KABD020032852022

IN THE COURT OF ADDL. SENIOR CIVIL JUDGE & JMFC., AT BIDAR

Present : **Abdul Khadar,** B.A. LL.B.,
Addl. Senior Civil Judge & JMFC.
Bidar.

Dated this the 16th day of December- 2023

Criminal Case No.45/2023

Complainant: Sharnbasappa S/o Gurushantappa Patil
Age: 44 years, Occ: Agriculture, R/o:
Basaveshwar colony Tq and Dist Bidar.

(**By Sri.N.M.S-Advocate**)

-Vs-

Accused : Devidas S/o Dadarao Sagave, Age: 48 years, Occ: Agriculture, R/o: Gundappa Kanak Postmaster, Opposite 2nd Papnash Gate South Shivnagar Bidar.

(**By Sri.J.D-Advocate**)

:J U D G M E N T:

The complainant filed the private complaint under Sec.200 of Cr.P.C., against the accused for having committed an offence punishable under Sec.138 of Negotiable Instruments Act.

2. It is the case of the complainant that, the accused being owner of land Sy.No.52/5 measuring 2 acres 25 guntas of village Inchur, Salgaon circle Tq Bhalki standing in the name of his wife Smt. Pratibha and being in need of money, he along with his mother entered into an agreement to sell the said land to the complainant for the mutually agreed consideration of Rs.30,00,000/- and out of this on receiving part consideration of Rs.15,00,000/- from the complainant, the accused and his mother (who is now since deceased) executed registered Agreement of Sale without possession bearing document No.2892/2015-16 dated: 31-08-2015 acknowledging the receipt of part consideration and agreeing to execute the sale deed after demarcation of said land by receiving balance consideration amount. However after the death of his mother the accused canceled the said agreement of sale on 06-05-2019 showing the refund of part consideration in the said cancellation deed, since the accused had issued post dated cheque bearing No.576797 dated 22-07-2019 payable at Corporation Bank Br. Bidar. After the receipt of the said cheque, and as per the instructions of the accused, the complainant after advance intimation to him deposited the said cheque in his account at State Bank of India D.C Office Road, Br Bidar for collection from where the said cheque was referred to the account of the accused for clearance. But the said cheque issued by the accused in favour of the complainant in respect of legally

recoverable debts has came to be returned unpaid by the bank of the accused with remarks as "**PAYMENT STOPPED BY Drawer"** with cheque return memo dated 17-08-2019 which in turn is communicated to the complainant by his banker. Immediately the complainant informed the accused about dishonoring of cheque, but he has not come forward to pay the dishonored cheque amount. Hence, the complainant got issued legal notice dated 07-09-2019 through RPAD calling upon the accused to pay the dishonored cheque amount within 15 days from the date of receipt of said notice. The notice issued by RPAD was duly served on 11-09-2019. In spite of legal notice, the accused has not paid the cheque amount nor replied the notice. Accordingly, complainant has filed the present complaint to take action against the accused in accordance with law and to award suitable compensation in the interest of justice and equity.

3. Being satisfied with the complaint averments, this Court has taken cognizance and after recording sworn statement being satisfied with the prima-facie case, issued summons to the accused compelling his appearance. Accused appeared through his counsel before this Court and got enlarged on bail. Substance of accusation was read over to the accused. Accused pleaded not guilty for the offence punishable u/s.138 of NI Act. Hence, this Court called upon the complainant to prove his case.

4. In support of the case, the complainant himself examined as P.W.1 and got marked 6 documents as per Ex.P1 to P6. One witness by name Jainu Khan examined as PW-2 and after closure of evidence of Complainant, the accused was examined as contemplated U/s.313 Cr.P.C and his statement was recorded. The accused, totally denied the case of the complainant and he has defense evidence. Accused himself examined as DW1 and 1 document got marked at Ex.D1 Copy of Cancellation deed dated:02-07-2013 on his behalf and closed his side evidence.

5. Heard arguments canvassed by the learned counsel for the complainant and the accused.

6. Now the points that arise for my consideration are:

- 1.Whether the complainant proves that the accused has issued a Post-dated cheque bearing No.576797 dated:22-07-2019 for Rs.15,00,000/- drawn from State Bank of India D.C Office road Branch Bidar in Discharge of legally enforceable debt and the said cheque returned dishonored for **Payment stopped by drawer** after issuance of legal notice, he fails to repay dishonored cheque amount within the stipulated period and thereby committed an offence punishable under Sec.138 of N.I. Act?
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2. What order?

