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Decided on	07	03	2026
Duration	YY	MM	DD
	01	08	08

IN THE COURT OF 2nd ADDL. SESSIONS JUDGE, SURAT

(Presided Over by R. R. BHATT)

CRIMINAL APPEAL No. 545/2024

Exh.________

APPELLANT (Original Accused)**:**
ASHRAF RASULBHAI PATHAN,
Aged about : 34 years, Occ. Business,
Address : C-1, Behind Rander Police Station,
Behind E-light Paradise, Rander, Surat.

VERSUS

RESPONDENT (Original Complainant)**:**
1.The State.

2.SUFIYAN SAKET PADALIYA,
Aged about: 26 Years, Occ. -,
Address : B/4/56, Rander Police line, Rander, Surat.

Appearance :-

Mr./Ms. R. G. Parekh,	Ld. Chief LADC for the appellant.
Mr./Ms. K. D. Khairnar ,	ld. Advocate for the respondent No.1
Mr./Ms. K. J. Parekh,	Ld. Advocate for the respondent No.2

:: <u>J U D G M E N T</u> ::

[1] The present Criminal Appeal preferred by the appellant - original accused under **Section 374 of the Cr.P.C.** (**corresponding provision, Section 415 of the B.N.S.S.**) emanates from the Judgment passed by the Ld. trial Judge, Surat dated **31/05/2024** in **Criminal Case No. 29154/2023,** whereby the appellant is hereby, sentenced to one year of simple imprisonment for an offence punishable under Section 138 of the N. I. Act, in accordance with Sections 260 to 265 of the Cr.P.C. The appellant - accused is also directed to pay compensation to the complainant, the cheque amount along with interest at the rate of 9% per annum from the date the cheque was returned. In default of payment, the accused shall undergo an additional six months of simple imprisonment.

[2] While presenting the appeal, the appellant sought suspension of the execution and operation of the impugned Judgment by preferring application under Section 389 of the Cr.P.C. (corresponding provision Section 430 of B.N.S.S.) and the 13th Add. Sessions Judge allowed the said application with condition of deposit of 20% of the compensation ordered by the Ld. trial Court. It transpires from the record that the appellant has not deposited 20% of compensation amount with the Nazir of District Court Surat.

<u>*:FACTUAL MATRIX:*</u>

[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 the accused, who was a friend of the complainant's brother Shahid Padaliya, borrowed Rs.1,50,000 from him for purchasing a house and later an additional Rs.50,000 from the complainant in his brother's presence, promising to repay the amount shortly. Upon demand for repayment, the accused issued cheque No. 177852 dated 05/12/2020 for Rs.50,000 drawn on IndusInd Bank, Rander Road Branch, Surat, assuring that it would be honoured, however, when presented at Bank of India, Anand Mahal Road Branch, Surat, the cheque was returned unpaid on 04/01/2021 with the remark "Funds Insufficient." Despite being informed and served with a legal notice dated 29/01/2021 under Section 138 of the Negotiable Instruments Act which was received on 30/01/2021, however, since no positive reciprocation of the Notice was made at the instance of accused, the complainant was constrained to prefer the complaint under the N. I. Act.

(C) The complaint preferred by the complainant was numbered as **C.C. No. 29154/2023**. The process / summons of the complaint was duly served upon the accused, who caused his appearance through Advocate and his plea was recorded, 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 complainant	4

:: DOCUMENTARY EVIDENCE ::

Sr. No.	Particulars	Exhibit
1	Cheque No. 177852	21
2	Cheque Return Memo	22
3	Office copy fo the legal notice issued to the accused	23
4	RPAD receipt	24
5	Acknowledgment Receipt.	25
6	Bank Statement of the complainant.	26
7	Aadhaar card of the complainant.	27

[5] Thereafter, the **Closing Purshish** came to be filed on behalf of the complainant and Further Statement of the accused came to be recorded under **Section 313 of the Code of Criminal Procedure**, wherein the accused nor his advocate remain present before the court hance his right to argue before the court and has not produced any evidence.

