However The Presumptions Are ... vs Demanding Repayment Of The Cheque ... on 28 April, 2023

1 CC.10324/2018(J)

KABC030300712018

Presented on : 27-04-2018
Registered on : 27-04-2018
Decided on : 28-04-2023
Duration : 5 years, 0 months, 1 days

IN THE COURT OF THE XV ADDL CHIEF METROPOLITAN MAGISTRATE AT BENGALURU CITY.

Dated this the 28th Day of April-2023

Present: Lokesh Dhanapal Havale. B.A.L.L.B.,
XV Addl.C.M.M., Bengaluru.

Judgment U/s.355 of the Cr.P.C. 1973.

1.Sl.No.of the case	CC.No.10324/2018
2.Name of the Complainant:	Smt. Reshma Banu W/o Sri. Syed Nasir, Aged about 44 years, R/at No.5, Venkatappa Layout, Chamundi Nagar Main Road, R.T Nagar Post, Bengaluru- 560 032.
3.Name of the accused:	Sri. Parveez Pasha S/o Late Abdul Jabbar, R/at No.15/2, 3rd cross, Bhuvaneshwari Nagar, R.T Nagar Post, Bengaluru- 560 032.

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4.The offence complained of :	U/s.138 of Negotiable Instruments

	Act.
5.Plea of the accused:	Pleaded not guilty.
6.Final Order:	Acting U/s.255(2) Cr.P.C., accused is Convicted.
7.Date of final Order	28.04.2023.

* * *

This complaint is filed U/Sec.200 of Cr.P.C. against the accused for the offence punishable U/Sec.138 of the Negotiable Instruments Act, 1881.

2. The facts of the complaint in brief are as under:

The complainant and accused are known to each other from last 10 to 15 years and they are friends. The accused has been doing building constructions business in and around the Bengaluru City. The accused had approached the complainant for hand loan of Rs.25,00,000/- for his business purpose. On the request of the accused, the complainant had given Rs.25,00,000/- to the accused from 10th April 2017 to till 25th June 2017 on different dates through account and also through cash. The accused had promised to repay the said amount within 3 months from 25th June 2017. After expiry of 3 months, the accused failed to repay the amount. On several demands made by the complainant, the accused finally

on 01.03.2018 issued a cheque bearing No.012795 dated 01.03.2018 for Rs.25,00,000/- drawn on Axis Bank Ltd, Sultanpalya branch, Bengaluru. On presentation of the said cheque for encashment, it was dishonoured for the reasons 'Funds Insufficient'. The complainant issued legal notice on 21.03.2018. It was returned to the complainant on with a reason 'Door locked' on 26.03.2018. The accused did not pay the amount even after the expiry of 15 days. The accused thereby committed an offence punishable U/s.138 of the N.I.Act.

3. After the institution of the complaint, the cognizance was taken and it has been registered as PCR No.5351/2018. The sworn statement of the complainant has been recorded and on the basis of sworn statement and other materials on hand, the criminal

case has been registered against the accused and summons was issued to accused. In response to the service of summons, the accused appeared through her learned counsel and got enlarged on bail. The prosecution papers were supplied to the accused and the substance of the accusation was read over and explained to the accused in the language known to her. He pleaded not guilty and claimed to be tried.

4. During trial the complainant examined himself as PW-1 and got marked Ex.P1 to P11. The statement of the accused U/s. 313 of Cr.P.C. was recorded. The accused examined himself as DW.1 and got marked Ex.D1 to D15 on his behalf.

5. Heard the arguments. On perusal of the entire materials on record, the points that arise for my consideration are as under;

1. Whether the complainant proves that the accused issued cheque bearing No.012795 dated 01.03.2018 for Rs.25,00,000/- drawn on Axis Bank, Sultanpalya branch, Bengaluru towards the discharge of legally enforceable debt/liability and on its presentation for encashment, it was dishonored with an endorsement "Funds Insufficient" and even after the notice is sent to the last known correct address of the accused, it was returned with shara 'door locked' which is deemed service of notice, the accused has not paid the amount within 15 days and thereby accused committed an offence punishable U/Sec.138 of N.I. Act, 1881?

2. Whether the accused rebuts the presumption U/s.139 of the N.I.Act?

3. What order?

6. My answers on the above points for consideration are as under:

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

REASONS

7. Point No.1 and 2 :- The points are taken together for the common discussion to avoid repetition of facts and evidence. It is necessary to discus the provisions U/s. 118(a) and 139 of the Act., 1881 at this stage.

"118. Presumptions as to negotiable instruments. - Until the contrary is proved, the following presumptions 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, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;"

"139. Presumption in favour of holder.- It shall be presumed, unless the contrary is proved, that the holder of a

cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability."

8. On plain perusal of the provision U/s. 118(a) and 139 of the N.I.Act., it can be seen that initially the presumptions constituted under these two provisions are in favour of the complainant. However the presumptions are rebuttable and it is open to an accused to raise a defence to rebut the statutory presumptions. An accused can raise a defence, wherein the existence of legally enforceable debt or liability can be contested.

