IN THE COURT OF THE LXXII ADDL. CITY CIVIL & SESSIONS JUDGE AT MAYO HALL BENGALURU, (CCH-73)

<u>Present:</u>

Sri.Abdul-Rahiman. A. Nandgadi,
B.Com, LL.B., (Spl.,)
LXXII Addl. City Civil & Sessions Judge, Bengaluru.

Dated this the 11th day of April, 2022.

<u>Crl. Appeal. No.25163/2021</u>

<u>Appellant/ Accused:-</u>	***Sri. S. C Ravikumar,*** *S/o Chowdappa,* *Aged about 47 years,* *R/at Sulibele, Hoskote taluk,* *Behind Government Hospital,* *College Road,* *Bangalore Rural District,* *Bangalore -562129.* ***[By Sri. M. Ramaswamy - Adv]***

V/s

<u>Respondent/ Complainant:</u>	***Sri. Y. C Suresh,*** *S/o Late. Chikkabachhappa,* *Aged about 47 years,* *R/at. Yenagunte Village,* *Hasigala Post,* *Sulibele Hobali,* *Hoskote Taluk,* *Bangalore Rural district.* ***[By Sri. Prasanna. G. R - Adv]***

JUDGMENT

This Appeal is preferred by the Appellant U/Sec. 374 (3) of Cr.P.C., being aggrieved by the Judgment and Order passed by the XXXIII ACMM, Mayohall Unit, Bengaluru, in CC. No.59020 of 2018, dtd. 30.08.2021, convicting the Appellant/Accused for the offence punishable U/Sec. 138 of NI Act, thereby sentencing him to pay a fine of Rs.10,05,000/-. Indefault to undergo simple imprisonment for a period of six months. Out of fine amount Rs.5,000/- is to be appropriate to the State and Rs 10,00,000/- is to be paid to the Complainant as Compensation U/Sec 357(1) of Cr.P.C.

2. *The Brief facts leading to filing of the present appeal are:*

The present Respondent filed a Complaint U/Sec.200 of Cr.P.C., against the present Appellant, alleging that, the Appellant approached him with a request to give hand loan of Rs 10,00,000/- but he has given Rs 9,00,000/- to the Appellant; and the Appellant promised to return the said amount within a period of 1 year. After lapse of a year, he demanded the Appellant to return the said handloan, *towards discharge the Appellant issued a post dated cheque bearing No 148075 dated 13.08.2018 for Rs 9,00,000/-, drawn on the HDFC Bank Ltd., K R Road, Melinapet, Hosakote Branch. The said cheque was presented for its encashment on 14.08.2018 through his banker Canara Bank, K R Puram Branch, but the same has been returned unencashed with an endorsement "Account Closed" on 16.08.2018. The same was intimated to the Appellant. Thereafter he got issued Legal Notice to the Appellant through his Counsel on 04.09.2018. The said notice was returned with an endorsement "Unclaimed" on 13.09.2018. The Appellant has neither complied nor replied the said notice. Hence, he was constrained to file a Complaint against the Appellant, before the Trial Court.*

3. *After filing of the Complaint, the Trial Court has issued summons U/Sec.204 of Cr.P.C. to the Appellant on 15.11.2018. The Appellant appeared before the Trial Court on 22.12.2018 and he was enlarged on bail. Substance of Accusation/Plea of the Appellant was recorded by the Trial Court on 29.12.2018, wherein the Appellant/Accused pleads not guilty and claims to be tried.*

4. *The Complainant inorder to prove his case got himself examined as P.W.1 and got marked 14-documents as Ex.P.1 to Ex.P14. PW1 was cross examined on behalf of the Appellant/Accused on 06.06.2019 & 27.11.2019.*

5. *On 19.12.2019, Statement of the Appellant/ Accused was recorded U/Sec. 313 of Cr.P.C. The Appellant got himself examined as DW.1 on 17.02.2020. DW.1 got marked 7 document as Ex.D1 to ExD7. DW.1 was cross-examined on behalf of the Complainant/ Respondent on 12.02.2021 & 22.07.2021.*

The Trial Court heard the Arguments of both the sides and has recorded Judgment of Conviction against the Appellant. Hence, the Appellant is before this Court, being aggrieved by the said Judgment of conviction.

