Received on: - 09/10/2015

Registered on: - 16/10/2015

Decided on: - 06/04/2018

Duration: - 02 year- 05 month- 10 days

C. C. No. 1413/15

In the Court of Add. Chief Metropolitan Magistrate, at Metropolitan Court No. 30, Ahmedabad.

Complainant:-

M/S. Arihant Enterprise

through its proprietor Mr. Urvishbhai Hasmukhlal Shah

Age. 32, Occ. Business

Add. Shop No. 64, Anand shopping centre,

Pir Mohammadshah Road, Ratanpole, Ahmedabad.

V/S

Accused:-

M/S. Navkar Garments,

its proprietor Mr. Manishbhai Bohra

Age. Adult, Occ. Business

Add. 12, Dighe Nagar Chs Ltd, Fitwala road,

Sai baba temple, Near Railway station,

Mumbai.

Appearance:-

For Complainant: - Ld. Advocate Mr. B. G. Rajpurohit

For Accused: - Ld. Advocate Mr. I. P. Rao

Offence: - U/Sec. 138 of Negotiable Instrument Act, 1881

Judgment

1. Complainant has filed the present complaint U/Sec. 142(b) of Negotiable Instrument Act, 1882 (In short called N.I.Act) for an offence U/Sec. 138 of N.I.Act against the accused herein. That brief fact of the present complaint are, parties to the present complaint are carrying their business in the name and at the address as shown in the title clause of the present complaint. Both are having a business relation and in that way they came into touch with each other. It is a complainant case that, accused herein approached to the complainant for the requirement of cloth for his business, it is therefore after settling the terms & conditions, complainant herein agreed to sale & accused herein agreed to purchase and accused herein agreed the terms & conditions as mentioned in the bills. Accused herein also requested to the complainant to maintained his separate account in his name, accordingly complainant has maintained the same. It is also agreed by the accused to make the payment of the bill within the period of one month from the date of the concern bill and also agreed to pay interest for 18% on late payment. Accordingly, accused has after selecting the goods placed an order and complainant has supplied/delivered/dispatched the goods to the accused herein. Details particular of the business has been specified by the complainant vide Para No. 3 of the complaint as under,

No.	Date	Bill	Amount in Rs.
1	18/04/14	159	0,73,800/-
2	23/04/14	190	0,52,335/-
3	24/04/14	196	0,68,170/-
4	05/05/14	264	0,96,263/-
5	05/05/14	265	1,17,163/-
6	10/05/14	297	0,95,874/-
7	15/05/14	337	0,97,223/-
8	12/06/14	461	0,42,100/-
9	12/06/14	462	0,79,280/-
10	12/06/14	463	0,78,960/-
11	12/06/14	464	1,13,560/-
		Total	***9,14,728/-***

It is being the complainant case that, accused herein has been dully received with the goods as mentioned in the above chart along with the invoices and delivery challan and never raised any complaints with respect to the said goods. According to the books of account of the complainant maintained in the name of the accused herein, total sum of Rs. 9,14,728/- found due to the accused herein. On request & demanding the said outstanding amount, accused herein issued a cheque No. 027269 for the sum of Rs. 39,280/- dated 13/07/15 from out of his own account maintained with the Union Bank of India, Tardeo road branch, as a part payment, with an assurance to honor the same on its presentation for the payment. Accordingly, complainant has deposited the said cheque for the payment in his account maintained with the Indusind Bank Ltd, Opp. Parimal garden, Elliss bridge branch, Ahmedabad on 08/08/15 but the same stands dishonored with an endorsement " **Exceeds arrangement ".** Hence, complainant has issued a legal notice U/Sec. 138 of N.I.Act through his Ld. Advocate on 31/08/2015 by R.P.A.D which was refused by the accused herein on 05/09/2015. But accused herein neither complied with the same nor filed any reply thereto. Hence finally complainant has filed the present complaint U/Sec. 142(b) of the N.I.Act for an offence U/Sec.138 of the N.I.Act.

2. Under the present complaint by taking cognizance U/Sec. 204 of Cr.P.C this court has issued process against the accused. Wherein accused herein remain present before this court. Than plea of the accused was recorded U/Sec. 251 of Cr.P.C vide Exh. 14. Than, in order to prove the present case complainant has mainly produced the following evidence,

ORAL EVIDENCE

Sr. No.	Details	Exh.
1	Proprietor of Arihant Enterprise Mr. Urvishbhai Hasmukhlal Shah	04
2	Mehul Shagvi, Officer from Indusind Bank Ltd. Parimal garden branch, Ahmedabad.	21

DOCUMENTARY EVIDENCE

Sr. No.	Details	Exh.

1	Cheque No.027269 issued by the accused; ***Dated:- 13/07/2015.***	T 07
2	Dishonour Memo of Exh.07; ***Dated:- 08/08/2015.***	T 08
3	Intimation memo in consonance with Exh. 08.	T 09
4	Notice issued by the complainant U/Sec. 138 through his Advocate to the accused herein; ***Dated:- 20/08/2015.***	T 10
5	Postal sleep of notice vide Exh. 10; ***Dated :- 31/08/15.***	T 11
6	Sealed cover of notice vide Exh. 10 with an endorsement "***Refused***".	T 12
7	copy of the complainant bank account statement	22