9. It is also well established that an accused need not examine himself for discharging the burden of proof placed upon him under a statute. He may discharge his burden on the basis of the materials already brought on record. An accused has constitutional rights to remain silent. The standard of proof on part of the accused and that of the prosecution in a Criminal Case is different. The prosecution must prove the guilt of an accused beyond all reasonable doubts, the standard of proof so as to prove a defence on the part of an accused is preponderance of probabilities.

10. Under the light of position of the law, I have perused the complaint and the evidence placed on record. The complainant in support of his claim made in the complaint has adduced

evidence by examining himself as PW-1 and he got marked Ex.P1 to 11. PW-1 filed his evidence affidavit on oath and reiterated the complaint averments. Ex.P1 is the cheque bearing No.012795 dated 01.03.2018 for Rs.25,00,000/- drawn on Axis Bank Ltd, Sultanpalya branch, Bengaluru in favour of the complainant. Ex.P1(a) is the signature of the accused. Ex.P2 is the bank return memo with shara "Funds Insufficient". Ex.P3 is the office copy of Legal Notice dated 21.03.2018 issued by the complainant to the accused demanding repayment of the cheque amount. Ex.P4 is the postal receipt for having sent the legal notice to the accused. Ex.P5 is the postal envelope returned with shara 'door locked' on 26.03.2018. Ex.P6 is the hand loan agreement. Ex.P6(a) is the signature of the accused. On perusal of the hand loan agreement, it discloses that the accused executed loan agreement in favour of the complainant on 10.01.2018. Ex.P7 & 8 are the 2 certified copies of money lending licneces. They discloses that the complainant is carrying on the business of money lending during the said period with licence. Ex.P9 is the bank statement. It discloses that the complainant transferred amount of Rs.3,40,000/- to the accused through bank account. Ex.P10 and 11 are the 2 lease agreements. Ex.P10 discloses that the accused executed lease agreement in favour of the complainant by receiving Rs.6,00,000/- as lease amount. Ex.P11 discloses that the accused executed lease agreement in favour of Rinku Kumari, who is the worker of the complainant in her beauty parlour, by receiving Rs.12,00,000/- as lease amount.

11. On perusal of the documents, it is clear that the cheque at Ex.P1 bearing No.012795 dated 01.03.2018 for

Rs.25,00,000/- drawn on Axis Bank Ltd, Sultanpalya branch, Bengaluru issued in favour of the complainant was presented within its validity. Ex.P2 is the bank endorsement with shara "Funds Insufficient" dated:05.03.2018. Ex.P3 is the office copy of Legal Notice dated 21.03.2018, which was unserved as per Ex.P5 with shara on 26.03.2018. The accused disputed the service of notice. The counsel for the accused argued that the service of notice is mandatory to attract the provision u/sec.138 of N.I Act. The complainant has not served the legal notice to the accused. During the cross examination PW.1 admitted that the notie was not served on the accused. He relied on the judgment of Hon'ble Karnataka High Court in the case of Udaya Shetty V/s Yogesh Gudigar reported in 2022 (1) KCCR 188 wherein it was held that 'Demand Notice allegedly sent both under certificate of posting as well as by registered post -Former not returned and latter returned with remark that 'addressee left and his address not known". Presumption of deemed service not available as accused has already left address mentioned on postal cover- If demand notice was not served, it cannot be said that ingredients of offences of dishonour of cheque were fulfilled - Accused acquitted of offence punishable under sec.138 of N.I Act. In the case of C.C. Alavi Haji v. Palapetty Muhammed reported in (2007) 6 SCC 555, the Hon'ble Supreme Court held that when the notice is sent by registered post by correctly addressing the drawer of the cheque, the mandatory requirement of issue of notice in terms of

clause (b) of proviso to Section 138 of the Act stands complied with. It is needless to emphasise that the complaint must contain basic facts regarding the mode and manner of the issuance of notice to the drawer of the cheque. In the case of N. Parameswaran Unni v. G. Kannan reported in (2017) 5 SCC 737 the Hon'ble Supreme Court held that it is clear from Section 27 of the General Clauses Act, 1897 and Section 114 of the Evidence Act, 1872 that once notice is sent by registered post by correctly addressing to the drawer of the cheque, the service of notice is deemed to have been effected. However, the drawer is at liberty to rebut this presumption. Such being the case, even where the postal envelopes are returned with various sharas it has to be deemed that the notice is served. The accused produced Adhaar card as per Ex.D12 and pass book as per Ex.D.13. The address mentioned in the Ex.P12 and 13 is No.24/1, 28th cross, Kanakanagara, R.T Nagara, Bengaluru North, Bengaluru. He stated that he has been residing at the said address from past 10 years. The notice sent by the complainant was not served on him. However during the course of cross examination DW.1, it was elicited that cheque at Ex.P1 belongs to his savings bank account. The address mentioned in Ex.P3 is the address of the account pertaining to the cheque at Ex.P1. It was also elicited that He resided in the addresses mentioned in Ex.D12 and 13 after