7. My findings on the above points are as under:

Point No.1 : In the Negative.

Point No.2 : As per the final order below for the following:

REASONS

Point No.1:-

8. It is pertinent to note that, whenever a private complainant is filed seeking prosecution of the accused for an offence punishable under Section 138 of Negotiable Instrument Act, if the issuance of cheque and the signature on the cheque is accepted and admitted by the accused, an initial presumption has to be raised by the Court in favour of the complainant, that the cheque in question was issued towards legally recoverable debt or liability. Of course, this presumption is rebuttable presumption. Such rebuttable evidence has to be placed before the Court by the accused. It is well known that, the accused can rebut the said legal presumption either by cross-examination of complainant or by leading evidence. The complainant himself examined as PW.1 filed affidavit by way of chief examination has reiterated the versions of complaint. I would not like to reproduce the same to avoid repetition of facts since the complainant has explained the details of complaint averments in chief examination. The complainant has produced 7 documents at Ex.P1 to P7.

9. So far as the document is concerned Ex.P1 is the cheque bearing No.576797 for Rs.15,00,000/- dt:22-07-2019 drawn on Corporation Bank Branch Bidar. Ex.P2 is the Return Memo Bank Endorsement, wherein Ex.P1-Cheque was presented by the complainant through his SBI banker, which was returned for the reason **"Payment stopped by drawer".** Ex.P3 is the office copy of the legal notice, wherein the complainant called upon the accused to pay the amount of Rs.15,00,000/- covered under the Ex.P1-cheque within 15 days from the date of receipt of notice. Ex.P4 and 5 are the (2) Postal receipts, Ex.P6 is the Track consignment, Ex.P7 is the Reply to notice. According to the learned counsel for the complainant, when the issuance of cheque and his signature are admitted, then the presumption as required under Section 139 of N.I. Act comes to the aid of the complainant. It is the turn of the accused to explain or rebut the said presumption by raising a probable defence.

10. According to the evidence of P.W.1, the accused being the owner of land Sy.No.52/5 measuring 2 acre 25 gunta of Inchur village Bhalki taluk. The same is standing in the name of his wife and being a need of money, he along with his wife entered into an agreement of sale for Rs.30,00,000/- out of which in the suit for consideration of Rs.15,00,000/- by executing registered sale agreement on 31-08-2015 agreeing execute the final sale deed after

demarcation of land by receiving balance consideration amount. Further stated that the accused on 06-05-2019 cancell the agreement agreeing to refund the advance amount by obtaining cancellation of deed and issued posted cheque bearing No.576797 dated: 22-07-2019 and the aforesaid cheque was made use of in the present case. Therefore there shall be initial burden on the complainant to prove that, the accused had due of Rs.15,00,000/- and the complainant having financial capacity to lend loan of Rs.15,00,000/- to the accused without taking documents except cheque. Further she drew attention of the Court to Sec.139 of N.I. Act, which reads thus:- 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 Sec.138 for the discharge, in whole or in part, of any debt or other liability.

11. So when the cross examination of P.W.1 indicates that, he is not an income Tax Assessee, he is a retired Government servant, he was working as Treasury officer and having income of Rs.6 Lakhs per year. If any person ask to help him, he will withdraw the amount from the bank and given to him. Before his retirement he has not pay loan any person, after that he lend loan. He denied that he has doing money lending business and Benami Transaction. He admits that the wife and mother of accused were entered sale agreement with him for Rs.25

