judicial tribunal, by a process of probable reasoning from some matter of fact, either judicially noticed or admitted or established by legal evidence to the satisfaction of the tribunal. Presumption literally means "taking as true without examination or proof".

18. Applying the definition of the word "proved" in Section 3 of the Evidence Act to the provisions of Sections 118 and 139 of the Act, it becomes evident that in a trial under Section 138 of the Act a presumption will have to be made that every negotiable instrument was made or drawn for consideration and that it was executed for discharge of debt or liability once the execution of negotiable instrument is either proved or admitted. As soon as the complainant discharges the burden to prove that the instrument, say a note, was executed by the accused, the rules of presumptions under Sections 118 and 139 of the Act help him shift the burden on the accused. The *presumptions will live, exist and survive and shall end only when the contrary is proved by the accused, that is, the cheque was not issued for consideration and in discharge of any debt or liability. A presumption is not in itself evidence, but only makes a prima facie case for a party for whose benefit it exists.*

19. The use of the phrase "until the contrary is proved" in Section 118 of the Act and use of the words "unless the contrary is proved" in Section 139 of the Act read with definitions of "may presume" and "shall presume" as given in Section 4 of the Evidence Act, makes it at once clear that presumptions to be raised under both the provisions are rebut table. When a presumption is rebut table, it only points out that the party on whom lies the duty of going forward with evidence, on the fact presumed and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over."

***19.** This Court held that the accused may adduce evidence to rebut the presumption, but mere denial regarding existence of debt shall not serve any purpose. Following was held in paragraph 20:*

"20....The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist..."

> ***20.*** *In the present case, the trial court as well as the Appellate Court having found that cheque contained the signatures of the accused and it was given to the appellant to present in the Bank of the presumption under Section 139 was rightly raised which was not rebutted by the accused. The accused had not led any evidence to rebut the aforesaid presumption. The accused even did not come in the witness box to support his case. In the reply to the notice which was given by the appellant the accused took the defence that the cheque was stolen by the appellant. The said defence was rejected by the trial court after considering the evidence on record with regard to which no contrary view has also been expressed by the High Court."*

[42] Further, it is also held in the recent Judgment of ***Sanjabij Tari Versus Kishore S.Borcar (Supra),*** as under:-

> *"15. In the present case, the cheque in question has admittedly been signed by the Respondent No.1- Accused . This Court is of the view that once the execution of the cheque is admitted, the presumption under Section 118 of the NI Act that the cheque in question was drawn for consideration and the presumption under Section 139 of the NI Act that the holder of the cheque received the said cheque in discharge of a legally enforceable debt or liability arises against the accused. It is pertinent to mention that observations to the contrary by a two Judges Bench in **Krishna Janardhan Bhat vs. Dattatraya G. Hegde, (2008) 4 SCC 54** have been set aside by a three Judges Bench in Rangappa (supra).*
>
> *16. This Court is further of the view that by creating this presumption, the law reinforces the reliability of cheques as a mode of payment in commercial transactions.*
>
> *17. Needless to mention that the presumption contemplated under Section 139 of the NI Act, is a rebuttable presumption. However, the initial onus of proving that the cheque is not in discharge of any debt or other liability is on the accused/drawer of the cheque [See: **Bir Singh vs. Mukesh Kumar, (2019) 4 SCC 197**].*

> *18. The judgment of this Court in APS Forex Services Private Limited (supra) relied upon by learned counsel for the Respondent No.1-Accused only says that presumption under Section 139 of the NI Act is rebuttable and when the same is rebutted, the onus would shift back to the complainant to prove his financial capacity, more particularly, when it is a case of giving loan by cash. This judgment nowhere states, as was sought to be contended by learned counsel for the Respondent No.1-Accused, that in cases of dishonour of cheques, in lieu of cash loans, the presumption under Section 139 of the NI Act does not arise."*

[43] Considering the ratio laid down in the above Judgments and applying the same to the factual matrix of the present case, I am of the view that the Ld. trial Court has rightly arrived to the conclusion and the Judgment passed by the Ld. trial Court, convicting the appellant - accused and subjecting him to sentence and fine/compensation, is just and proper and the same does not warrant any modification, intervention or reversal. Accordingly, I decide issue no. 1 & 2 in negative and following final order is passed:-

:: ORDER ::

1. The present Criminal Misc. Appeal stands **dismissed.**

2. The Judgment and Order dated **04.03.2025**

convicting the appellant – original accused, rendered by the Ld. trial Court, Surat in **Criminal Case No. 5365/2019** stands **confirmed and made absolute.**

3. The bail bond(s) of the appellant - accused stands cancelled. Consequently, the Appellant - accused to surrender before the Ld. Magistrate forthwith.

4. In compliance to the provisions of **Section - 363 of the Code of Criminal Procedure** a certified copy of this Judgment be supplied to the accused free of cost.

5. After completion of the appeal period, **the 20% amount** deposited by the appellant before the Registry, is hereby ordered to be paid to the respondent - complainant, by A/c. payee cheque after due verification. If the deposited amount is converted into Fixed Deposit, then the same shall be disbursed after liquidating the Fixed Deposit.

6. The copy of this Judgment be sent to the Ld. Magistrate for necessary information, knowledge

and compliance.

7. Record and Proceedings be transmitted to the concerned Court forthwith.

Pronounced in open Court today on this
25th day of March, 2026.

Date : 25.03.2026
Place : Surat.

(Rahul Arunkumar Trivedi)
Sessions Judge, Surat.
Code No. **GJ01495.**

//kapil//