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

<u>Order</u>

"(1)The accused Ashraf Rasulbhai Pathan, Adult, Occupation: Business, Residing At: C-1, Behind Rander Police Station, Behind E-light Paradise, Rander, Surat, is hereby sentenced to one year of simple imprisonment for the offence under Section 138 of the Negotiable Instruments Act, in accordance with Sections 260 to 265 of the Cr.P.C.

(2) Under Section 357(3) of the Cr.P.C., the accused is directed to pay to the complainant, as compensation, the cheque amount along with interest at the rate of 9% per annum from the date of return of the cheque, in default thereof, the accused shall undergo an additional six months of simple imprisonment.

(3) As the accused is not present for execution of the sentence order, a non-bailable warrant is directed to be issued against the accused under Section 418(2) of the Cr.P.C. for enforcement of the sentence."

[7] Being aggrieved with the said order, the appellant - accused has preferred the present appeal. At the time of filing the appeal, Ld. Advocate Shri A. Z. Shaikh appeared on behalf of the appellant. Thereafter, despite issuance of summons on several occasions, neither the appellant - accused nor any Advocate on his behalf remained present before this Court.

[7.1] At this juncture, it will be profitable to refer the Judgment of Hon'ble High Court of Gujarat in the case of ***Sunilbhai @ Chhindiyabhai @ Sureshbhai Vasava Vs. State of Gujarat*** reported in ***2019(3) GLR 2090***, wherein, it is held as under:-

"14. The following procedure is required to be considered by the Sessions Judges while dealing with conviction appeals under the Code wherein convict / Advocate is / are not available:
(i) If the Advocate appearing for the appellant - convict is present and is ready to proceed with the appeal, the Court has to decide the same on merits and reasoned judgment is to be delivered even if the convict is absconding. It is needless to say that the convict should always be subjected to consequences of his abscondance.
(ii) The court cannot dismiss in default of convict, an appeal for non-prosecution.
(iii) If the convict is absconding and his Advocate is absent, and if the convict has jumped the bail / temporary bail granted by the court, the court itself shall take recourse provided under the provisions of the code to secure the presence of absconding convict and can issue;
(a) notice to surety, recover the amount of surety, if surety

> *is available;*
> *(b) issue non-bailable warrant for arrest of convict;*
> *(c) pass orders of attachment of his property declaring him proclaimed offender, etc. under Sections 82, 83 of the Code.*
> *(iv) after exhausting all possible efforts if the convict could not be traced out and if the court is satisfied and is of the opinion that the convict is recalcitrant and has shown total disrespect to the orders passed by the court and has jumped the bail / temporary bail, the court can dispose of the appeal after perusing the record and judgment of the trial court. If the court deems it appropriate to appoint a pro bono lawyer to assist it, nothing in law would preclude the court from doing so.*
> *(v) that if the case is decided on merits in the absence of the appellant convict, the High Court can remedy the situation."*

[7.2] Considering the ratio laid down in the aforesaid Judgment, in the present case neither the appellant - accused nor his Advocate has remained absent before the Court. In the said set of circumstances, under the NALSA Scheme, the DLSA, Surat has appointed Ld. Chief Legal Aid Defence Counsel Shri. R. G. Parekh and she has been appointed as Amicus Curiae (friend of the Court) to represent the appellant - accused in the present appeal.

<u>SUBMISSIONS OF THE APPELLANT</u>:

[8] Ld. Chief LADC appeared on behalf of appellant has submitted that the order passed by Ld. trial Judge is bad, illegal, perverse and against the principles of law and same needs to be quashed and set aside. It is submitted that the impugned cheque is not provided by the accused to the complainant towards any legally enforceable debt and hence also the finding of Ld. trial Court is erroneous.