Lakhs, after receiving the same, he cancel the sale agreement. He has not met the accused, by demanding to receive the balance sale consideration amount and execute registered sale deed in respect of Sy.No.54. He admits that without approaching the accused he straight away filed this case through Vilas Rao More Advocate. He deposed that the accused got mutated his name in the Sy.No.52 from his mother and cheated him. He admits that, he has made party who are executed the sale agreement and both sale agreements are canceled on the same day. He has not issued notice to accused before cancellation of sale agreement as there is a due from them and after demise of the mother of accused he has not issued notice to LRs demanding them to execute sale agreement. The accused executed the sale agreement on receiving amount and not purchased any property and he admits that in both sale agreements the accused is not a party. After demise of accused mother he has not asked cheque from the wife of accused and not filed suit for specific performance of contract. He further deposed that the accused returned the amount as he cancel the sale agreement. After that he received Rs.25 Lakhs from him and issued the alleged cheque to him. He has no documents to show that the transaction held between, himself, accused, accused mother and wife of the accused. He has no documents to show that the accused asked loan from him and he paid Rs. 25 Lakhs to him. He has not gone to the house of accused at Inchuru, Bhalki Taluka. He do not know the boundaries of the land shown in sale agreement and not visited the land. The accused received Rs.25 Lakh for the expenses of his children education. When he received 25 Lakhs then he entered sale agreement without possession. The sale agreement executed by the accused has not been produced, but the sale agreement is executed by the mother of accused and his wife were produced. He do not say when and how much amount he paid to the accused. At the time of cancellation of sale agreement before the Sub-Registrar Bhalki there was no written contract with him and accused. He do not know who filled the contents of cheque. Further he deposed that on the date of cancel of sale agreement, he paid amount to the complainant before the Sub-Register, but the accused given the alleged cheques in Bidar. He admits that he has not produced the sale agreement and cancellation of sale agreement before the court. He do not know the contents of notice and reply and also the contents of complaint. He do not say the issuance of cheque, date of issue, place of issue and time of issue. He admits that in between himself and accused no sale deed. He admits that after cancellation of sale agreement on 19-07-2019 the accused received Rs.6,16.000/- from him and executed registered sale deed. He admits that after the sale transaction there was no relation with himself and accused. He admits that at the time of sale deed dated: 25-07-2019 no due amount of sale agreement from the accused. He paid total sale consideration amount to accused. He has no objection the contents of Cancellation of sale agreement. The accused issued two cheques. He denied that after sale deed the accused not borrowed any amount from him. After the demise of mother of accused, he asked security document after cancellation of sale agreement, he has not returned the cheques to accused and the same was misused and filed this complaint. He denied that after execution of sale deed, there was no legally recoverable from the accused.

12. For Substantiate the case of complainant for source of income he examined one eye witness by name Jainu Khan has deposed that, the accused wife Smt. Pratibha W/o Devidas has executed sale of agreement on dated: 31-8-2015 the documents has registered (sale of agreement) bearing documents No. BHL-1-0 2892/2015-16, by way of this indenture which is registered in SRO Bhalki the agriculture land bearing land Sy No.52/5 measuring 02 acres 25 guntas situated at Inchur Tq Bhalki Dist Bidar, he has taken the account of Rs. 15,00,000/- (Rupees fifteen lakh only) by way cash the accused has received. The clever accused and his wife requesting cancellation of sale of agreement. By way mode of post dated cheque has given accused and his wife given fully assurance with the honour of cheque which is given

accused on behalf of his wife. she has no any income source that is the reason Mr. Devidas has given his cheque with fully confidence and assurance that the cheque will be honoured by me in front of eye witness Further accused has given post dated cheque given in favour of complainant (Sharaanabasappa) cheque bearing No. 576797 dated: 22-07-2019 on Corporation Bank Bidar Branch Bidar. As per the advance intimation to the accused the cheque has been deposited in the state bank of India Near DC office Branch has been deposited, further that the SBI bank has given written memo as payment stopped by drawer which return memo has given bank on dated: 17- 08-2019 further that complaint has inform to all the circumstances to the Mr. Jainu Khan S/0 Hameed Khan and further that he called out the Mr. Devidas and his wife Pratibha all the information has given to the accused through the mediator him. The complaint has issued the legal notice 07-09-2019 and further accused has given the reply notice through his counsel.

13. This witness cross examined wherein he categorically admits that he had no house in Bidar and he do not know where the Sangameshwar Nagar colony situated in Bidar. He knows Zubair and Laxman resident of Sangameshwar Nagar, they are his friends except, he do not know the Transaction of this case. He admits that he had given and taken of money transaction with the

complainant since 2015 as the complaint is Government servant as through him he lending the amount to others after that he collected the said amount the borrowers and given to the complainant as mediator. In 2017 first time he met the accused as he has due amount to the complainant he accused Rs.4 Lakhs from the complainant and the same was returned in 2023, with interest to complainant through cheque. The present cheque amount as he borrowed by the accused after clearance of Rs.4 Lakhs. He has not read over the contents of his chief affidavit and who prepared into before the filling of the complaint, the complainant told him he is a witness for the cheque case. He admits that at the time of lending and its repayment by the accused to the complainant he was not a witness. He do not remember when the money transaction held between them. At the time of transaction the accused has written in white paper and given it to the complainant and he borrowed loan for the education expenses of his children. In his presence there was a written document for Rs. 10-15 Lakhs. The complaint paid cash to the accused from his house. Except this he do not know the other facts of the case. The accused himself issued cheque of his mother and wife he do not remember the date in 2017, but he do not know what happened those cheques. He denied that in order to help his friend, he deposing false evidence.