22.10.2018. The answers elicited in the cross examination of DW.1 clearly shows that the accused admits the address mentioned in the notice at Ex.P3. In the case on hand, the envelope at Ex.P5 returned with shara 'Door lock' on 26.03.2018. Further the

judgment relied on by the counsel for the accused is not applicable as the notice returned with shara door locked and not with shara addresee left. Therefore on the basis of evidence on record, this Court is of the opinion that the notice issued by the complainant it is deemed to have been served on the accused as per Ex.P5. Further as per Judgment of Hon'ble Supreme Court of India in the case of C.C.Alavi Haji Vs. Palapetty Muhammed and Another reported in (2007) 6 SCC 555, it was held at para No.17 as under;

> 17. It is also to be borne in mind that the requirement of giving of notice is a clear departure from the rule of Criminal Law, where there is no stipulation of giving of a notice before filing a complaint. Any drawer who claims that he did not receive the notice sent by post, can, within 15 days of receipt of summons from the court in respect of the complaint U/s.138 of the Act, make payment of the cheque amount and submit to the Court that he had made payment within 15 days of receipt of summons (by receiving a copy of complaint with the summons) and, therefore, the complaint is liable to be rejected. A person who does not pay within 15 days of receipt of the summons from the Court along with the copy of the complaint u/s.138 of the Act, cannot obviously contend that there was no proper service of notice as required u/s.138, by ignoring statutory presumption to the contrary u/s.27 of the G.C. Act and Section 114 of the Evidence Act. In our view, any other interpretation of the

> proviso would defeat the very object of the legislation. As observed in Bhaskaran's case (supra), if the 'giving of notice' in the context of Clause (b) of the proviso was the same as the 'receipt of notice' a trickster cheque drawer would get the premium to avoid receiving

the notice by adopting different strategies and escape from legal consequences of Section 138 of the Act.

In a nutshell it can be said that the statutory notice is an opportunity given to the accused to make payment and avoid the consequences of 138 of N.I.Act. In the case on hand, the summons issued by the court on the address mentioned in the notice and complaint was duly served on accused as per order sheet dated 03.12.2019 and the accused appeared through his counsel and obtained the bail. The accused also admitted the service of summons in his evidence stating that he came to know about the case after receipt of summons from the Court. Therefore he cannot take the shelter of statutory requirement of service of notice to avoid the consequences of Section 138 of N.I.Act. The complaint was filed on 19.04.2018, which is within limitation. The cheque and the signature in the cheque are not disputed. Therefore, the documents on record clearly show that the complainant has complied the ingredients of Section 138(a) to (c) of the N.I.Act. Therefore the presumptions U/s.118 and 139 of the N.I.Act arise in favour of the complainant. The presumptions are rebuttable and the burden is on the accused to rebut the presumptions. The accused can rebut the presumption by raising probable defence and

proving it relying on the evidence of the complainant or by leading his direct evidence.

12. The counsel for the complainant argued that the cheque and signature are admitted. The transaction by way of account transfer as per Ex.P9 is admitted. The accused failed to prove that he has not executed loan agreement as per Ex.P6. The signature in Ex.P6 is admitted. The accused failed to rebut the presumption by proving the defence. The accused challenged the financial capacity of the complainant. The complainant proved the transaction and financial capacity on the basis of the documents at Ex.P1, Ex.P6 to 11 and on the basis of admissions given by the accused in his cross examination. Hence, prayed to convict the accused. On the other hand the counsel for the accused argued that the complainant failed to prove the financial capacity and transaction by way of cash. The complainant has not produced any documents in respect of her businesses and income. The accused failed to produce IT returns and bank account statements. The accused failed to examine the witness. The documents at Ex.P6 and Ex.P10 and 11 are created. The complainant misused the signed blank cheque and signed blank papers to create the documents. The complainant stated to have transferred Rs.5,00,000/- but no bank statement is produced. The complainant failed to produce account audit in respect of her money lending

business. She did not mention the source of funds in her complaint. She stated that she gave the amount by way of cash in the denomination of Rs.500/- and 1,000/- which are banned as on

08.11.2016. There is no transaction between the complainant and the accused as alleged in the complaint. The accused has no liability to pay the cheque amount.

12.(a) The learned counsel for the complainant relied on the following citations:-

1. The judgment of Hon'ble Supreme Court in the case of P. Rasiya vs Abdul Nazeer and Another in Crl.Appeal No.1233-1235/2022.

2. The judgment of Hon'ble Supreme Court in the case of Oriental Bank of Commerce v/s Prabodh Kumar Tiwari reported in 2022 Live Law (SC) 714.

3. The judgment of Hon'ble High Court of Karnataka in the case of Sri. Yogesh Poojary v/s Sri. K. Shankara Bhat reported in ILR 2019 KAR 493.

4. The judgment of Hon'ble Supreme Court in the case of H. Pukhraj v/s D. Parasmal reported in (2015) 17 Supreme Court Cases 368.

5. The judgment of Hon'ble Supreme Court in the case of Triyabak S. Hegde v/s Sripad in Crl.Appeal Nos849-850/2011.

12. (b) The learned counsel for the accused relied on the following citations:-

1. The judgment of Hon'ble High Court of Karnataka in the case of Sri. B.P Venkatesulu v/s Sri. K.P. Mani Nayar reported in 2001(1) KCCR 212.

2. The judgment of Hon'ble Supreme Court of India in the case of M.S Narayana Menon Alias Mani v/s State of Kerala and Another reported in AIR 2006(6) SUPREME COURT CASES 39.