3. That, complainant has been provided with sufficient opportunity to produce their part evidence and after producing the above evidence complainant declared their part of evidence to be closed vide purshish Exh. 26. Than, further statement of the accused was recorded U/Sec. 313 of Cr.P.C Wherein accused herein by denying the prosecution evidence put forward his respective defence that, " Payment of the goods as alleged in the present complaint for the total sum of Rs. 9,14,728/- has been paid to the complainant before filling the present complaint, which is dully admitted by the complainant during his cross-examination. In support of the present submission accused herein requested to consider the copy of the bank account statement produce by his Ld. Advocate along with an application dated 27/06/16 as a part of his further statement, accordingly, same has considered as Exh. 27; Accused herein further stated that, he has return the defective goods to the complainant herein; he further stated that, complainant has received the present cheque vide Exh. 7 as security in advanced which was promised to be return, as & when payment of the same paid by the accused but complainant has mis-used the said cheque without having any due in existence." During the further statement accused herein did not shown his desireness to enter into the defence evidence as well as to examine the defence witness. Accused herein shown his desireness to produce certain documents with respect to his defence and also declared to produce the same on the next date after recording his further statement. But in spite of having sufficient opportunity given too the accused, no such document has been produced on record. Than, present complaint was kept for the final argument. Wherein Ld. Advocate for the complainant has submitted their part of written argument vide Exh. 30. Ld. Advocate for the accused has been provided with sufficient opportunity to submit his part of oral or written argument, but no effort has been made to do so. Instead of to submit their part of final argument Ld. Advocate for the accused has submitted an application vide Exh. 34 praying to drop the present proceedings against him, which was after hearing both the parties disallowed. Than also sufficient opportunity has been provided to the Ld. Advocate for the accused to submit their part of final argument but no effort is made. Finally under an application vide Exh. 35 right of the accused to submit their part of final argument was order to be closed and present matter was kept for the final judgment. That, present complaint was kept for the final judgment on 27/03/18, but on the same day only Ld. Advocate for both the parties remain present, both the parties remain absent in spite of having sufficient knowledge to remain present for hearing the final judgment. On 27/03/18 Ld. Advocate for the accused produce two Demand draft vide DD No. 928003 for the sum of Rs. 16,721/- & DD No. 928004 for the sum of Rs. 1,80,751/- in favor of the complainant along with the declaration on behalf of the present accused vide Exh. 36. As Ld. Advocate for the complainant decline to receive the same it is therefore as per the request made by Ld. Advocate for the accused said declaration & demand draft submitted along with the same, taken on record vide Exh. 36, 36/1, 36/2 & 36/3 respectively. On the day 27/03/18 which was fixed for to declare final judgment under the present complaint, but in the absence of the accused Ld. Advocate for the accused submitted an application vide Exh. 37 to open his right to submit his part of final argument, but with specific reason as stipulated in an order below the same, said application was disallow. Ld. Advocate for the accused also submitted an exemption application vide Exh. 38, which was allow but with a specific direction to cause present of the accused before this court on 06/04/18 to hear the final judgment. Finally, present complaint was kept today to declare final judgment in the presence of both the parties.

4. That, considering the evidence produced on record, further statement of the accused as well as arguments submitted by the complainant side, following issue has been raised before this court in order to decide the present complaint,

ISSUE

A) Whether prosecution prove beyond all the reasonable doubt that, accused has committed an offence U/Sec. 138 of The Negotiable Instrument Act, 1881?

B) What order?

That answer of the above issues are given here under,

A) " Affirmative "

B) As per the final order.

5. That reasons for the answer of the above issues are discussed and determined in detail as under,

5.1) **Issue No. A: -** That before determining the disputed fact in order to determine the present issue, it is pertinent to note here **an undisputed/admitted facts** amongst the parties to the present complaint, which are as under,

- ✔ Accused is carrying his business in the name of the Navkar Garments & he is being an owner of the said firm. (Accused herein clearly admitted the present fact during the complainant cross-examination as well as during the further statement).
- ✔ Alleged transaction in the present complaint is remain admitted amongst both the parties. (Present fact neither deny nor disputed nor challenged by the accused herein during the whole trial, on the contrary clearly admitted on record.)

✔ After filling the present complaint, on 19/10/15 accused has paid a sum of Rs. 50,260/- to the complainant; on 03/03/16 accused has paid a sum of Rs. 80,000/- to the complainant; till the date of complainant's cross-examination accused has paid a total sum of Rs. 1,75,568/- to the complainant. (During the complainant's cross-examination present fact specifically asked by the accused & specifically admitted by the complainant herein.)

5.2) That considering the whole record, Now it is pertinent to clarify herein the main disputed facts amongst both the parties & defences taken by the accused as under,

✗ During the further statement accused herein put up a plea that, accused has returned the defective goods to the complainant herein.

✗ During the further statement accused herein put up a plea that, No due of the accused as alleged in the present complaint was in existence.

✗ During the further statement accused herein put up a plea that, cheque vide Exh. 7 was given to the complainant in advance as a security and same was agreed to be returned to the accused as & when accused made payment of the same. But in spite of complainant has been paid with the amount of the goods complainant has filed the present false complaint against him by mis-using the present cheque.

✗

5.3) Now, considering the above admitted/undisputed and disputed facts amongst the parties to the present complaint, if the present issue be determine than, first of all complainant has filed the present complaint for an offence U/Sec. 138 of the N.I.Act, hence it is to be determined whether the complainant herein able to satisfy/has complied with an essential conditions of the Sec. 138 of N.I. Act? For the said purpose Sec. 138 of the N.I.Act is enumerated herein as under,

> **Section 138:- Dishonour of cheque for insufficiency, etc., of funds in the accounts :-**
>
> 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 honor 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 extend to two year***, 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 Three 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 induce 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 cheques 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.

Explanation: - For the purpose of this section, "**debt or other liability**" means **a legally enforceable debt or other liability**.

That, keep in mind the above provision it provides a presumption that, ***a drawer has committed an offence*** **provided condition No. (a) to (c) of the proviso part are complied with**. It is therefore first of all it is to be determined whether the complainant has complied with the conditions as laid down in the proviso part of the above provision or not!

5.4) That, in order to determine the present facts, if record of the prosecution evidence be scrutinize than, ***first of all during the whole trial accused herein never deny or disputed or challenge that, cheque vide Exh. 7 is not belongst to his own account maintained with the Union bank of India, Tardeo road branch, Mumbai as well as said cheque bearing his own signature.*** With respect to the present cheque accused herein not put forward any kind of defence during the complainant's cross-examination. But during the further statement accused herein only stated that, said cheque was given in advance merely as a security but was not issued for any kind of debt or liability. Without prejudice with the explanation given by the accused during the further statement with respect to the present cheque, at this juncture perusing the documents vide Exh. 27 replied upon by the accused herein during his further statement, it appears crystal clear that, present cheque vide Exh. 7 is belongst to the accused own account maintained with the ***Union bank of India, Tardeo road branch, Mumbai.*** Accused herein never deny or challenged his own signature over the present cheque vide Exh. 7 and looking to the dishonor memo vide Exh. 8 it appears crystal clear that, present cheque was return with an endorsement " Exceed arrangement " and not due to the reason " signature differ ". Moreover, during the whole trial issuance of the present cheque by the accused herein in favor of the complainant never been denied or disputed or challenged. Hence, looking to the present record no reason appears to deny that, present cheque vide Exh. 7 was issued by the accused herein out of his own account maintained with ***the Union bank of India, Tardeo road branch, Mumbai bearing his own signature in favor of the complainant.*** As present fact dully established on record it is therefore no reason appears as to why due execution of the said cheque should be denied? With respect to the present proposition of law at this juncture it is appropriate to have reference with the decision of ***the Honb'le Supreme court of India in Rangappa V/S Mohan***, where in Honb'le Supreme Court has clearly held that, *once issuance of the cheque and signature therein are admitted, presumption of legally enforceable debt in favor of the holder of the cheque arises and it is for the accused to rebut the said presumption based on the preponderance of probabilities*.