14. As per decision reported in **<u>2019 SCC On line SC 389, in a case between Rohith Bai Jeevan Ltd., V/s State of Gujarath.</u>** Wherein, the Division Bench of Hon'ble Apex Court pleased to observed that, the onus though shifts on the accused to establish a probable defence so as to rebut such presumption. Wherein, it was also pleased to observed that, presumption it was needed to be drawn by the Court Under Section 118 of Negotiable Instruments Act, would oblige the court to presume that cheque had been issued for consideration and only contrary is prove, such presumption would hold the ground. Wherein, it was also pleased to observed that, the test of proportionality should guide the construction and interpretation reverse onus clauses and the accused cannot be expected to discharge an unduly high standard of proof. In the absence of compelling justification, reverse onus clauses usually impose evidentiary burden and not a persuasive burden. It is settled position that, when accused has to rebut the presumption under Section 139 of Negotiable Instruments Act, the standard of proof doing so is that of "preponderance of probabilities". Therefore, if the accused is able to raise the probable defence, which creates a doubt or liability, the prosecution can fail. As clarified in the citation, 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 own.

In the said dictum, it also observed that, the accused also may rely upon presumption of fact, for instance, those mentioned in Section114 of the Evidence Act, to rebut the presumption arising under Sections 118 and 139 of Negotiable Instruments Act.

15. Accordingly, it made clear that, it is the initial burden on the accused needs to prove his probable defence under the principal of preponderance of probabilities. It is capable to raise doubts as to the existence of legally recoverable debt or liability, then whatever the statutory presumption supports the case of complainant would fail. Therefore, it is just and proper to appreciate the evidence of accused on priority coupled with appreciation of the defence taken during the course of cross of PW.1. Accordingly, the defence placed by the accused by way of cross-examining the PW.1 is to be appreciate to give effect to the probable defence, whether it goes to root of case of complainant or it is not enough to rebut the statutory presumption enumerated under Sections 118 and 139 of Negotiable Instruments Act. In the cross-examination of PW.1 so many factors were extracted by the advocate for accused during the cross of PW.1.

16. No doubt, as discussed earlier from the begin itself the accused has attack on the source of income. Wherein, it appears that the evidence of PW-1 and 2

contradicts each other and no corroboration. PW-1 in his cross deposed that his annual income was Rs.6,00,000/-, but he paid Rs.25,00,000/- cash to the accused wife and mother to purchase the land landed property from them. To show that he had sufficient amount to pay them on the date of execution of sale agreement, where he adjusted the amount of Rs.25 Lakhs is not pleaded in his complaint, Notice and Chief affidavit.

17. The accused has also contended that, he has not issued questioned cheque in favour of complainant and the signature on the cheque does not belongs to him. The specific defence of the accused that the cheque was misused by the complainant, after cancellation of sale agreement.

18. The said defence could have been seen in the part cross-examination done by his advocate to the PW.1. In the cross-examination of PW.1, he deposed that, he advanced Rs.25,00,000/- for family necessities where as the legal notice he pleaded that the loan amount was given for the purpose of business. In the cross examination he deposed that he advanced amount to the accused for the expenses of Education of children of accused, in 2019. In the evidence of PW-1 it appears that the accused is retired Treasury officer, his yearly income is Rs.6 Lakhs. But in the evidence of PW-2 it indicate that the accused

received Rs.4 Lakh in 2017 and the same was repaid in 2023. The complainant used to borrow money from him as the complainant had financial difficulty. This evidence of PW-2 is quite clear that the complainant had no financial capacity to lend alleged loan amount to the accused. Further the complainant has not produced documents to show that where and how he secured the amount of Rs.25 Lakhs to lend loan to be accused.