3. The judgment of Hon'ble Supreme Court in the case of Krishna Janardhan Bhat v/s Dattatraya. G. Hegde reported in AIR 2008 SUPREME COURT 1325.

4. The judgment of Hon'ble High Court of Karnataka in the case of Shiva Murthy v/s Amruthraj reported in ILR 2008 KAR 4629.

5. The judgment of Hon'ble Supreme Court in the case of K. Prakashan v/s P.KI Surenderan reported in (2008) 1 Supreme Court Cases 258.

6. The judgment of Hon'ble Bombay High Court in the case of Sanjay Mishra V/s Ms. Kanishka Kappoor @ Bujju abd Anr reported in 2009 Crl.L.J. 3777.

7. The judgment of Hon'ble Karnataka High Court, Circuit Bench at Dharawad in the case of Veerayya v/s G.K Madivalar reported in 2012(3)KCCR 2057.

8. The judgment of Hon'ble Andhra Pradesh High Court in the case of Nagisetty Nagaiah v/s State of A.P and Another reported in 2004 Crl.L.J. 4107.

9. The judgment of Hon'ble Supreme Court in the case of K. Subramani. V/s K. Damodara Naidu reported in 2015 AIR SCW 64..

10. The judgment of Hon'ble Karnataka High Court in the case of Veerayya v/s G.K Madivalar reported in 2012(3) KCCR 2057.

11. The judgment of judgment of the Hon'ble Supreme Court of India in the case of Rajaram S/o Sriramulu Naidu (Since deceased)through LR.sv/s Maruchachalam (since deceased)

through LR.s reported in Criminal Appeal No.1978/2013.

12. The judgment of judgment of the Hon'ble High Court of Delhi in the case of Satish Kumar v/s State of Delhi reported in Crl.L.P.95/2006.

13. The judgment of the Hon'ble High Court of Delhi in the case of Ashok Baugh v/s Kamal Baugh & Anr reported in Crl.L.P.358/2012.

14. The judgment of the Hon'ble High Court of Delhi in the case of Sajidur Rehman v/s Rajiv Kashyap and Another reported in Crl.Rev.P.500/2014.

15. The judgment of the Hon'ble Karnataka High Court of Dharwad Bench, in the case of Vishal v/s Prakash Kadapa Hegannahalli reported in 2020(3) KCCR 2373.

16. The judgment of the Hon'ble High Court of Karnataka in the case of Kantharaj v/s Sham Shudin reported in 2022(2) AKR 264.

17. The judgment of the Hon'ble Karnataka High Court in the case of Prakash Shetty v/s Venkatesh reported in 2022(2)AKR 640.

18. The judgment of the Hon'ble Supreme Court in the case of Rajaram Sriramulu Naidu (since deceased) through LR.s v/s Maruthachalam (since deceased) through Lrs reported in AIR 2023 SC 471.

19. The judgment of the Hon'ble Karnataka High Court in the case of Udaya Shetty v/s Yogesh Gudigar reported in 2022(1) KCCR 188.

20. The judgment of the Hon'ble Supreme Court in the case of Basalingappa v/s Mudibasappa reported in AIR 2019 SC 1983.

21. The judgment of the Hon'ble Supreme Court in the case of John K Abraham v/s Simon C Abraham and another reported in (2014) 2 SCC 236.

22. The judgment of the Hon'ble Supreme Court in the case of M.S. Narayana Menon Vs. State of Kerala reported in (2006) 6 Supreme Court Cases 39

13. In the following land mark of judgments of the Hon'ble Supreme Court, the aspect of presumptions, burden of proof and aspect of the financial capacity of the complainant have been settled.

(a) The Hon'ble Supreme Court in the case of M.S. Narayana Menon Vs. State of Kerala reported in (2006) 6 Supreme Court Cases 39, held as under:-

"30. Applying the said definitions of 'proved' or 'disproved' to principle behind Section 118(a) of the Act, the Court shall presume a negotiable instrument to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable

that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon.

31. A Division Bench of this Court in Bharat Barrel & Drum Manufacturing Company v. Amin Chand Payrelal reported in (1999) 3 SCC 35 albeit in a civil case laid down the law in the following terms:

"12. Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the

defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or

by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non- existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt."

This Court, therefore, clearly opined that it is not necessary for the defendant to disprove the existence of consideration by way of direct evidence.

32. The standard of proof evidently is preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from the materials on records but also by reference to the circumstances upon which he relies.

33. Presumption drawn under a statute has only an evidentiary value. Presumptions are raised in terms of the

Evidence Act. Presumption drawn in respect of one fact may be an evidence even for the purpose of drawing presumption under another."

(b) The Hon'ble Supreme Court in Kumar Exports Vs. Sharma carpets reported in (2009) 2 SCC 513, held as under;

"20. The accused in a trial under Section 138 of the Act has two options. He can either show that consideration and debt did not exist or that under the particular circumstances of the case the non-existence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non- existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought

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

21. The accused has also an option to prove the non-existence of consideration and debt or liability either by letting in evidence or in some clear and exceptional cases, from the case set out by the complainant, that is, the averments in the complaint, the case set out in the statutory

notice and evidence adduced by the complainant during the trial. Once such rebuttal evidence is adduced and accepted by the court, having regard to all the circumstances of the case and the preponderance of probabilities, the evidential burden shifts back to the complainant and, thereafter, the

presumptions under Sections 118 and 139 of the Act will not again come to the complainant's rescue.