Hence, in the case on hand also while it is dully established on record that, cheque vide Exh. 7 was issued by the accused herein bearing his own signature out of his own account maintained with ***with the Union bank of india, Tardeo road branch, Mumbai, it is therefore*** in view of the principle laid down by the Honb'le Supreme court (Supra) initial presumption U/Sec. 139 is required to be drawn in favored to the complainant and against the accused herein unless the contrary is proved on record. It is therefore considering the present situation no reason appears as to why tentative exhibit given to the present document should not be confirmed? ***Accordingly, Tentative exhibit No.7 given to the present document is hereby order to be confirmed.***

Now, perusing the cheque vide Exh. 7 it appears to have contained the date 13/07/2015. Perusing the document vide Exh. 8 said cheque appears to have been deposited by the complainant in his account for the payment on 07/08/2015. With respect to the present documents & facts contained therein it is pertinent to note here that, accused has no where put forward any defence nor it has been denied by the accused nor put forward any explanation thereto in his further statement. It is therefore considering the present record, it appears crystal clear that, cheque vide Exh. 07 has been presented by the complainant in his bank for the payment within the period of its validity. Hence it is clearly proved on record that, **complainant has complied with the Clause No.(a) of the proviso part to the Sec. 138 of N.I.Act.**

5.5) Now so far as the Clause No. (b) & (c) are concern, it also appears by perusing the documents vide Exh. 7 & 8 that, said cheque stood dishonored on 08/08/2015. The reason stated in dishonour memo vide Exh. 8 for the dishonour of the cheque is **" Exceed arrangement "**. At this juncture with reference to the present fact first of all it is important to determine Sec. 146 of N.I.Act which provides as under,

Sec. 146:- Bank's sleep Prima facie evidence of certain facts. - The court **shall**, in respect of every proceeding under this chapter, on production of bank's sleep or memo having thereon the official mark denoting that the cheque has been dishonoured, **presume the fact of dishonour of such cheque**, ***unless and until such fact is disproved.***

That as the present provision has used the term **"shall"**, hence by virtue of Sec. 4 of Indian Evidence Act, 1872 present provision becomes mandatory for the court to presume the fact presumed therein unless and untill the contrary proved.

Now it is required to be determine, whether the accused herein remain succeed to prove contrary to the fact as presumed by virtue of the Sec. 146 of N.I.Act or not! For the same considering the whole record, it appears crystal clear that, accused has neither challenge the present document nor put forward any specific defence against the present document nor ever pleaded that, he had sufficient balance in his account to honor the said cheque on the date of its dishonor or he had sufficient arrangement with his banker to honor the said cheque on the date of its dishonor. Hence, considering the record it appears that, accused herein remain failed to prove the contrary to the facts as presumed by virtue of the Sec. 146 of N.I.Act. Hence, it appears crystal clear that, complainant herein remain succeed to prove the present document vide Exh. 08 and the facts contained therein. It is pertinent to note here that, document vide Exh. 09 is issued by the complainant's banker in consonance with the document vide Exh. 08 & recording the same fact as reflected in the document vide Exh. 08. It is therefore no reason appears as to why tentative exhibit given to the present documents should not be confirmed? ***Accordingly, Tentative exhibit No. 8 & 9 are hereby order to be confirmed.***

Moreover considering the record it appears that, after dishonouring the cheque vide Exh. 07 complainant has issued a legal notice vide Exh. 10 to the accused herein on 31/08/2015 through postal sleep vide Exh. 11. Said notice appears to have been refused by the accused herein and sealed cover of the same is produced on record vide Exh. 12. It is pertinent to note here that, to corroborate the accused plea accused himself relied upon the document vide Exh. 27 during his further statement. Document vide Exh. 27 contained the bank account statement of the accused wherein accused is regularly maintaining his account and out of which account accused has issued the present cheque vide Exh. 7. Perusing the record it appears crystal clear that, an address on which complainant has issued/send the statutory notice vide Exh. 10 as well as address as stipulated in the sealed cover vide Exh. 12 is being the same address which is recorded in the accused bank account with his banker. It is therefore no reason appears to deny or disbelieve that, complainant has issued the present statutory notice to the accused herein at his true & correct address but the same was return back with an endorsement "Refused". It is pertinent to note here that, during the whole trial accused herein has not made any endeavor either to prove the contrary or to prove otherwise. It is settled principle of law that, refusal is equivalent to be served. In fact it is to be treated as constructive service of the notice. With reference to the present proposition of law at this juncture it is appropriate to have a reference with the decision of the ***Honb'le Apex court in Jagdish Singh Vs. Natthu Singh ; State of M.P. Vs. Hiralal & Ors. and V.Raja Kumari Vs. P.Subbarama Naidu & Anr.*** wherein Honb'le Apex court has clearly held that, *when a notice is sent by registered post and is returned with a postal endorsement refused or not available in the house or house locked or shop closed or addressee not in station, due service has to be presumed.* It is therefore no reason appears as to why due service of the present notice to the accused herein at his true & correct address should be doubted or should not be believed or should be denied? considering the present record it appears crystal clear that, documents vide Exh. 10 to 12 are dully proved on record by having due corroboration from each other and dully prove the constructive service of the said notice to the accused herein. It is therefore no reason appears as to why tentative exhibits given to the said documents should not be confirmed? ***Accordingly, Tentative exhibit given to the present***

documents vide Exh. 10 to 12 are hereby order to be confirmed. Hence, present record dully established on record that, complainant herein has dully complied with the requirement of law as envisaged by Sec. 138 (b) of N.I.Act. Moreover, it is admitted position on record that, accused herein neither complied with the present notice nor filed any reply thereto. It is therefore finally at the expiry of 15 days notice period, next within 30 days complainant has filed the present complaint U/Sec. 142(b) of the N.I.Act within the period of its limitation for an offence U/Sec. 138 of N.I.Act. Considering the present record no reason appears either to deny the present established fact on record or to disbelieve the same.

5.6) Hence, considering the discussions as made in sub – para No. 5.4 & 5.5 it appears crystal clear that, **complainant has dully complied with the requirement of Clause No. (a) to (c) of the proviso part to the Sec. 138 and then after filed the present complaint in view of the Sec. 142(b) of N.I.Act within the period of its limitation**.