6. *On preferring the appeal by the Appellant/Accused, this Court has suspended the sentence under appeal, for a period of three months, initially on 23.09.2021. Notice of the Appeal memo and I.A.No.1/2021 was issued to the Respondent* *and TCR were called-for. Respondent set-in his appearance on 17.11.2021. TCR were secured on 17.11.2021.*

7. *Heard the arguments of Learned Counsel Appellant. He has placed his reliance on one decision, reported in 2020(2) AKR 540.*

Learned Counsel for the Respondent has filed his Written Arguments.

I have carefully gone through the decision relied on behalf of the Appellant; and the Written Arguments filed on behalf of the Respondent.

8. *The Appellant has preferred this appeal on the following grounds:*

Grounds of Appeal:

a) The Trial Court has gravelly erred in convicting the Appellant for the offence punishable U/Sec. 138 of N.I. Act, which is manifestly erroneous and opposed to the facts and circumstances of the case;

b) The Trial Court has failed to consider that the Cheque-ExP1 was given as Security in a Chit transaction, in the year 2016;

c) The Trial Court has miserably failed to appreciate the oral and documentary evidence on record, in a proper and perspective manner;

d) The Trial Court has failed to consider that, the Respondent has not proved the fact of giving Hand Loan of Rs.9,00,000/-;

e) The Trial Court has failed to consider that, there was no any enforceable debt, as the Respondent has failed to prove his capacity to pay the amount, as alleged in the complaint;

f) The Trial Court has failed to consider that, the Notice issued as per Ex.P3 has not been served on the Accused;

g) The Trial Court has failed to consider that, the Respondent is running a chit business, of which the Appellant was subscriber of it and under the said transaction he has issued the Cheque in question, as security;

h) The Trial Court has failed to shift the burden on the Appellant and has failed to apply the principles of proof. The Trial Court has shouldered the burden to prove the defence of the Appellant on the basis of proof beyond reasonable doubt, whereas the Trial Court ought to have measured the proof, as to be measured in the civil cases, as on the basis of preponderance of probabilities;

i) The Trial Court has wrongly arrived at a conclusion that, the Complainant has discharged his initial burden to avail the benefit of presumption, but the Accused has not rebutted the said presumption;

Hence, prayed to allow the said appeal and setaside the Judgment of Conviction passed by the Trial Court.

9. *Following points arise for my consideration;*

1. Whether the Respondent/ Complainant is entitle initially, for the benefit of presumption available U/Sec. 139 of N.I. Act?

2. Whether the Appellant/ Accused proves on the basis of preponderance of probabilities that, the Cheque-Ex.P.1 was issued by him under the Chit transaction inbetween him and the Respondent, in the year 2016?

3. Whether the Appellant/ Accused shows on the basis of preponderance of probabilities that, the Notice Ex.P3 issued, is not served upon him?

4. Whether the Trial Court has rightly held that, Appellant/Accused has failed to rebut the presumption available U/Sec. 139 of N.I. Act?

5. Whether the Appellant/ Accused shows that the Order of Conviction and Sentence recorded by the Trial Court in CC.No. 59020 of 2018, dtd.30.08.2021, deserves to be

setaside, and thereby call for the interference of this Court?

6. What Order?

10. *My finding on the above points are as under:*

Point No.1 : In the Affirmative;
Point No.2 : In the Negative;
Point No.3 : In the Negative;
Point No.4 : In the Affirmative;
Point No.5 : In the Negative;
Point No.6 : As per final order for the following :

R E A S O N S

11. *The rank of parties will be referred to, as they were before the Trial Court.*

12. POINT NO.1:-

The Complainant has filed a Complaint U/Sec. 200 of Cr.P.C. alleging that, the Accused had approached him with a request for a hand loan of Rs.10,00,000/-. Accordingly he had paid an amount of Rs 9,00,000/-, wherein he had undertaken to return the said amount within one year. On expiry of the said period, on demand of the Complainant, the Accused issued the Cheque-Ex.P1. The said Cheque *was presented for its encashment through his banker, but the same has been returned unencashed with an endorsement "Account Closed" on 16.08.2018, as per Ex.P2. On receipt of Ex.P2, he issued a Legal Notice to the Accused, through his counsel by RPAD on 04.09.2018, as per Ex.P3, postal receipt Ex.P4, the said Notice was returned with an endorsement "Not Claimed" as per Postal Returned Envelop-Ex.P5.*

13. *On the basis of the said documents and the preliminary evidence led by the Complainant, the Trial Court has issued summons to the Accused U/Sec.204 of Cr.P.C., on 15.11.2018. I do not find any error in the said order of the Trial Court.*