(c) The Hon'ble Supreme Court in Rangappa Vs. Mohan reported in (2010)11 SCC 441 held as under:

26. In light of these extracts, we are in agreement with the respondent-claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan Bhat (supra) may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence, wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption, which favours the complainant.

27. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under

Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the

accused/defendant cannot be expected to discharge an unduly high standard or proof.

28. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of `preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own.

(d) The the Hon'ble Supreme Court in Basalingappa Vs. Mudibasappa reported in (2019) 5 SCC 418 held as under:-

"25. We having noticed the ratio laid down by this Court in the above cases on Sections 118 (a) and 139, we now summarise the principles enumerated by this Court in following manner:

25.1. Once the execution of cheque is admitted Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.

25.2. The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.

25.3. To rebut the presumption, it is open for the accused to rely on evidence led by him or the accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record

by the parties but also by reference to the circumstances upon which they rely.

25.4. That it is not necessary for the accused to come in the witness box in support of his defence, Section 139 imposed an evidentiary burden and not a persuasive burden.

25.5. It is not necessary for the accused to come in the witness box to support his defence.

(e) The Hon'ble Supreme Court of India in the case of A.P.S Forex Services Pvt Ltd Vs. Shakthi Internatonal Fashion Linkers & Others reported in 2020 STPL 5773 SC, held at para No.7 as under:

7. Coming back to the facts in the present case and considering the fact that the accused has admitted the issuance of the cheques and his signature on the cheque and that the cheque in question was issued for the second time, after the earlier cheques were dishonoured and that even according to the accused some amount was due and payable, there is a presumption under Section 139 of the N.I. Act that there exists a legally enforceable debt or liability. Of course such presumption is rebuttable in nature. However, to rebut the presumption the accused was required to lead the evidence that full amount due and payable to

the complainant has been paid. In the present case, no such evidence has been led by the accused. The story put forward by the accused that the cheques were given by way of security is not believable in absence of further evidence to rebut the presumption and more particularly the cheque in question was issued for the second time, after the earlier cheques were dishonoured. Therefore, both the courts below have materially erred in not properly appreciating and considering the presumption in favour of the complainant that there exists legally enforceable debt or liability as per Section 139 of the N.I. Act. It appears that both, the Learned Trial Court as well as the High Court, have committed error in shifting the burden upon the complainant

to prove the debt or liability, without appreciating the presumption under Section 139 of N.I. Act. As observed above, Section 139 of the Act is an example of reverse onus clause and therefore once the issuance of the cheque has been admitted and even the signature on the cheque has been admitted, there is always a presumption in favour of the complainant that there exists legally enforceable debt or liability and thereafter it is for the accused to rebut such presumption by leading evidence.

(f) The Hon'ble Supreme Court of India in the case of Thriyambak S Hegade Vs. Sripad reported in 2021 STPL 10270 SC, held at para No.11 & 12 as under:

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11. From the facts arising in this case and the nature of the rival contentions, the record would disclose that the signature on the documents at Exhibits P-6 and P-2 is not disputed. Exhibit P-2 is the dishonoured cheque based on which the complaint was filed. From the evidence tendered before the JMFC, it is clear that the respondent has not disputed the signature on the cheque. If that be the position, as noted by the courts below a presumption would arise under Section 139 in favour of the appellant who was the holder of the cheque. Section 139 of the N.I. Act reads as hereunder: "139. Presumption in favour of holder- It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability."

12. Insofar as the payment of the amount by the appellant in the context of the cheque having been signed by the respondent, the presumption for passing of the consideration would arise as provided under Section 118(a) of N.I. Act which reads as hereunder:- "118. Presumptions as to negotiable instruments - Until the contrary is proved, the following presumptions 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, indorsed, negotiated

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or transferred, was accepted, indorsed, negotiated or transferred for consideration."

(g) The Hon'ble Supreme Court of India in the case of M/s. Kalamani Tex v. P. Balasubramanian reported in 2021 STPL 1056 observed at para No.14 to 18 as under:-

14. Adverting to the case in hand, we find on a plain reading of its Judgment that the trial Court completely overlooked the provisions and failed to appreciate the statutory presumption drawn under Section 118 and Section 139 of NIA. The Statute mandates that once the signature(s) of an accused on the cheque/negotiable instrument are established, then these 'reverse onus' clauses become operative. In such a situation, the obligation shifts upon the accused to discharge the presumption imposed upon him. This point of law has been crystalized by this Court in Rohitbhai Jivanlal Patel Vs. State of Gujarat, (2019) 18 SCC 106 in the following words:

"In the case at hand, even after purportedly drawing the presumption under Section 139 of the NI Act, the trial Court proceeded to question the want of evidence on the part of the complainant as regards the source of funds for advancing loan to the accused and want of examination of relevant witnesses who allegedly extended him money for advancing it to the accused. This approach of the Trial

Court had been at variance with the principles of presumption in law. After such presumption, the onus shifted to the accused and unless the accused had discharged the onus by bringing on record such facts and circumstances as to show the preponderance of probabilities tilting in his favour, any doubt on the complainant's case could not have been raised for want of evidence regarding the source of funds for advancing loan to the appellant-accused....."