19. On perusal of admission of PW.1, it clearly demonstrates that the story of the complainant is doubtful and he has not paid the amount as stated by him to the accused. The complainant has not produced any cogent or documentary evidence to show that he had sufficient income to lend a sum of Rs.25,00,000/- in the year 2017 , since the complainant himself admits that he had no income. On perusal of complaint averments, it appears that, with regard to cancellation of sale agreement, entered in between the wife and mother of accused, the accused issued the alleged cheque in question to the complainant in 2019. but in the cross examination of Pw-1 he deposed that on the date of cancellation of sale agreement. The accused paid entire 25 Lakhs to him and canceled the sale agreement, but the accused borrowed Rs.25 Lakhs after the cancellation of sale agreement for the education expenses of his children and towards discharge of the said debt he issued the alleged cheque to

him. On the basis of chief examination as well as cross-examination of PW.1, the case of complainant creates doubt, whether the complainant lent Rs.25,00,000/- to the accused during the year 2019 in installments. On perusal of cross examination, it is unbelievable that PW.1 has given so much of amount by taking cheque, unless proving his capacity to lend Rs.15,00,000/-, then case of the complainant cannot be accepted. Further, he has not produced his personal bank account statement and pass book before the court. The evidence also discloses that, there is no legally recoverable debt of Rs.15,00,000/- as claimed by the complainant under Ex.P1 from the accused. The evidence also discloses that the complainant had no money transaction with the accused and he misused the said cheque by taking from him at the time of cancellation of sale agreement entered between Saheba and Pratibha after repayment.

20. The statutory presumption under Sec.139 of N.I. Act explains initial presumption in favour of the producer of an instrument. It says court shall presume that one instrument is handed over in favour of another person only for the purpose of recovery of existed debt. Therefore, the statutory presumption explained under Sec.139 of N.I. Act always provides presumption in favour of the complainant. But, it does not mean that the statutory presumption cannot be rebutted. The said presumption can be rebutted

at the strength of strong oral and documentary evidence. Let us see the attempt of the accused to rebut the evidence of complainant.

21. The counsel for the accused argued that the complainant who has lent Rs.25,00,000/- to the accused without obtaining any documents except cheques in question without proving his source of income. The accused counsel further argued that the complainant not proved that he paid Rs.25,00,000/- to the accused in his personal capacity. Hence, it is highly impossible in such a situation and burden is cast on the complainant to show the source of income. Hence, the accused rebutted the presumption lies in favour of complainant. The oral and documentary evidence of complainant is not corroborated and the same is consisting of number of variations, which shows that the case of complainant is false one. It is turn of the accused to raise probable defence.

22. To defeat the case of the complainant, accused himself examined as D.W.1, wherein he deposed that, has issued disputed cheque bearing No.576797 dated: 22-07-2019 for sum of Rs.15,00,000/- in favour of the complainant towards legally recoverable debts is false. Further deposed that he has not issued any cheque dated 22-07-2019 in favour of complainant. His wife has obtained loan of Rs.10.00 Lakhs from the complainant

refundable within five years with interest totaling to Rs. 15.00 lakhs. She has executed registered agreement of sale in respect of her owned and possessed land Sy.No.52/5 measuring 2 acres 25 guntas of village Inchur Tq. Bhalki. After Execution of this agreement of sale his mother died on 08-04-2015. after the death of his mother complaint demanding for refund of money. He issued three blank cheques to the complainant as additional security and the complainant agreed that he would return those cheques after cancellation of agreement of sale. He approached the complainant requesting to cancel the agreement of sale as he was willing to refund the entire amount of Rs.15.00 lakhs shown in the agreement of sale which includes principal amount of Rs.5.00 Lakhs plus interest of Rs.10.00 Lakhs. Accordingly the complainant canceled the agreement of sale by executing Deed of cancellation of Agreement of sale on 06-05-2019. He has paid entire amount of Rs. 15.00 Lakhs to complainant before Sub-Registrar and after receiving the entire amount executed the deed of cancellation.

23. Further he deposed that he repaid the entire amount he demanded the complainant for return of his three cheques but he went on making false promises and lame excuse stating that the cheques are misplaced and will return soon. Since he had faith in the complaint he believable in his assurance. Since complainant despite of

his repeated requests was avoiding to return the three cheques suspecting foul play on the part o complainant, he passed instructions to bank to stop payment. However the complainant with a malafide intention presented the cheque and filed this false complaint. Hence he prayed to dismiss the complaint by acquitting him in accordance with law. He produced Cancellation Deed dated:31-08-2018 at Ex.D1, wherein there is a recital that accordingly the second party has already paid the said amount of Rs. 15 Lkahs to the first party before the attesting witnesses and same is acknowledged by the first party for having been received and first party is executing the Cancellation of agreement of sale in favour of the second party of the above land.