14. *The Accused had appeared before the Trial Court on 29.12.2018 and he was enlarged on bail. Substance of Accusation/Plea was recorded on 29.12.2018. I have gone through the contents of the substance of Accusation/Plea recorded by the Trial Court. I do not find any fault, in the Plea/Substance of Accusation, recorded by the Trial Court.*

15. *Looking to the nature of defence takenup by the Accused, more specifically the cross examination of PW.1, at Page No.1, Para No.2, Line Nos.6 to 8, which reads as under:*

> *"…. It is false to suggest that I have received two signed blank cheques from the Accused in connection with the chit fund. ..."*

As per this evidence, a suggestion is made to the Complaint on behalf of the Accused that, the Accused has issued a signed blank Cheque as security to him in 2016, towards the repayment of the chit money. The said suggestion is denied by the Complainant.

15.01. *As per this suggestion, the Accused admits that, he has issued the signed blank Cheque, which leads to admission of the fact that, Ex.P1-Cheque belongs to him and he has issued the said Cheque.*

16. *As per the documentary evidence Ex.P1 to Ex.P5 and the ocular evidence, more specifically the defence taken by the Accused, it can be said that, the Accused has admitted that, the Cheque belongs* *to him and he has issued the same to the Complainant.*

17. *Thus the Complainant has proved the initial burden casted upon him U/Sec.138 of N.I. Act, to show that, the Cheque belong to Accused.*

18. *On viewing the amount of oral evidence with Ex.P.1 to Ex.P.5, which will suffice the Complainant to have benefit of presumption available U/Sec.138, 139 of N.I. Act.*

18.01. *As per the trite principle of law, dealing with the presumption U/Sec.138 & 139 of N.I.Act and as per the dictum laid down by* ***the Hon'ble Apex Court in the case of K. Subramani V/s K. Damodara Naidu, reported in 2014 (12) SCALE 677,*** *as well as in the case reported in* ***(2010) 11 SCC 441,*** *wherein it is held that,*

> *"Presumption U/Sec.139 of N.I.Act accrues to the benefit of the Complainant, unless the Accused rebut that presumption".*

18.02. *Now it is for the Accused to rebut the said presumption, available to the Complainant U/Sec.139 of N.I.Act.*

Hence, ***I answer POINT NO.1 IN THE AFFIRMATIVE.***

19. <u>POINT NOS.2 AND 4:</u>

Since both these points are interlinked with eachother, they are taken for joint discussion, inorder to avoid repeatation and confusion, in the discussion.

The defence takenup by the Accused is that, the Complainant is running a chit business for which, he is a subscriber, on subscribing the chit, he has issued the Cheque-Ex.P1, as security under the said transaction.

19.01. *This line of defence can be seen as per cross examination of PW.1, at Page No.1, Para No.2 line Nos. 6 to 8, which reads as under:-*

> *".... It is false to suggest that I have received two signed blank cheques from the Accused in connection with the chit fund. ..."*

As per this evidence, a suggestion is made to the Complaint on behalf of the Accused that, he has issued signed blank Cheque in 2016, as security to *the Complainant towards repayment of the chit money, but same is denied by the Complainant.*

19.02. *When the Complainant has denied the defence suggested by the Accused that, he was running a Chit transaction, then it was for the Accused to show that, as to when the said transaction has taken place; as to when he has subscribed the chit; what was the chit price; who were other subscribers of the said chit; what was the duration of the said chit; what was the terms of installments, etc.,*

19.02.01. *The Accused has produced a Book called as Chit Book at ExD1.*

19.02.02. *Coming to the ocular evidence on this point, more specifically,*

a) examination-in-chief of DW1 at Page No 1, Para No 1, Line Nos 7 to 11, which reads as under:

> *"... The said chit has commenced in the month of January-2017. I have issued one cheque to the complainant when the chit has been commenced and also I have issued one more blank signed cheque when I have received the prized money. ...".*

As per this evidence Accused/DW1 contends that, the said Chit transaction had commenced in January 2017 and had issued one cheque at the commencement of the said transaction; and had issued one more Cheque when he had received the prize amount.

b) examination-in-chief of DW1 at Page No 2, Para No 1, Line Nos 2 to 5, which reads as under:

> *"… I have received the prized money in the month of September -2016. I have paid the entire chit amount to the complainant by May-2017. ...".*

As per this evidence Accused/DW1 contends that, he had received prize amount in the month of September 2016 and he has paid the entire prize amount to the Complainant by May 2017.