5.7) That considering the discussions as made in above **sub-Para No. 5.4 to 5.6** it appears crystal clear that, complainant has filed the present complaint in accordance with the Sec. 142(b) of N.I.Act ***after complying with an essential conditions of the proviso part to the Sec. 138 of N.I.Act.*** It is therefore offence in view of Sec. 138 of N.I.Act stands completed and section itself provides a presumption that, ***accused shall be deemed to have committed an offence U/Sec. 138 of N.I.Act***. But presumption as envisaged by Sec. 138 is rebuttable presumption. Along with the same at this juncture it is important to discuss an important provision of the N.I.Act; That is Sec. 139 and 118 of N.I.Act which provides as under,

Section 118 - Presumptions as to negotiable instruments:-

Unless the contrary is proved, the following presumption shall be made:-

(a) **of consideration :-** that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, endorsed, negotiated or transferred, as accepted, endorsed, negotiated or transferred for consideration;

(b) **As to date: -** that every negotiable instrument bearing a date was made or drawn on such date;

(c) **As to time of acceptance: -** that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;

(d) **As to time of transfer: -** that every transfer of a negotiable instrument was made before its maturity;

(e) **As to order of endorsements -**: that the endorsement appearing upon a negotiable instrument were made in the order in which they appear thereon;

(f) **As to stamps: -** that a lost promissory note, bill of exchange or cheque was duly stamped;

(g) **That holder is a holder in due cours**e: - that the holder of a negotiable instrument is a holder in due course: provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud. or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him.

Sec. 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 Sec. 138 **for the discharge**, in whole or in part, of any debt or **other liability.**

That present both the provision provides an important presumptions for the facts contained therein. Hence, while it is proved on record that, complainant herein has filed the present complaint U/Sec. 142(b) of N.I.Act after complying with an essential conditions of the proviso part to the Sec. 138 of N.I.Act, than facts as provided by the above said provisions are compulsorily required to be presumed ***unless and untill contrary is proved on the record.***

5.8) That all these section used the term **“shall”**. Hence unless the contrary is proved court is bound to presume the fact as provided by the said sections by virtue of the **Sec. 4** of the Indian Evidence Act, 1872.

5.9) That with reference to the present issue, it is appropriate to take reference of the judgment passed by the Hon'ble Supreme court of India in **“Hiten P. Dalal V/S Bratindranath Banerjee” 2001 Cri.L.J 4647(1)**, wherein Honb'le Supreme court has clearly determined that, “The *effect of the Sec. 139 is to place the evidential burden on the accused of proving that,* ***the cheque was not received by the complainant towards the discharge of any liability****. Because Both Sec. 138 and 139 require that the court* ***“ SHALL PRESUME “*** *the liability of the drawer of the cheque for the amount for which the cheque are drawn, as noted in its obligatory on the court to raise the 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 shits the onus on to the accused. Such a presumption is a presumption of law, as distinguished from the presumption of fact which describes provisions by which the court “may presume” a certain state of affairs. Presumption 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 oblige to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumption of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of presumed fact."*

The same issue has also been determined by the Honb'le Supreme court of India in **Rangappa V/S Mohan AIR 2010 SC 1898**, wherein Honb'le Supreme court has clearly held that, *"The presumption mandated by Sec. 139 of the Act does indeed include the existence of legally enforceable debt or liability. 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. Sec. 139 of N.I.Act is an example of reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instrument. While Sec. 138 specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption U/Sec. 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Sec. 138 can be better described as a regulatory offence since the bouncing of cheque is largely in the nature of civil wrong whose impact is usually confined to the private parties involved in commercial transaction.*

In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the accused can not be expected to discharge an unduly high standard or proof. In the absence of compelling justification, reverse onus clause usually impose an evidentiary burden and not a persuasive burden. Keeping in this view, it is a settled position that when an accused has to rebut the presumption U/Sec. 139, the standard of proof for doing so is that of ' ***preponderance of probabilities*** *'. Therefore,* ***if an accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt/liability, the presumption can fail. 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."***

5.10) Hence, at this juncture as it is proved on record that, complainant has filed the present complaint U/Sec. 142(b) after complying with an essential conditions of the proviso part to the Sec. 138 of the N.I.Act, than co-joining reading of Sec. 138, 139 and 118 raised a mandatory initial presumption in favor of the complainant and against the accused ***unless and untill the contrary is proved*** that, ***accused has drawn and issued the cheque vide Exh. 07 for the discharge of legally enforceable debt or*** " **other liability**" " **existed** " ***in favour of the complainant which was due to the accused herein.*** But however present presumption is rebuttable one and it is open for the accused to rebut the said presumption on the standard of '***<u>preponderance of probability</u>***' by *creating doubt* ***about the existence of*** *a legally enforceable debt/ other liability* and for the same accused herein can either do the same by adducing evidence or can do so the same by rely on the materials submitted by the complainant.

5.11) Moreover, so far as to clear the issue of standard of proof on the shoulder of the accused in the above said presumptions with more certainity, at this juncture it is important to be determine <u>what the term **"proved"** meant by</u>. That Sec. 3 of the Indian Evidence Act, 1872 define the term **"Proved"** which provides as under,

> **"Proved"** - A fact is said to be proved when, after considering the matter before it, the <u>court either believes it to exist</u> or <u>consider its existence so probable</u> that <u>a prudent man ought</u>, <u>under the circumstances of the particular case</u>, <u>to act upon the supposition that it exist.</u>

That above term clearly suggest that, any fact appears on record and by considering the same, any prudent person can act upon or believe its existence so probable, than such fact can be said to be proved.

In short, with reference to the above presumptions, standard of proof on the shoulder of the accused is not so high but is shall be the standard of ***"preponderance of probability"*** which has been clearly held by the Honb'le Supreme court in ***Hiten P. Dalal's case & Rangappa's case (supra)***. Hence *accused is required to prove the contrary facts against the facts as presumed by the above said presumptions* ***on the standard of preponderance of probability***.

5.12) Hence, at this juncture initial presumption favoured to the complainant that, ***cheque vide Exh. 07 was drawn and issued by the accused in favour of the complainant***, ***in order to discharge the legally enforceable debt/other liability either in whole/ part***. That, it is therefore *now the burden shifts on the shoulder of the accused herein to prove the contrary fact, based on the standard of preponderance of probability*, that is to say, **accused has to show that,** ***no such debt/other liability was ever been in existence*** **at the time** ***of drawing & issuing the cheque vide Exh. 07*** in favour of the complainant payable by the accused herein.

5.13) Now, it is to be determined whether the accused herein is able to shift the burden as lies upon his shoulder by virtue of the above said presumption! For the said purpose defence taken by the accused herein as clarified in Sub-para No. 5.2 required to be determine herein.