15. Once the 2nd Appellant had admitted his signatures on the cheque and the Deed, the trial Court ought to have presumed that the cheque was issued as consideration for a legally enforceable debt. The trial Court fell in error when it called upon the Complainant-Respondent to explain the circumstances under which the appellants were liable to pay. Such approach of the Trial Court was directly in the teeth of the established legal

position as discussed above, and amounts to a patent error of law.

16. No doubt, and as correctly argued by senior Counsel for the appellants, the presumptions raised under Section 118 and Section 139 are rebuttable in nature. As held in M.S.Narayana Menon Vs. State of Kerala, (2006) 6 SCC 39, which was relied upon in Basalingappa (supra), a probable defence needs to be raised, which must meet the standard of "preponderance of probability", and not mere

possibility. These principles were also affirmed in the case of Kumar Exports (supra), wherein it was further held that a bare denial of passing of consideration would not aid the case of accused.

17. Even if we take the arguments raised by the appellants at face value that only a blank cheque and signed blank stamp papers were given to the respondent, yet the statutory presumption cannot be obliterated. It is useful to cite Bir Singh v. Mukesh Kumar, (2019) 4 SCC 197, 36 where this court held that:

> "Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt."

18. Considering the fact that there has been an admitted business relationship between the parties, we are of the opinion that the defence raised by the appellants does not inspire confidence or meet the standard of 'preponderance of probability'. In the absence of any other relevant material, it appears to us that the High Court did not err in discarding the appellants' defence and upholding

the onus imposed upon them in terms of Section 118 and Section 139 of the NIA.

h) The Hon'ble Supreme Court of India in its latest case of Jain P Jose v/s Santhosh reported in SLP Crl.5241/2016 dated 10.11.2022 observed by referring to its earlier Judgments in Vasanth Kumar v/s Vijaya Kumari, Rangappa v/s Mohan and Kalamani Tex and Another v/s P. Balasubramanian that the complainant is entitled to the benefit of presumption u/sec.139 of N.I Act that the cheque was issued for discharge of legally enforceable debt or liability.

14. Therefore on perusal of the Judgments, it is clear that an accused need not examine himself for discharging the burden of proof placed upon him under a statute. He may discharge his burden on the basis of the materials already brought on record. An accused has constitutional rights to remain silent. The standard of proof on part of the accused and that of the prosecution in a Criminal Case is different. The prosecution must prove the guilt of an accused beyond all reasonable doubt and the standard of proof so as to prove a defence on the part of an accused is preponderance of probabilities. If the cheque and signature are admitted, the presumption arises that the cheque was issued for legally enforceable debt/liability. The presumption is rebuttable. The accused has to raise a probable defence and prove it by adducing evidence, which must meet the standard of

preponderance of probabilities. Unless the same has been done, doubt can not be raised on the case of the complainant. The presumption raised in favour of the complainant u/sec.139 of N.I Act operates until rebutted by the accused by proving probable defence. As per the settled law that unless and until the accused rebuts the presumption U/sec.139 of N.I Act, the onus does not shift on the complainant to prove his case. Under the aforesaid settled law the evidence on record has to be appreciated.

15. It is the defence of the accused that he knew the complainant. He obtained the loan of Rs.3,40,000/- from the complainant. The complainant came in contact with him during the said transaction. He took the said amount in 2017 with interest at the rate of 10%. He paid the interest by way of cash. He had the factory of hollow blocks. The complainant sent her son and asked to supply hollow blocks for their construction of building. He supplied the hollow blocks to the complainant for the principal amount, he gave signed blank cheque and signed blank stamp paper and signed blank white sheets at the time of obtaining the loan. Even though he repaid the principal amount by supplying the hollow blocks, the complainant did not return the

documents and signed blank cheque. He had kept mineral water agency. Even though he repaid the amount, the complainant came along with 25 persons to his mineral water agency and quarreled with him stating that no amount was repaid and assaulted him. He filed complaint in DJ Halli police station and criminal case was pending in Mayo Hall Court.

16. In order to prove his defence, the accused produced the certified copy of the order sheet in CC.No.5944/2018 pending before the Hon'ble XI ACMM, Meyo Hall, Bengaluru. Certified copy of the charge sheet filed in the said case, certified copy of FIR in the said case, certified copy of the statements in the said case. Certified copy of the Spot Panchanama in the case, certified copy of the further statement of the complainant in the said case, certified copy of the statements of the two witnesses in the said case and certified copy of the wound certificate in the said case as per Ex.D1 to 11. On perusal of Ex.D1 to 11 it is clear that he filed complaint against the complainant and 3 others on 04.03.2018. The FIR was registered against the complainant and 3 others on the same day. It is alleged in the complaint that on 04.03.2018 at 2.30 pm when he was sitting in his water filter shop at Kanakanagara, the complainant herein and 3 others, who are accused No.1 to 4 in the said case, entered into his shop and quarelled with him in respect of finance matter; threw the water cans and assaulted the accused herein, who is the complainant in the said case, on his face and stomach and threatened him. The said documents show that there is finance transaction between the complainant and the accused. The accused did not explain about the details of the finance transaction between him and the complainant while giving police complaint in the said case. During his cross examination, when it was suggested to DW.1 that there is no connection between the loan transaction and the criminal case pending before the 11th ACMM, Bengaluru in