c) cross examination of DW1 at Page No 6, Para No 1, Line Nos 2 to 5, which reads as under:

> *"… It is false to suggest that I have stated that, I have cleared the chit amount in the year 2017, the witness volunteers that I have cleared the chit amount in the year 2013 itself. ...".*

As per this evidence Accused/DW1 denies the suggestion made to him on behalf of the Complainant that, he has stated that he has cleared the chit *amount in the year 2017, but he contends that, he had cleared the Chit amount in the year 2013 itself.*

d) cross examination of DW1 at Page No 6, Para No 1, Line Nos 5 & 6, which reads as under:

> *"... It is false to suggest that Ex.D1 is not connected or related to this case or the transaction. ..."*

As per this evidence Accused/DW1 denies the suggestion made to him on behalf of the Complainant that, ExD1 is not connected or related to this case or the transaction.

e) cross examination of DW1 at Page No 3, Para No 1, Line Nos 6 to 8, which reads as under:

> *"…. I have not produced the document to show that I am the one of the Subscriber of Chit run by the complainant. ...".*

As per this evidence Accused/DW1 contends that, he has not produced any documents to show that the Complainant was running a Chit Business.

19.02.03. *On the basis of the above ocular evidence and on carefully going through the Book called by the Accused as Chit Book-ExD1, it can be said that,* *a) firstly, the Accused has not suggested the existence of the said Book in the cross examination of PW1/Complainant;*

b) secondly, no signature of the Complainant is found on the said Book;

c) thirdly, handwriting of the Complainant is denied;

d) fourthly, transaction under the said book is closed on 10.08.2013, whereas the present Cheque-ExP1 is dated 13.08.2018.

Though issuance of the Cheque-ExP1 on 13.08.2018 is denied by the Accused, as per the cross examination of PW1, at Page No 3, Para No 1, Line Nos 8 & 9, which reads as under:

> *"…. It is false to suggest that Accused has not at all issued Ex.P1 Cheque as on 13.08.2018. …."*

But as per the presumption enshrined in Sec 118(b) of Negotiable Instruments Act, 1881, it is to be presumed that every Negotiable Instrument bearing a date was made or drawn on such date, unless the contrary is proved.

The Accused has not brought any cogent evidence to prove the contrary, on the basis of *preponderance of probabilities i.e., he has not issued the Cheque-ExP1 on 13.08.2018.*

So the said contention of the Accused cannot be believed.

e) fiftly, the Accused has failed to show that the Complainant was running a Chit business, as suggested by him;

f) sixthly, the Accused had issued the Cheque-ExP1, either at the commencement of the alleged Chit Business; or towards payment of the Chit Amount, on receipt of the prize money;

g) seventhly, the Accused has not produced any material on record to show that, he has paid the prize amount, received under the alleged Chit transaction.

h) eightly, in one breath the Accused contends that he has paid the Chit amount in 2017; and in another breath he contends that he has paid the Chit amount in 2013. He himself is not definite as when he has paid the alleged Chit amount to the Complainant.

19.02.04. *Thus the Accused has failed to show that,*

a) the Complainant has undertaken a chit fund business; he has subscribed to the said business and he has paid certain installments under the said chit transaction. More importantly, issuance of the Cheque by the Accused under the said transaction, as a security, in 2016.

20. *The second contention taken up by the Learned Counsel for the Accused that, though the Accused requested the Complainant to return the Cheque-Ex.P1 after payments of the installments, but the same has not been returned by the Complainant.*

20.01. *Coming to the ocular evidence on this point, more specifically,*

a) examination-in-chief of DW1 at Page No 2, Line Nos 5 to 9, which reads as under:

> *"… The complainant has not returned the signed blank cheque when I have asked him to return the cheque after the entire amount. I have not at all borrowed Rs.9 lakhs from the complainant as claimed in the complaint. I have not received any demand notice prior to the filing of complaint.".*

As per this evidence Accused/DW1 contends that, the Complainant has not returned the Cheque-ExP1, on payment of the entire Chit amount.

b) cross examination of DW1 at Page No 3, Para No 1, Line Nos 8 to 11, which reads as under:

> *"I have not given any complaint to the police for not returning my cheque even after repayment of full chit amount to the complainant and even I have not given any legal notice to the complainant for to return it. ..."*

As per this evidence Accused/DW1 contends that, he has not lodged any police complaint against the Complainant, for not returning his Cheque-ExP1.