24. This witness cross examined by the counsel for the complainant in length, but nothing has been elicited from his mouth that there is legally recoverable debt under Ex.P1 From the accused. It is suggested that the Sy.No.52/*/5 belongs to his uncle after his death the Khata sanctioned in the name of Ambadas, thereafter Khata mutated in the name of his wife Pratibha. As per the partition the said property fallen to the share of his mother has been denied. He know the contents of para No.4 of affidavit in chief. He admits that he given 3 signed blank cheques in favour of complainant. After cancellation of Sale agreement he paid the consideration amount to

complainant by cash. On 08-04-2015 his mother died after that he cancel the sale agreement executed by his mother in respect of Sy.No.54/AA. He denied that in order escape from the liability, he filed false affidavit and deposing false evidence.

25. PW.1 has utterly failed to prove that, the accused got issued the cheques on due execution for repayment of Rs.25 lakhs. Thereby, the accused has successfully proved through the mouth of PW.1 and accused has not issued the questioned cheques to the complainant. In that regard, no satisfactory explanation is forth coming from the side of complainant.

26. The counsel for the complainant relied the following decisions.

> **1. In Crl.Appeal No. 271 of 2020 (SC) in the case of APS Forex services Pvt. Ltd Vs. Shakti International Fashon Linkers and Ors wherein it is held that** however all the aforesaid cheques when presented came to be dishonored. According to the complainant thereafter the respondents issue one another cheque bearing No.374941 of Rs.9,55,574/- of the partnership firm namely Shakti international in discharge of the legal liability. According to the complainant when the same cheque was presented the same came to be

dishonored due to STOP PAYMENT vide bank memo dated 02-06-2014.

2. In Crl.Appeal No. 1020 of 2010 (SC) in the case of Rangappa Vs. Sri.Mohan wherein it is held that, Coming back to the facts in the present case, we are in agreement with the High Court's view that the accused did not raise a probable defence. As noted earlier the defence of loss of a blank cheque was taken u[elatedly and the accused had mentioned a different date in the 'stop' payment instruction to his bank. Furthermore, the instruction to 'stop payment' had not even mentioned that the cheque had been lost. In conclusion, we find no reasons to interfere with the final order to the High Court, dated 26-10-2005 which recorded a finding of conviction against the appellant. The present appeal is disposed of accordingly.

3. In Crl.Rev.Pet.No. 2599 of 2011 (HCK) in the case of Shantappa Vs. Sanjeev.

4. In 2023 (4) SCR 2893 in the case of Mahabala vs. Smt. Usha, wherein it is held that presumption duty of the accused to rebut and lead the evidence. Failure to do so- presumption against the accused. I have gone through the above decisions relied by the complainant it is not applicable to the facts and circumstances of the present case on hand.

27. It is well settled law that the act raises two presumptions. Firstly, with regard to the passing of consideration as contained in Sec.118(a) of the Act, therein and secondly a presumption that the holder of the cheque receiving the same nature referred to the Sec.139 discharged in whole or in part any debt or other liability. Both presumptions are rebuttal in nature. Having regard to the definition of terms proved and disproved as contained in Sec.3 of the Evidence Act, the burden upon the prosecution visa-versa an accused was only expected to rebut the presumption of law on the scale of preponderance of probabilities and was not required to prove his defence beyond reasonable doubt. The chief affidavit as well as cross-examination of PW-1, there are number of discrepancies. Hence, the case of complainant creates doubt with regard to the existence of liability of the accused to the complainant. When once such evidence is placed by way of cross-examination of PW-1, then, complainant must be in a position to show the existence of legally recoverable debt as on the date issuance of cheque. Therefore, I am of the view that the complainant has utterly failed to prove that Ex.P1 cheque has been issued towards legally recoverable debt. On the other hand, the accused has been in successful in raising probable defence in the mind of court that Ex.P1 cheque was not issued by the accused to clear his debt owed to the complainant.

28. In this regard it is useful to relied the following citations reported in:

1. **Criminal Appeal No. 1020 of 2010 in the case of Rangappa V/s Mohan,** wherein it is held that the burden of proving that the cheque had not been issued for any debt or liability is on the accused. It is further held that, the denial averments in the reply by the accused is not sufficient to shift the burden of proof to the complainant. The accused has to prove in trial by leading cogent evidence that there is no debt or liability.