CC.No.59448/2018, he admitted it. He voluntarily stated that after filing of the cheque, the complainant came and quarrelled with him. However there is no mention of transaction with respect to the cheque in question anywhere in the documents at Ex.D1 to 11. There is no mention anywhere in Ex.D1 to 11 about the loan of Rs.3,40,000/- borrowed by him from the complainant during the year 2017 by handing over blank signed cheque, blank signed bond paper and blank signed white paper. Further there is no mention in Ex.D1 to 11 about payment of interest at the rate of 10% and repayment of the said amount by way supplying hollow blocks to the extent of principal amount. Therefore the documents

at Ex.D1 to 14 does not come to aid of the accused in proving his defence.

17. It is the case of the complainant that she lent Rs.25,00,000/- by way of bank transfer and by way of cash during the period from 10.04.2017 to 25.06.2017. The complainant produced bank statement as per Ex.P9 to show that she paid Rs.3,40,000/- to the accused through account. On perusal of Ex.P9, it is clear that she paid Rs.70,000/- on 10.04.2017, Rs.70,000/- 23.05.2017, Rs.60,000/- on 26.05.2017 and Rs.1,40,000/- on 21.06.2017 through cheque numbers 190912, 190916 to 190918. It was also suggested to her in the cross examination by the counsel for the accused that she paid Rs.3,40,000/- to the accused by way of open cheques and she admitted it. The accused also stated in his defence evidence that he borrowed Rs.3,40,000/-. The complainant produced the loan

agreement at Ex.P6 dated 10.01.2018 to show that she paid Rs.3,40,000/- through bank account and Rs.21,60,000/- by way of cash. The accused disputed the payment alleged to have been made by the complainant by way of cash. It is the defence of the accused in the cross examination of PW.1 by way of suggestion to PW.1 that he obtained loan of Rs.3,40,000/- only in the year 2017 and he repaid the said amount in the year 2017 itself. However that is not the defence taken by the accused in the defence evidence. It is the defence of the accused in the defence evidence that he took the loan of Rs.3,40,000/- in 2017 with interest at the rate of 10%. He paid the interest by way of cash. He had the factory of hollow blocks. The complainant sent her son and asked him to supply hollow blocks for their building construction. He supplied the hollow blocks to the complainant for the principal amount. However the accused has not produced any documents to show that he paid the interest at the rate of 10% to the complainant by way of cash. He has also not produced any documents to show that he had hollow blocks factory; the complainant asked him to supply hollow blocks through her son and he supplied the hollow blocks to the complainant. He would have produced the registration certificate of his business, order placed by complainant, bill/invoice raised by him, delivery challan/e-way bill for having supplied the blocks or he would have examined the person, who has supplied the blocks to the complainant. Nothing has been done to prove the said facts. It is also pertinent to note that the accused has not even specified the details as to when the order was placed and when the hollow

blocks were delivered to the complainant. Therefore the defence of the accused is not supported by any evidence and it is inconsistent, contradictory and vague.

18. It is the case of the complainant that the accused admitting the liability executed the loan agreement at Ex.P6 on 10.01.2018. It is the defence of the accused that he gave signed blank cheque and signed blank stamp paper and signed blank white sheet at the time of obtaining the loan. As per the version of the accused, he obtained loan of Rs.3,40,000/- through account in the year 2017. He admitted the credit of amounts as per Ex.P9, which are dated 10.04.2017, 23.05.2017, 26.05.2017 and 21.06.2017 amounting to Rs.3,40,000. The accused has not made clear as to when the blank signed cheque, blank signed stamp paper and blank signed white paper were given in the above four dates. The accused is not specific about the date. He stated that he gave them while availing the loan in the year 2017. However on perusal of Ex.P6, it is found that the stamp paper on which the loan agreement was executed is dated 10.01.2018 and the name of the purchaser of the stamp paper is shown as Parvez Pasha, who is the accused. The date of execution of the agreement is also same date. During the cross examination, the accused admitted that he purchased the stamp paper at Ex.P6. It is the defence of the accused in the cross examination of PW.1 that he repaid the loan amount of Rs.3,40,000/- in the year 2017 itself. It is the defence of the accused in the defence evidence that he supplied hollow blocks worth Rs.3,40,000/- to the complainant. There is no

document on record to prove either of the defences of the accused. If the accused had repaid the loan amount in the 2017 itself, it is not explained by the accused as to why he purchased the stamp paper stating himself as the second party and the complainant as first party with the description loan agreement by paying the stamp duty of Rs.200/-. Therefore the defence of the accused that he gave the blank signed stamp paper and blank signed white paper during the year 2017 is not at all believable. He admitted the signature found in Ex.P6, which is at Ex.P6(a). It was suggested in the cross examination of PW.1 that the first page of Ex.P6 is not signed by either of the parties and therefore it is created. PW.1 denied it. The signature of the accused and complainant not being on the first page i.e. stamp paper does not make any difference as the stamp paper at Ex.P6 was purchased by the accused himself with description loan agreement. The admission of accused of purchase of stamp paper at Ex.P6 and his signature in Ex.P6, clearly goes to show that the accused purchased the said stamp paper in order to execute loan agreement in favour of the complainant and he is merely denying

the execution in order to escape from the liability.