20.02. *If that is the case, then the Accused ought to have issued notice to the Complainant calling upon him to return the Cheque Ex.P1, by contending that, he has paid the entire chit amount, under the chit fund transaction. But no any such notice is issued by the Accused.*

The Accused ought to have lodged a Police Complaint, contending that, inspite of receipt of the entire Chit Amount the Complainant has failed to returned the Cheque-ExP1 taken as Security, under *the said Chit Transaction. But no such Complainant is filed by the Accused, against the Complainant.*

The Accused ought to have issued instructions to his Banker that, inspite of receipt of the entire Chit Amount the Complainant has failed to returned the Cheque-ExP1, taken as Security. But no such material is placed by the Accused.

In the absence of the cogent evidence even this contentions of the Accused cannot believed.

21. *The third contention taken up by the Learned Counsel for the Accused that, the writings of the Cheque-Ex.P1 is not that of the Accused. This line of defence can be seen, as per the cross examination of PW1, at Page No 3, Para No 1, Line Nos 5 to 11, which reads as under:*

> *"It is true that the signature in the cheque is in blue ink and the other writings are in black ink. It is false to suggest that I have obtained the blank signed cheque and thereafter filled it as per my whims and fancies. It is false to suggest that the accused ha snot at all issued EX.P1 cheque as on 13.8.2018. It is false to suggest that the said cheque has been much prior to the said date when chit fund money has been paid to the accused long back."*

21.01. *The Cheque Ex.P1 has been returned unencashed with an endorsement "Account Closed" as per Ex.P2 by the bank. As per Sec.146 of NI Act a presumption of fact is attached to Ex.P2 that, dishonour of the Cheque is for the reasons stated in the memo.*

21.02. *If the writings on the Cheque where to be disputed then the reason shown in Ex.P2 could not be of the Account Closed, but would have been different. Thus in the light of presumption under Sec.146 of the said Act, contention of the Learned Counsel for the Accused cannot be believed.*

22. *The fourth contention taken up by the Learned Counsel for the Accused, is that, there is no legally recoverable debt for issuance of the Cheque - Ex.P1.*

The Learned Counsel for the Appellant has placed his reliance on the decision of ***the Hon'ble High Court of Karnataka in the case of Vishal Shrinivas Malpani Vs Prakash Kadappa Hegannawar, reported in 2020(2) AKR 540,*** *wherein it is observed at Para Nos 19 & 20 as under:*

"19. In the present case on hand, though the accused has admitted the signature of cheque and that it belongs to him, but has denied the transaction of there being any legally recoverable debt and any consideration was paid by virtue of the said cheque Ex.P1. On going through the oral evidence and documents produced by the complainant, it is the case of the complainant that he has borrowed loan from his friend, father, brother and Bank/Society to pay to the accused of a sum of Rs.14,00,000/- which he has paid at one stretch. Though the complainant has produced Exs.P-1 to P-8 and got marked Ex.P-9 through P.W.4, there is no document produced by the complainant to show that he has parted with the amount to the accused. It is also trite law that when a person is paying huge amount of Rs.14,00,000/- to a person whom he is not very well acquainted with, he would pay the said amount without there being any corroborative or supportive document or agreement. Therefore, it is hard to believe that the complainant has parted with the huge amount of Rs.14,00,000/- without there being any supportive document or witness to the said parting of the amount. It is also relevant to note here that when the accused raises the plea that there is no transaction and he does not know the accused and places material for closure of the account, the onus shifts on the complainant to prove that he had parted with the amount as loan to the accused and that he had the financial capacity and a legally recoverable debt.

20. It is also to be noted that the complainant has not clearly and specifically stated with regard to the date of payment of

> *the alleged loan to the accused either in his complaint or in his evidence, it is also hard to believe that after giving such a huge amount to a person, who is not so very close and the complainant being a businessman that he would part with such a huge amount without charging any interest. All these facts raise a doubt in the mind of this Court as to whether such a transaction has existed or happened.*

22.01. *The Complainant contends that, the Accused has issued the Cheque towards the repayment of the hand loan taken by him. And further contends that, he has paid an amount of Rs 9,00,000/- to the Accused in cash on 04.04.2016.*

a) This can be seen as per the ocular evidence, more specifically, cross examination of PW1, at Page No 1, Para No 3 to Page No 2 Line No 1, which reads as under:

> *"I have withdrawn the said amount from Federal Bank. I can produce my bank statement of the relevant date of withdrawal of money to the Court.".*

b) As per the documentary evidence, more specifically, Bank Statement at ExP6. As per this document it is seen that the Complainant has withdrawn an amount of Rs 14,00,000/- from the bank on 04.04.2016.