2. AIR 2019 Supreme Court 1983, in the case of Basalingappa V/s Mudibasappa, in Crminal appeal NO.636/2019 decided on 09.04.2019, where in it is held that Dishonour of cheque-Non mentioning of date of issuance of cheque by complainant in complaint as well as in his evidence-Complaint not satisfactorily explaining contradiction in complaint vis-a-vis his examination-in-chief and cross-examination-His failure to prove financial capacity though he is a retired employee to advance substantial amount to different persons including accused- Findings of trial court that complainant cannot prove his financial capacity, cannot be termed as perverse without discarding evidence laid by defence- Accused entitled acquittal.

3. **Criminal Appeal No. 2784/2012, in the case of Santosh V/s Haribhai**, where in it is held that when a probable defence is set up by accused, burden is on the complainant to explain it. Standard of proof applicable to evaluate such explanation is beyond reasonable doubt. Failure to explain material contradictions results in dismissal of complainant.

29. In view of the above rulings coupled with the oral and documentary evidence, the accused has given rebuttal evidence to the case of the complainant. There

are number of discrepancies in his pleading as well as evidence of PW.1. In the pleading as well as cross of PW.1, there is no mentioning of alleged request of pay the loan as well as the particulars of mobilization of fund including alleged lent with its better particulars, as to time, date and place is not been satisfactorily explained by the complainant. Though, he tendered for cross, it is not enough to demonstrate his case, but his evidence contradicts. The evidence of PW.1 is contradicts as to alleged issuance of cheque from the point of his own pleading. The very pleading as well as the evidence of PW.1 and PW-2 is the mixture of contradictory statement omission and development. Therefore, the very evidence of PW.1 rather support his case, it creates doubt, as to the bonafidness and genuineness of alleged transaction held between complainant and accused. Despite that, the complainant has not vigilant in prove his case by making necessary pleading as well as prove the case with corroborative evidence. The accused has successfully proved his probable defence by way of cross-examining the PW.1 and PW-2 and destroyed the very case of complainant. Hence, the accused is entitled for benefit of doubt for acquittal.

30. The complainant has failed to prove with cogent evidence as to the lending of loan of Rs.15 lakhs to the accused. Thus, that fact itself is sufficient to infer that,

accused is able to rebut presumptions available in favour of complainant under Sections 118 and 139 of the Negotiable Instruments Act.

31. In this case on hand also, on the lack of the complaint failed to prove the alleged loan transaction, it can gather the probability that, he is not liable to pay Ex.P1 cheque amount of Rs.15 lakhs and it is not legally recoverable debt. So, the burden is on the complainant to prove strictly with cogent and believable evidence that, the accused has borrowed the cheque amount and he is legally liable to pay the same. Just because, there is a presumption under Section139 of Negotiable Instruments Act, that, will not create any special right to the complainant so as to initiate a proceeding against the drawer of the cheque, who is not at all liable to pay the cheque amount. The accused has taken his defence at the earliest point of time, while record accusation and statement under Sec313 of Cr.P.C. by way of denial. The evidence placed on record clearly probablize that, complainant has failed to prove that, accused issued the cheque for discharge of liability of Rs.15 lakhs. Hence, complainant has failed to prove the guilt of accused for the offence punishable under Section138 of Negotiable Instruments Act.

32. Apart from that, in a decision reported in **(2015) 1 Supreme Court Cases 99 in this case of K.Subramani /Vs/ K.Damodara Naidu**, the Hon'ble Apex court held that:

"The Hon'ble Apex Court confirmed the Judgment of Trial Court acquitting the accused on the ground of capacity to pay the amount of cheque. In the above said ruling the Trial Court acquitted the accused on the ground that the complainant had no source of income to lend sum of Rs.14,00,000/-. In the appeal the 1st Appellate Court set aside the order and remanded the matter to the Trial Court to give an opportunity to complainant to prove the same. The accused went in appeal before the Hon'ble Apex Court and the Hon'ble Apex Court has set aside the order of the 1st Appellate Court and upheld the acquittal order passed by the Trial Court".