5.13.1) first of all it is pertinent to note here that, it is being the basic principle of criminal jurisprudence that, accused is always presumed to be innocent and case of the prosecution is always required to be proved by the prosecution on his own footing beyond all the reasonable doubt and accused is always expected/required to raise a probable doubt over the case of the prosecution. But various presumption of law provided in various statute with regard to the guilt of the accused can be an exception to the present general principle of criminal jurisprudence. In the case on hand present complaint is filed under the special statute wherein presumption of law provided U/Sec. 118, 138 & 139 are an exception to the said general principle of criminal jurisprudence, which are also in mandatory nature and in view what has been determined in above sub-para No. 5.4 to 5.6 complainant herein remain succeed to established the basis to raise the said presumption of law. Now, in view of as clarified in sub-para No. 5.12 it is the burden on the shoulder of the accused herein to rebutt the same or to prove the contrary or to prove otherwise. Accused can do the same by rely upon the prosecution evidence, based on the standard of preponderance of probabilities. But the very important factor to be keep in mind is, defence of the accused should be a specific & consistence at all level. Under the prosecution like the present complaint, defence of the accused bears much importance at three stages, (1) in reply to the statutory notice (2) during the complainant's cross-examination and (3) during the further statement recorded

U/Sec. 313 of Cr.P.C. Again it is pertinent to note here that, at all the three stages defence of the accused is expected/required to be a specific & that too a consistence. Accused is also expected/required to prove the same on record with probabilities or established the reason on record to believe its probability & mere plea is not sufficient. In the case on hand, it is pertinent to note here that, accused herein has not put forward any defence what so ever it may be, during the complainant's cross-examination. On the contrary raised a plea during the further statement which was never been raised during the complainant's cross-examination. Not only that, during the complainant's cross-examination as well as during the further statement recorded U/Sec. 313 of Cr.P.C accused herein neither deny nor disputed nor challenged the basis facts of the present complaint that are, " ***Issuance of an order of goods by him as alleged in the complaint; delivery of the said goods by the complainant to the accused herein in consonance with the accused order; receipt of the said goods to the accused herein; business transaction amongst both the parties in view of the schedule as specified in Para No. 3 of the complaint; accused herein never raised any dispute with regard to the goods delivered to him by the complainant.***" Meaning thereby basic facts with which complainant has filed the present complaint are neither deny nor disputed nor challenged by the accused herein during the whole trial and thereby remain admitted on the part of the accused herein.

Moreover, during the further statement accused herein raise a plea that, " *goods delivered by the complainant was found defective and it is therefore accused has returned the said defective goods to the complaint.*" But accused herein never raised such a plea during the complainant's cross-examination. Accused herein has not specified as to whole goods received by him was found defective or few one. If the present plea was true, than question arise as to why accused has not put forward the present specific plea during the complainant's cross-examination? No plausible explanation is available on record from the accused herein. It is therefore no reason appears as to why present plea should be believe or considered? In spite of the same, if present plea be believed & considered than, mere putting a plea is not sufficient, it is expected from the accused either to prove the said plea on record or established a fact or reason or circumstances which may raise a reason to believe the same. But in the case on hand except merely putting the present plea, accused herein not made any endeavor to established the present plea on record. No evidence or reason or circumstance available on record which can either corroborate the present plea or raise a reason to believe the present plea or established the same on record. Hence, no reason appears to believe that, "*any goods as delivered by the complainant to the accused herein as well as received by the accused was found defective*". **Hence, it can be said that, accused herein remain failed to prove that,** " *any goods as delivered by the complainant* *to the accused herein as well as received by the accused was found defective and it is therefore accused has return the same to the complainant."*

Moreover, accused herein raise plea during his further statement that, "***cheque vide Exh. 7 was issued by him in advance merely for the purpose of security***". But no such plea was ever raised by him during the complainant's cross-examination. it is pertinent to note here that, mere putting a plea is not sufficient, it is expected from the accused either to prove the said plea on record or established a fact or reason or circumstances which may raise a reason to believe the same. But in the case on hand except merely putting the present plea, accused herein not made any endeavor to established the present plea on record. No evidence or reason or circumstance available on record which can either corroborate the present plea or raise a reason to believe the present plea or established the same on record. Hence, it can be said that, accused herein is remain failed to prove even the present plea on record.

Except the same, it is also pertinent to note here that, accused herein not raised any defence whatsoever may be during the complainant's cross-examination with respect to the basic facts with which complainant has filed the present complaint and clearly admitted the same on record and without denying the same & without disputing the same & without challenging the same, raised an absolutely contrary plea during the further statement. Which is not sustainable in law. That too later on remain absolutely failed either to to prove the same or to established the same on record. It is therefore also plea raised by the accused during the further statement are not sustainable in law.

Moreover, during the complainant's cross-examination accused herein never raised any plea that, "*total outstanding for the total sum of Rs. 9,14,728/- has been paid by him to the complainant, on the contrary impliedly admitted the whole basic facts of the complainant*". While during the further statement specifically for the question No. 6 accused herein put forward his absolutely contrary explanation that, " *he has paid a payment of the said goods for the total sum of Rs. 9,14,728/- to the complainant herein.*" But looking to the whole record no effort is made to prove accordingly.

Looking to the whole record it appears clearly proved on record that, "*accused had issued an order for the goods as alleged in the present complaint, in view of the same complainant had delivered the goods to the accused herein which was received by the accused as alleged in the present complaint and no disputed is raised by the accused with respect to the said goods. Said goods was for the total sum of Rs. 9,14,728/-*". It is pertinent to note here that, during the whole trial accused herein neither deny the present fact nor disputed the same nor challenged the same and admitted the same impliedly. As well as accused herein remain absolutely failed either to contradict the same or to prove the contrary or to prove otherwise. It is also pertinent to note here that, accused herein remain failed to prove that, " *out of the total goods received by him any goods were found defective and any goods were return by him to the complainant.*" Impliedly reason appears to believe that, "***accused was in receipt with all the goods for the total sum of Rs. 9,14,728/- as delivered by the complainant and no goods were found defective and no goods ever returned by the accused to the complainant and it is therefore accused is absolutely liable to pay the entire consideration amount for the sum of Rs. 9,14,728/- to the complainant herein***".