22.02. *When the Accused has denied the transaction of the friendly loan and has takenup a defence that, he had issued the Cheque-Ex.P1 as security, under chit fund transaction, unless the Accused brings certain materials on record to probabilize his defence, under such circumstances a presumption is to be raised withregard the consideration of the Cheque, as required U/Sec. 118(a) of NI Act.*

23. *Further, if at all, the Accused had given the Cheque-Ex.P1, as contended by him, then after repayment of the entire Chit amount to Complainant, firstly Complainant would have returned the cheque; secondly, if Complainant had failed to returned the cheque, then the Accused would have asked the Complainant to return the cheque, and if not returned, then he was expected to have issued Notice to the Complainant, asking him to return the Cheque. But no such notice is issued by the Accused to the Complainant.*

24. *So the defence takenup by the Accused has remained unproved, on the basis of preponderance of probabilites.*

25. *As per the decision of* ***the Hon'ble Apex Court, in the case of APS Forex Services Pvt. Ltd., V/s Shakthi International Fashion linkers & others,*** *wherein it is held that;*

> *"When the financial capacity of the Complainant is questioned in support of probable defence, despite presumption U/Sec. 139 of the N.I. Act, withregard to the existence of legally enforceable debt, the onus shifts on the Complainant to prove the financial capacity. Under such circumstances, complainant is required to prove his financial capacity, inorder to raise the presumption available U/Sec. 139 of N.I. Act, in his favour".*

26. *Further, as per the decision of* ***the Hon'ble Apex Court, in the case of Basalingappa V/s Mudibasappa, reported in (2019) 5 SCC 418,*** *wherein it is held that;*

> *"Appellant disputing financial capacity of the Complainant to pay the amount, by leading cogent evidence to prove it, leads to the Accused probablising his defence, then burden would be on the Complainant to establish his financial capacity".*

27. *Further, as per the decision of* ***the Hon'ble Apex Court, in the case of John K Abraham Vs Simon C Abraham & Anr, reported in (2014) 2 SCC 236,*** *wherein it is held that;*

> *"Inorder to draw presumption U/Sec 118(a) R/w Sec 139, burden lies on the Complainant to show that*
> *(i) that he had the requisite funds for advancing the sum of money/loan in question to the accused;*
> *(ii) that the issuance of cheque by accused in support of repayment of money advanced was true; and*
> *(iii) that the accused was bound to make payment as had been agreed while issuing cheque in favour of complainant."*

28. *Further, as per the decision of* ***the Hon'ble Apex Court, in the case of M S Narayana Menon Alias Mani Vs State of Kerala & Another, reported in (2006) 6 SCC 39; in the case of*** *wherein it is held that;*

> *"Initial burden is on the Accused to rebut the presumption U/Sec 118(a) and 139, as to the issuance of cheque for consideration and discharge of debt, by raising probable defence. If the accused discharges the said burden,*

> *the onus thereafter shifts on to the complainant to prove his case.*
>
> *Burden of proof on accused is not heavy. Accused need not disprove the prosecution case in its entirety. Accused can discharge the burden on the basis of preponderance of probabilities through direct or circumstantial evidence."*

29. *Applying the above principles of law to the instant case at hand, it is seen that, in the present case though the Accused has questioned the financial capacity of the Complainant to lend money to him. But on the other hand, the Complainant, has shown that he was holding Rs 14,00,000/- as on 04.04.2016, as per ExP6-Bank Statement, to show his Capability to pay an amount of Rs 9,00,000/- to the Accused, as on 04.04.2016. Under such circumstances, the said defence is not sustainable. Though the financial capacity of the Complainant is questioned by the Accused, but the same is not supported with probable defence of the Accused. Hence, the said stand of the Accused is not acceptable.*

30. *Under these circumstances, the Accused/ Appellant should have led some cogent evidence to show that, he had given the signed blank cheque-Ex.P1 to the Complainant, as security under the chit fund transaction, of which he was the subscriber, in 2016. Unless the Accused leads cogent evidence to this effect, the defence of the Accused will not become probable, but it will be merely a palpable defence, which will not be sufficient to discharge his duty to rebut the presumption available U/Sec. 139 of the N.I. Act, to the Complainant.*

31. *Thus, as per the above oral and documentary evidence, it can be said that, the Accused has taken various stands in his defence. On looking to the line of defence and the various contentions taken up by the Accused, in his evidence, the version of the Accused is not inspiring the confidence of this Court. Hence, the contention of the Appellant/Accused cannot be accepted at all.*