33. In the case on hand, accused has questioned the financial capacity of complainant. Complainant has not produced any documents to show his financial capacity to lend an amount of Rs.25lakhs to accused. When complainant has failed to prove the transaction alleged in the complaint, then the question of issuing the cheques for discharge of Rs.25 lakhs does not arise. The evidence placed on record clearly probablize that, complainant has failed to prove that, accused issued the cheques for discharge of liability of Rs.25lakhs. Hence, complainant

has failed to prove the guilt of accused for the offence punishable under Section 138 of Negotiable Instruments Act.

34. From the above elaborate discussions, it very much clear that, the complainant has failed to adduce cogent and corroborative evidence to show that, accused has issued cheque Ex.P1 in discharge of his legally payable debt for valid consideration. Hence, rebutted the legal presumptions under Sections139 and 118 of Negotiable Instruments Act in favour of the accused.

35. The sum and substances of principles laid down in the rulings referred above are that, once it is proved that, cheque pertaining to the account of the accused is dishonoured and the requirements envisaged under Sections 138 of (a) to (c) of Negotiable Instruments Act is complied, then it has to be presumed that, cheque in question was issued in discharge of legally recoverable debt. The presumption envisaged under Section 138 of Negotiable Instruments Act is mandatory presumption and it has to be raised in every cheque bounce cases. Now, it is settled principles that, to rebut the presumption, accused has to set up a probable defence and he need not prove the defence beyond reasonable doubt.

36. Thus, on appreciation of evidence on record, I hold that, the complainant has failed to prove the case by

rebutting the presumption envisaged under Sections 118 and 139 of Negotiable Instruments Act. The complainant has failed to discharge the initial burden to prove his contention as alleged in the complaint. Hence, the complainant has not produced needed evidence to prove that, amount of Rs.25lakhs legally recoverable debt. Therefore, since the complainant has failed to discharge the reverse burden, question of appreciating other things and weakness of the accused is not a ground to accept the claim of the complainant in its entirety without the support of the substantial documentary evidence pertaining to the said transaction. The complainant fails to prove his case beyond all reasonable doubt. As discussed above, the complainant has utterly failed to prove the guilt of the accused for the offence punishable under Section 138 of Negotiable Instruments Act.

37. Therefore, on the basis of aforesaid decisions coupled with the defense taken by the accused, those decisions are squarely applicable to the present case on hand. The accused has given rebuttal evidence to the case of the complainant. The complainant failed to give corroborative evidence. Hence, the case of the complainant creates doubtful. It is burden on the complainant to washout all these doubts, but complainant failed to do so. When such being the case based on the presumption and assumption this Court cannot hold that

accused has committed the offence as alleged by the complainant. In view of the above fact, I am of the view that complainant has failed to prove that the cheque has been issued for legally recoverable debt. Hence, I answer Point No.1 in the **Negative**.

Point No.2:

38. In view of the above findings on point No1, I proceed to pass the following:

ORDER

Acting under Section 255(1) Cr.P.C. the accused is hereby acquitted for the offence punishable under Section 138 of Negotiable Instruments Act.

The bail bond and surety bond of the accused is hereby stand canceled.

(Dictated to the stenographer on computer, corrected and then pronounced by me in the open court on this the 16th day of December-2023.)

(Abdul Khadar)
Addl. Sr Civil Judge & J.M.F.C
BIDAR.

ANNEXURE

List of Witnesses examined on behalf of complainant:

PW1 : Sharnabasappa
PW2 : Jainu Khan

List of Documents marked on behalf of complainant:

Ex.P1	:	Cheque dt: 22-07-2019
Ex.P2	:	Return Memo dated:17-08-2019
Ex.P3	:	Legal notice dated 07-09-2019
Ex.P4 & 5	:	(2) Postal receipts
Ex.P6	:	Post Track consignment
Ex.P7	:	Reply to notice dated:03-10-2019

List of Witnesses examined on behalf of accused:

DW-1 : Devidas

List of documents marked on behalf of accused:

Ex.D1 : Deed of Cancellation

- **(Abdul Khadar)**
  Addl. Sr Civil Judge & J.M.F.C
  BIDAR.

Order pronounced in the open court vide separate judgment

ORDER

Acting under Section 255(1) Cr.P.C. the accused is hereby acquitted for the offence punishable under Section 138 of Negotiable Instruments Act.

The bail bond and surety bond of the accused is hereby stand canceled.

(Abdul Khadar)
Addl. Sr. Civil Judge & JMFC
Bidar.