Now, it is pertinent to note here that, with respect to the fact as clarified herein above, which the complainant herein remain succeed to prove on record and that too which was never been disputed by the accused herein, complainant has filed total 9 complaints against the present accused for the dishonor of the total 9 cheques. It is being admitted fact amongst both the parties that, total sum for the goods delivered by the complainant to the accused herein was for the sum of Rs. 9,14,728/-. It is being also admitted fact amongst both the parties that, total amount for all the cheques of all the nine complaint's are, for the sum of Rs. 3,52,319/-. Accused herein has produce a copy of his bank account statement vide Exh.27, out of which account present cheque vide Exh. 7 has been issued, during his further statement with respect to the specific question No. 6 which question was specifically as " *complainant has delivered several goods vide various bills & delivery challan in view of the accused order & requirement, for the total sum of Rs. 9,14,728/-.*" In reply accused herein put forward his explanation in clear wording that, " *i have made payment of the present goods to the complainant through bank and complainant has dully admitted the same during the cross-examination and in consonance to the same, my Ld. Advocate has produce bank statement along with an application dated 27/06/16, which may kindly be consider as a part of my further statement.*" *In view of the said request said copy has been consider as a part of accused further statement & for the sake of convenience allotted Exh. 27.* But scrutinizing the said bank account statement no such entry is reflected which can prove that, "*accused has paid a whole consideration amount for the sum of Rs. 9,14,728/- to the complainant herein*", it is therefore answer/explanation put forward by the accused herein with respect to the specific question No. 6 during the further statement, appears to be false. In the same way with respect to the same specific question, with a same specific explanation accused has produce a copy of his bank account statement of the same bank vide Exh. 25 in C. C. No. 1414/15. But scrutinizing the said bank account statement no such entry is reflected which can prove that, "*accused has paid a whole consideration amount for the sum of Rs.*

9,14,728/- to the complainant herein, it is therefore answer/explanation put forward by the accused herein with respect to the specific question No. 6 even in C. C. No. 1414/15 during the further statement appears to be false. Same copy as produce vide Exh. 25 in C. C. No. 1414/15 has been repeatedly produced in all remaining seven cases as a part of the further statement.

Perusing all these entries, it appears crystal clear on record that, entire consideration amount for the total sum of Rs. 9,14,728/- has not been paid by the accused to the complainant herein. But perusing the present entries it appears that, accused had paid several amount to the complainant before filling the present complaint as well as other complaints and few amount appears to have been paid after filling the present complaint, which the complainant has dully admitted during his cross-examination. So far as the amount paid before filling the present complaint as well as other complainant's are concern, it is hereby makes it clear that, during the whole trial accused herein no where ever pleaded/raised a specific defence that, *that amount was actually paid with respect to his liability of the respective cheques of all the nine complaints.* On the contrary perusing the present entries it appears crystal clear that, *said payments were made towards the whole consideration price & after paying the same for the remaining due accused had issued the present cheques.* As clarified herein above accused herein remain failed to prove that present cheque was issued on security basis, hence no reason appears to deny that, ***present cheque was issued towards his remaining due.***

So far as the payment made by the accused after filling the present complaint are concern, ***question arise as to whether payment made by the accused after filling the present complaint would absolve him from the criminal liability under the present complaint?*** as during the complainant's cross-examination accused herein stick with the only fact that, after filling the present complaint accused had paid several amount to the complainant but complainant has not withdrawn the present complaint. With respect to the present issue, if present record be scrutinize than it appears that, present cheque contains a date 13/07/15, which was dishonored on 08/08/15, notice of the same was served to the accused on 05/09/15, accordingly cause of action to institute the present complaint was arose on 21/09/15 and in view of that offence with respect to the dishonored cheque under the present complaint was stood completed on 21/09/15. It is pertinent to note here that, all the cheques in all the remaining complaints filed by the complainant against the accused herein, has been dishonored on 08/08/15, notice in the said cases were served to the accused on 05/09/15 and cause of action of all the remaining cases was also arose on 21/09/15, accordingly, offence with respect to the said dishonored cheques under all the remaining complaints was also stood completed on 21/09/15. Perusing the account statement vide Exh. 27 sum of Rs. 720/- appears to have been credited in the complainant's account on 08/08/15 & sum of Rs. 40,580/- appears to have been credited in the complainant account on 08/09/15, but during the whole trial accused herein not raised any specific plea either during the complainant cross-examination or during his further statement that, "*said amount was credited by the accused herein in favor to the complainant with respect to his liability under the present cheque vide Exh. 7 or with respect to the other cheques in rest of the complaint.*" If accused herein desire to take such a plea or desire to take advantage with such a plea, than accused was duty bound to raise such a specific plea & established the same on record or even raise a probable reason on record which can show the reason to believe such a plea, but during the whole trial accused herein never raise such a plea nor ever tried to prove the same on record. Hence, no reason appears to believe that, said payment was credited by the accused herein to the complainant with respect to his liability under the present cheque vide Exh. 7 or with respect to the other cheques stands dishonored in rest of the complaints. *Impliedly reason appears to believe that, that amount was credited by the accused towards the entire consideration amount.* Against the same looking to the record it appears crystal clear that, accused herein has not paid entire amount of the goods and greater amount than the present cheque are still due to the accused herein. In fact accused herein dully admitted his liability under the present cheque specifically in his own application vide Exh. 34 and finally in the declaration as made through his Ld. Advocate vide Exh. 36, wherein by admitting his liability accused had submitted demand draft in favor of the complainant herein for the sum of Rs. 16,721/- vide Exh. 36/2 & for the sum of Rs. 1,80,751/-vide Exh. 36/3, for the total sum of Rs. 1,97,472/- and sought mercy of this court. Present admission on the part of the accused herein clearly contradict the accused own version as raised during his further statement and established on record that, "the date on which cause of action to file the present complaint was arose after the completion of an offence with respect to the present cheque, accused was clearly indebted to the complainant herein for the amount of the present cheque vide Exh. 7 and it is therefore accused herein at the final stage made a declaration vide Exh. 36 to the same effect as well as submitted demand draft for the greater amount than the amount of the present cheque through his Ld. Advocate, but complainant herein not accepted the same. Present fact itself prove the liability of the accused herein with respect to the present cheque under the present complaint and leave no matter of doubt on record.

During the complainant's cross-examination as well as during the further statement as well as in an application made vide Exh. 34 as well as in the declaration as made vide Exh. 36, accused herein repeatedly praying that, after filling the present complaint, accused has paid greater amount than the present cheque specifically on 19/10/15 for the sum of Rs. 50,268/- & 0n 03/02/16 for the sum of Rs. 80,000/- as reflected even in Exh.