32. *Considering the inconsistent contentions raised by the Accused in the cross examination of PW1 and on leading evidence as DW1, it can be said* *that, the stands taken up by the Accused, is not fortified with cogent evidence, on the basis of preponderance of probabilities, inorder to rebut the presumption available to the Complainant, U/Sec 139 of NI Act. So, in the absence of material evidence, the different and distinct stands, taken up by the Accused, cannot be accepted at all.*

33. *Thus, the presumption available to the Complainant U/Sec. 139 of N.I. Act, has remained unrebutted, from the side of the Appellant/Accused. Hence, presumption available to the Complainant U/ Sec.139 of N.I.Act stands unrebutted. I have gone through the Judgment of the Trial Court, rightly the Trial Court has concluded that the Accused has failed to rebut the presumption available to the Complainant U/Sec.139 of N.I.Act.*

HENCE, ***I ANSWER POINT NO. 2 IN THE NEGATIVE AND POINT NO. 4 IN THE AFFIRMATIVE.***

34. ***POINT NO.3:***

The Accused contends that, he has not received the Notice-ExP3, issued by the Complainant, through his Counsel.

34.01. *The Complainant has produced the Notice-Ex.P3 dtd. 04.09.2018; Postal receipt-Ex.P4 and Postal Returned Envelop at Ex.P5.*

34.02. *Coming to the ocular evidence, on this point, more specifically, cross examination of DW1 at Page No 3, Para No 2, Line Nos 3 to 5, which reads as under:*

> *"It is true to suggest that my address shown in cause title is true and correct. ...."*

As per this evidence, the Accused/DW1 admits that the addressed shown in the causetitle of the Complainant is true and correct.

34.02.01. *Further on perusal of the address shown by the Appellant/ Accused on the Cause title of the Complaint and Notice-ExP3 as well as Returned Postal Envelop-ExP5, it is seen that, the address of the Appellant/Accused shown in all the three documents is one and the same.*

34.02.02. *Thus, the address shown in Ex.P3- Notice and Ex.P5- Returned Postal Envelope, is the admitted address of the Accused.*

34.03. *As per the decision o**f the Hon'ble Apex Court, in the case of Indo Automobiles V/s Jai Durga Enterprises (Crl.Appeal No.1101 of 2008 date of decision 15.08.2008),** wherein it is observed in para No.8 that:*

> *"... In K Bhaskaran V/s Sankaran Vaidhyan Baton and another, 1999 7 SCC 510, it has been held that, the context of Sec138B of Negotiable Instruments Act, invites a liberal interpretation favouring the person who has the statutory obligation to give notice under the act because he must be presumed to be the loser in the transaction and provision itself has been made in his interest and if a strict interpretation is asked for that would give a handle to the trickster Cheque drawer. It is also well settled that once notice has been sent by registered post with acknowledgement due in a correct address, it must be presumed that the service has been made effective. ...."*

Applying the above said principles of law to the instant case at hand, on perusing Ex.P3 and Ex.P5, it is seen that, there is an endorsement as "Not Claimed". Thus, the Complainant has shown that the Notice-Ex.P3 is issued to the address of the Accused.

34.04. *When the Accused contends that, the said Notice-Ex.P3 is not served upon him, then it is for him- burden is on the Accused to show on the basis of preponderance of probabilities that, either the address shown in Ex.P3 and Ex.P5 is incorrect or he was not residing on the address shown in the said Notice, on the relevant point of time.*

In the present case, no such rebuttal evidence is lead by the Accused, to disbelieve the endorsement made by the Postal Authorities, as per Ex.P5, which leads to the presumption U/Sec 114 of Indian Evidence Act, as well as, U/Sec 27 of the General Clauses Act.