[8.1] Ld. Chief LADC has submitted that as per established principles of criminal jurisprudence complainant is supposed to prove his case beyond reasonable doubt. Even in cases where a specific statutes provides for a presumption to be raised against the accused, the foundational facts must be proved by the complainant / prosecution and then only the presumption can be drawn and as per principle of reverse onus and then the accused would be liable to rebut the presumption. In order to buttress her contentions, Ld. Chief LADC has relied upon the Judgment of ***Kali Ram Vs. State of HP reported in AIR 1973 SC 2773 in Criminal Appeal No. 22 of 1973,***

[8.2] It is further contended that Ld. trial Court has grossly erred in not considering explanation provided by accused in Further Statement recorded u/s 313 of Cr.P.C and therefore also the decision in question needs to be recalled. On all above grounds it is submitted that the impugned Judgment and Order passed by Ld. trial Court needs to be quashed and set aside.

<u>SUBMISSIONS OF THE RESPONDENT</u>:

[9] Per contra, Ld. Advocate appearing 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 submitted by Ld. Advocate for the respondent - complainant that the impugned Judgment passed by Ld. trial Court is just, proper and same does not warrant any modification, intervention or reversal. It is contended that appellant has failed to challenge the execution of the cheque in favour of respondent and said fact being proved which is mandatory on the part of the appellant under Section 139 of N.I. Act to rebut the presumption to the fact that impugned cheque is issued towards legally enforceable debt to the payee by drawer. Hence, the Judgment of Ld. trial Court of convicting the appellant - accused and subjecting him the fine and imprisonment is just and proper and same does not warrant any modification, intervention or reversal and therefore, the present appeal needs to be dismissed.

POINTS OF DETERMINATION:

[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 31/05/2024 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 ::

<u>Point Nos. 1 to 3</u>:

[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:

> ***"Section 138:***
> *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] In the present case, it is the case of the the respondent - complainant that the accused, who was a friend of the complainant's brother Shahid Padaliya, borrowed Rs.1,50,000 from him for purchasing a house and later an additional Rs.50,000 from the complainant in his brother's presence, promising to repay the amount shortly. In support thereof, the respondent - complainant has also produced Office copy fo the legal notice issued to the accused at Exh. 23. further, the respondent-complainant has produced original Cheque No. 177852 given by the accused-appellant and Cheque Return Memo at Exh.21 & 22.

[21] Considering above, In view of Section 139 of N.I. Act, a statutory presumption arises in favour of the respondent that the cheque was issued towards discharge of legally enforceable debt or liability. The burden to rebut such presumption lies upon the accused/ accused.

[22] At this juncture, it will be apt to refer the Judgment of 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."*

[23] Moreover, 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."

[24] Further, it is held by Hon'ble Apex Court in the case of ***Sanjabij Tari Versus Kishore S.Borcar*** reported in ***2025 (0) AIJEL-SC 75934,*** 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."

[25] Considering, the ratio laid down in above referred Judgments and analyzing the facts of the present case, it clearly transpires that in the present case the appellant - accused has failed to establish any sound defence on preponderance of probability so as to rebut the presumption levelled against appellant - accused upon the execution of cheque being proved.

[26] Cumulative reading of above, clearly transpires that the judgment passed by Ld. trial Court of convicting the appellant and subjecting him fine and imprisonment, appears to be just, proper and judicious and same does not warrant any modification, intervention and reversal. Accordingly, I decide point of determinations and following final order is passed:-

:: O R D E R ::

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

2. The Judgment and Order dated **31/05/2024** convicting the appellant – original accused, rendered by the Ld. trial Court, Surat in **Criminal Case No. 29154/2023**

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

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

Pronounced in open Court today on this 07th day of March, 2026.

Date:07/03/2026
Surat.

(Rakesh Rajnikant Bhatt)
2nd Additional Sessions Judge,
Surat
(Unique ID Code: **GJ00608**)

//V//