27, which is dully admitted even by the complainant during his cross-examination, it is therefore present complaint is not tenable against him. ***But whether present fact absolve the accused herein from the criminal liability with respect to the present cheque under the present complaint?*** To answer the present question at this juncture it is appropriate to have a reference with the decision of the ***Honb'le Supreme court in Rajneesh Aggarwal V/S Amit J. Bhalla, Criminal Appeal No. 10-12 of 2001, date of decision 04/01/2001***, Wherein Honb'le supreme court has clearly held that, "***So far as the criminal complaint under Sec. 138 of N.I.Act is concern, once the offence is committed, any payment made subsequent thereto will not absolve the accused of the liability of criminal offence, though in the matte of awarding sentence, it may have some effect on the court trying the offence.***" In the case on hand also, offence in view of Sec. 138 of N.I.Act with respect to the cheque vide Exh. 7 was stood completed on 21/09/15 and after cause of action arose to file the present complaint, any payment made by the accused as admitted by the complaint will not absolve him from the criminal liability under the present complaint in view of as held by the Honb'le Supreme court *(supra)* and presumption U/Sec. 138 also established the same on record. Hence, present repeated prayer of the accused that, "*Due to the reason, after filling the present complaint greater amount than the present cheque has been paid to the complainant, present complaint is not tenable against him*", said plea/prayer is not sustainable in law in view of as held by the Honb'le Supreme court of India *(supra)* as well as in view of presumption of law U/Sec. 138 of N.I.Act.

5.13.2) Hence, considering the discussions as made in above sub-para No. 5.13.1 it appears crystal clear that, all the plea as raised by the accused during his further statement as clarified in sub-para No. 5.2 appears to be devoid of any substance, accused herein remain absolutely failed to prove/established the same on record, all the plea appears to be unsustainable in the eyes of law. Hence, it can be said that accused herein remain failed to shift the burden as lies on his shoulder in view as clarified in sub-para No. 5.12. Accordingly, case of the prosecution stands proved on record by having benefit with the presumption of law U/Sec. 118, 138 & 139 of N.I.Act.

(6) Hence, considering the discussions as made herein above para No. 5 it appears crystal clear that, accused herein remain failed to discharge the burden as lies upon his shoulder in view as clarified in sub-para No. 5.12. On the contrary case of the prosecution proved on record with the help of presumption of law U/Sec. 118, 138 read with Sec. 139 of N.I.Act. Hence, it can be said that, complainant herein remain succeed to prove his case beyond all the reasonable doubt. It is therefore considering all these discussions present **Issue No. A** hereby answer in "**Affirmative**".

(7) **<u>Issue No. B :-</u>** That, considering the discussions as made in Issue

No. A it is proved on record that, complainant herein remain succeed to prove his case & guilt against the present accused beyond all the reasonable doubt. Hence, it is proved on record that, present accused Mr. Manishbhai Bohra a proprietor of Navkar Garments has committed an offence U/Sec. 138 of The Negotiable Instrument Act, 1881. ***Hence, present accused Mr. Manishbhai Bohra a proprietor of Navkar Garments is hereby held guilty U/Sec. 255(2) of Criminal Procedure Code, 1973 for an offence U/Sec. 138 of The Negotiable Instrument Act, 1881.***

Let the present accused be heard on the quantum of sentence.

Present order pronounced, declared and singed in the open court today on this 06th day of April, 2018.

Date:- 06/04/2018.

Ahmedabad.

(Raja Ranchhodbhai Patel)

(Add. Chief Metropolitan Magistrate, Court No.30)

Code No. GJ00922

(8) Today in the first session Ld. Advocate for both the parties remain present before this court. Present complaint was kept on 27/03/18 for to declare final judgment. But on that day only advocates remain present, neither party remain present before this court. On 27/03/18 Ld. Advocate for the accused herein filed an exemption application of the accused, which was allowed in the larger interest of justice but given specific direction to cause presence of the accused herein today to hear the final judgment, along with the same Ld. Advocate for the complainant has also been directed to cause presence of the complainant today to hear the final judgment. Accordingly, judgment in the present complaint was adjourned today for the specific reason to declare the same in the presence of both the parties, specifically in the presence of the accused herein. But in spite of the specific direction neither accused himself remain present before this court nor Ld. Advocate for the accused has caused his presence before this court. It is therefore reason appears to believe that, accused herein did not desire to be heard personally at this juncture. It is therefore considering the law laid down by the Honb'le High Court of Gujarat in Special Criminal Application (Quashing) No. 9113 of 2016 Ishwarbhai Hirabhai Chunara V/S State of Gujarat specifically an answer to the question No. 1 in para No. 6, this court has choose to declare the present judgment in the presence of Ld. Advocate for both the parties, even in the absence of the accused herein as well as choose not to further delay the final declaration of the present judgment. Honb'le High Court of Gujarat has clearly raised a question No. 1 as here under,

(6) The issue in this application is squarely covered by a Devision bench decision in the case of Sharad Jethalal Savla V.S State of Gujarat and others [Criminal Miscellaneous Application No.19862 of 2015 decided on 14th November 2016]. I may quote the relevant observations made in the said judgment:

"15 Having heard the learned counsel appearing for the parties and having considered the materials on record, the following questions fall for my consideration:

I. Whether on account of the absence of the applicant accused herein on the date of the pronouncement of the judgment, the judgment would become invalid in view of the provisions of Section 353 of the Code of Criminal Procedure, 1973?

Honb'le High Court has answered the present question vide Para No. 22 to 26 as here under,

ANALYSIS:

(22) So far as the first question is concerned as regards the pronouncement of the judgment and order of conviction and sentence in the

absence of the applicant accused, I am of the view that no illegality could be said to have been committed by the trial court.

(23) Chapter XVI of the Cr.P.C. deals with the commencement of the proceedings before the Magistrate. Under Section 204, Cr.P.C. the Magistrate after taking cognizance of the offence issues summons or warrants, depending upon the case, i.e., either a summons case or a warrant case. Under Section 205 (1), Cr.P.C., the Magistrate having issued the summons for the personal attendance of the accused is empowered to dispense with the personal attendance of the accused and permit him to appear by his pleader/advocate. Under sub-section (2) even if the magistrate dispense with the personal attendance of the accused in his discretion at any stage of the proceedings, he is empowered to direct the personal attendance of the accused in the manner provided in the Section. Chapter XXIV, Cr.P.C. deals with the general provisions as to inquiries and trials. Under Sec. 317, at any stage of the inquiry or trial, the concern judge or magistrate trying the case is empowered to dispense with the personal attendance of the accused before the Court in

the interest of Justice or in the event the accused is found persistently disturbing the proceedings of the Court. At the same time at any stage of the proceedings he could direct the personal attendance of the accused. Under sub-section (2), even if the accused is not represented by an advocate, if the presiding officer feels that the personal attendance of the accused is necessary, he may adjourn the inquiry or trial. Chapter XXVII deals with the pronouncement of the judgment. After laying down the procedure about the pronouncement of the judgment, Sub-Section (5) of Sec, 353 states that, if the accused is in the custody, he shall be brought to the court to hear the judgment pronounced. Under Sub-section (6), if the accused is not in custody, he shall be required by the Court to attend to hear the judgment pronounced, Except where his personal attendance during the trial has been dispensed with and the sentence is one of fine only or he is acquitted.