34.05. *Thus, under such circumstances, I am of the considered opinion that, the Notice issued by the Complainant to the correct addresses of the Accused shown in Ex.P3 and Ex.P5, is presumed to be deemed service, in the absence of any contrary/ rebuttal evidence from the side of the Accused.*

Hence, ***I ANSWER POINT NO.3 IN THE NEGATIVE.***

35. <u>POINT NO.5:</u>

Under these circumstances, there is no any hurdle to derive the presumption available to the holder of the cheque U/Sec.118 as well as U/Sec. 139 of N.I.Act. I find force to my above opinion as per the decision of ***the Hon'ble Apex Court in the case of Hiten Pidalal V.s Bratindranath Banergi reported in 2001 Crl.L.J. 4647 (Supreme Court) as well as in the case of M.S.Narayan Menon @ Mani V/s State of Kerala and Another reported in 2006 SAR.Crl.616 and in the case of Krishna Janardhan Bhat V/s Dattatreya G. Hegde reported in (2008)2 SCC Crl. 166.*** *Rightly, the Trial Court has considered all these aspect and there is no any fault on the part of the Trial Court. I do not find any force in the submission of the learned counsel for the Appellant.*

36. *Further 313 Statement is recorded by the Trial Court on 19.12.2019, it covers the entire incriminating substance, brought on record by way of evidence, against the Accused. The Trial Court has examined the Accused U/Sec. 313 of Cr.P.C. I have gone through the statement of the Accused recorded by the Trial Court U/Sec. 313 of Cr.P.C., and reply* *given by the Accused, to the said questions, in the statement. I do not find any fault in the statement of the Accused, recorded by Trial Court U/Sec 313 of Cr.P.C.*

37. *I have carefully gone through the reasonings given by the Trial Court, while awarding compensation to the Complainant U/Sec.357 of Cr.P.C. I do not find any error or material irregularity in the said findings.*

38. *Further inorder to conclude,* ***the Hon'ble High Court has held in General Auto Sales Vs Vijayalakshmi, reported in 2005(1) KLT 478,*** *in Paragraph No 8 thereof, that:*

> *"Even if a blank signed cheque has been given towards liability or even as security, then the liability subsists and quantified, if the cheque is filled up and presented to the Bank, the person who had drawn the cheque, cannot avoid the criminal liability under Section 138 of NI Act".*

38.01. *Further* ***the Hon'ble Apex Court has held in Rangappa Vs Sri Mohan, reported in (2010) 11 SCC 441,*** *that;*

> *"Once issuance of cheque and signature thereon are admitted, presumption of a legally enforceable debt infavour of the holder of the cheque arises. It is for the Accused to rebut the said presumption, though Accused need not adduce his own evidence and can rely upon the material submitted by the Complainant. However, mere statement of the Accused may not be sufficient to rebut the said presumption".*

39. *In this case there was really presumption available infavour of the Complainant in terms of Section 138 & 139 of Negotiable Instruments Act, against the accused and the accused has not discharged his burden to rebut that presumption.*

40. *The Trial Court has considered all the aspects, the grounds taken up by the Accused as defence. The Order of the Trial Court in awarding compensation to the Complainant, is also wel-reasoned.*

41. *When no fault is committed by the Trial Court, in coming to the conclusion, convicting the Accused for the offence punishable U/Sec 138 of NI*

Act, interference to that effect, by this Court does not arise at all.

42. *Thus, I decline to interfere with the findings recorded by the Trial Court.*

43. *Necessarily the prosecution succeeds. The conviction is therefore confirmed, as the accused is found guilty of the offence punishable under Section 138 of Negotiable Instruments Act. The Accused is hereby directed to pay an amount of compensation as ordered by the Trial Court.*

Hence, for the above reasons ***I am constrained to answer POINT NO.5 IN THE NEGATIVE.***

44. ***POINT NO. 6:***

For having answered Point Nos.1 and 4 in the Affirmative; Point Nos. 2, 3 & 5 in the Negative, I proceed to pass the following:

ORDER

Acting U/Sec.386 of Cr.P.C., the Appeal preferred by the Appellant/Accused is hereby Dismissed.

In the consequences, the order of conviction passed by the Learned XXXIII Addl. CMM, Bengaluru in C.C.No.59020/2018 dtd.30.08.2021, recording conviction of the Accused, is hereby confirmed.

The order of suspension passed by this Court U/Sec.389 of Cr.P.C. stands revoked.

The Trial Court shall execute its order, as per law.
No order as to costs.

In case, if the Appellant/Accused has deposited the amount, as directed U/Sec. 148 of N.I. Act, the same may be dealt with, as per Law U/Sec. 143 of the said Act.

Remit the TCR to the Trial Court, on obtaining necessary acknowledgment, from it, alongwith the copy of this Judgment.

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*(Dictated to the Stenographer directly on computer system, computerized by her and print out taken by her, after correction, signed and pronounced by me, in the open court on this the **11th of April, 2022.**)*

[Abdul-Rahiman. A. Nandgadi]
LXXII Addl.City Civil & Sessions Judge, Bengaluru. (CCH-73)