(24) From the above provisions it can be safely presumed that the presence of the accused is insisted during the trial for more than one reason though the provisions are made for dispensing wit their personal attendance

for the reasons enumerated U/Sec. 205 or 317, Cr.P.C. The reasons for insisting for their personal attendance are that during the trial, the presiding officer is expected to record the evidence in the present of the accused in the language known to him and the accused has to follow the evidence that is being let in by the prosecution against his interests and give suitable instructions to his counsel to disprove the case of the prosecution as he will be the appropriate person who knows the truth or otherwise of the allegations made against him. Likewise the presence of the accused is insisted at the time of pronouncement of the judgment and in the event of his being convicted he has to be heard on the sentence to be imposed. Hence, there is every justification in insisting for the appearance of the accused during the trial.

(25) However, the judgment that the learned Magistrate may pronounce in the absence of the accused by itself will not vitiate the judgment. Sub- section (7) of Section 353 of the Cr.P.C clearly lays down that no judgment delivered by any criminal court shall be deemed to be invalid by reason only of the absence of any party.

(26) The First question is answered accordingly.

Hence, keep in mind the principle of law as clarified herein above so far as the Sec. 353 of Cr.P.C is concern, this court choose to declare the present judgment in the presence of Ld. Advocate for both the parties as well as in the absence of both the parties, in order to prevent further delay in delivering the justice.

Heard, Ld. advocate for both the parties for the quantum of sentence. Ld. Advocate for the accused herein mainly submitted that, at the end of trial accused has submitted demand draft in favor of the complainant, it is therefore accused should be treated with leniency. Against the present submission Ld. Advocate of the complainant has submitted that, accused had clearly admitted the whole case of the prosecution during the trial and after dragging the complainant herein with the whole trial, on the day 27/03/18 which was fixed for to declare final judgment as accused has submitted the demand draft through his Ld. Advocate even without being sincere to remain presence before this court, which clearly shows bad conduct on the part of the accused, it is therefore looking to the conduct on the part of the accused herein, Ld. Advocate for the complainant requested this court to impose maximum sentence to the accused herein.

Considering the rival submission, first of all it is proved on record that, accused herein remain failed to pay the amount of the present cheque vide Exh. 7 since the year 2014 till today. It is true that, accused has submitted two demand draft vide Exh. 36/2 & 36/3 in C. C. No. 1413/15 with respect to all nine complaints but as accused has dragged the complainant herein till the whole trial and on the day which was fixed for to declare the final judgment on 27/03/18 as accused has submitted the said demand draft, it is therefore considering the said conduct on the part of the accused herein, complainant herein decline to accept the same. Looking to the record, reason put forward by the Ld. Advocate for the complainant not to accept the said demand draft appears to be absolutely just, fair & reasonable. Looking to the conduct on the part of the accused herein, it appears crystal clear that, it was because of the accused fault complainant had to enter into the present litigation, dragged with the whole trial approximately for the two & half year, contest the same, had to bear with the cost of the present litigations. Hence, conduct on the part of the accused herein appears absolutely unjust, unfair & unreasonable, specifically towards the complainant herein. Looking to the seriousness of the present offence it appears to be economic only and grievance of the complainant also appears to be economic only. This is being an offence which certainly adversely affect the smooth economic transaction done in the society based on the negotiable instrument and certainly affect the faith of the people who usually engaged in the economic business. But so far as the social aspect is concern it is not so serious like offences against state & body, which may affect the social peace or body or physical mind of person. But as clarified herein above conduct of the accused herein absolutely appears to be unjust, unfair & unreasonable towards the complainant herein and also accused has spoiled valuable time of this court. It is therefore, looking to the peculiar fact & circumstances of the present case, financial loss caused to the complainant herein as well as harassment caused to the complainant herein, if accused herein be punished for the present offence with the simple imprisonment for the term of one year and complainant herein be awarded with compensation for the amount of the present cheque vide Exh. 07 U/Sec. 357(3) of Cr.P.C keep in mind the law laid down by **The Honb'le Supreme court of India in AIR 1988 SC, 2127 Hari Krishna & State of Haryana V/S Sukhbirsingh** *as well as* by **The Honb'le Punjab and Haryana High court in Ajay Bansal V/S Nirmal Jain case** as well as by **The Honb'le Supreme court of India in AIR 2002 Cri.L.J. 1003 Suganthi Suresh Kumar V/S Jagdeeshan's case**, and failure to which accused herein be further directed to undergo simple imprisonment for the term of three month, than this court is of the certain view that, looking to the peculiar facts & circumstances of the present case, complete justice would be seen to have been done to the complainant herein.

Hence, considering the discussions as made herein above this court is of the certain view to pass the final order in the present **Issue No. B** as under,

FINAL ORDER

i. Present accused ***Mr. Manishbhai Bohra a proprietor of Navkar Garments*** is hereby convicted U/Sec. 255(2) of The Criminal Procedure Code, 1973 for an offence punishable U/Sec. 138 of The Negotiable Instrument Act, 1881.

ii. Present accused ***Mr. Manishbhai Bohra a proprietor of Navkar Garments*** is hereby sentenced to undergo simple imprisonment for the term of one year.

iii. Present accused ***Mr. Manishbhai Bohra a proprietor of Navkar Garments*** is hereby further order U/Sec. 357(3) of Criminal Procedure Code, 1973 to pay the amount of the cheque vide Exh. 07 towards compensation ***to the complainant herein*** within the period of 30 days from the pronouncement of the present order. Failure to which accused shall further undergo sentence of simple imprisonment for the term of three month.

iv. Registry of this court is hereby directed to provide copy of the present judgment free of cost to the present accused immediately on his presence caused before this court in view of Sec. 363(1) of Criminal Procedure Code, 1973.

Present final order pronounced, declared and singed in the open court today on this 06th day of April, 2018.

Date:- 06/04/2018

Ahmedabad.

(Raja Ranchhodbhai Patel)

(Add. Chief Metropolitan Magistrate, Court No.30)

Code No. GJ00922