19. It is the case of the complainant that the accused issued the cheque at Ex.P1 on 01.03.2018. It is the defence of the accused that he gave signed blank cheque and signed blank stamp paper and signed blank white sheet at the time of obtaining the loan. As per the version of the accused, he obtained loan of Rs.3,40,000/- through account in the year 2017. He admitted the

credit of amounts as per Ex.P9, which are dated 10.04.2017, 23.05.2017, 26.05.2017 and 21.06.2017 amounting to Rs.3,40,000. The accused has not made clear as to when the blank signed cheque, blank signed stamp paper and blank signed white paper were given in the above four dates. The accused is not specific about the date. He stated that he gave them while availing the loan in the year 2017. On perusal of the ExP.1, it is clear that the cheque was drawn on 05.03.2018. As per the provision U/s. 118 (a) and (b) of NI Act, until the contrary is proved, it shall be presumed that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration and that every negotiable instrument bearing a date was made or drawn on such date. The burden is on the accused to prove that the cheque was issued in the year 2017 and not as on 05.03.2018.

20. In order to prove his defence, the accused produced ExD.14 and 15. ExD.14 is the bank account statement of the Axis Bank account of the accused to which the cheque belongs. The statement is produced to show that the cheque at ExP.1 was issued in 2017 i.e. between 01.01.2017 to 31.12.2017. ExD.15 is the cheque record slip. It discloses that the series cheque No.012791 to 012810 have been taken by the accused. The cheque number of the cheque at ExP.1 is 012795. ExD.15 is produced to show that the accused utilized the said cheques including cheque at ExP.1 in 2017 itself. On perusal of ExD.15, it discloses that the

cheque series number 012792 was utilized on 02.03.2017, No.012793 and 012794 were utilized on 10.03.2017. The name of the persons in whose favour cheques have been issued and the amounts are also mentioned. However there is no mention of name, date and amount in respect of the cheque at ExP.1. No.95

is only written in ExD.15 and in that number 9 is overwritten. When the contents of ExD.15 are verified with ExD.14 bank statement there is no debit in respect cheque series number 012792 to 012794. Moreover there is no entry in ExD.14 about the any of the cheque series number from 012791 to 012810. ExD.14(a) is the only cheque series found in ExD.14 on 09.03.2017, which is bearing No.012760. When the discrepancy is elicited in the cross examination, the accused stated that he has document and he can produce it. However no document is produced. Therefore the entries in ExD.15 not being corroborated with entries in ExD.14, it is not at believable that the cheque at ExP.1 was issued in 2017.

21. On the other hand, it was elicited in the cross examination of DW.1 that he has no bank pass book in respect of the account pertaining to the cheque at Ex.P1. He voluntarily stated that he has to obtain the bank statement. When it was asked as to whether he can produce the bank statement of the year 2018, he stated that the bank is not providing it and it can be summoned by the Court. When the accused produced the bank statement of the 2017, he would not have any hurdle to produce the bank statement of the year 2018. The accused stated that he

asked for the said statement and the bank has not given it and he can examine the bank official. Nothing has been done to produce the statement and therefore adverse inference can be drawn that if the statement of 2018 is produced it would go against him. The accused stated that generally when the cheque is presented for encashment, he receives the message to his mobile. He stated that he did not receive the message in respect of presentation of the cheque at ExP.1 on 05.03.2018. He voluntarily stated that on the next day the complainant came along with her associates and quarreled with him and he lost his mobile in the quarrel. He came to know about the misuse of cheque after receipt of summons. During his cross examination, when it was suggested to DW.1 that there is no connection between the loan transaction and the criminal case in CC.No.59448/2018 pending before the 11th ACMM, Bengaluru, he admitted it. He voluntarily stated that after filing of the cheque, the complainant came and quarreled with him. On perusal of Ex.D1 to 11, it is clear that the incident took place on 04.03.2018 at 2.30 pm. Therefore the evidence of accused that he lost the mobile on the next day of 05.03.2018 is not believable. It is also not believable that he came to know about the misuse of cheque after receiving the summons.

22. Apart from that there is no mention of issuance of blank signed cheque or blank signed paper in favour of the complainant in Ex.D4 and 5. The accused admitted during cross

examination that the cheque at Ex.P1 and the stamp paper at Ex.P6 are with the complainant. He stated that he had no hurdle

to mention about the cheque and the stamp paper being with the complainant at the time of Ex.D4 and 5. He did not gave any complaint till this day in respect of cheque and stamp paper being with the complainant. He has not issued notice to the complainant to return the cheque and stamp paper after repayment of loan as alleged by him. He did not take any action against the complainant for misusing the cheque and stamp paper. It was suggested to PW.1 that Ex.P6 is created but the accused failed to take any steps to prove the same. When the complainant failed to return the cheque and stamp payment even after repayment as alleged by the accused in the defence evidence, he would have issued stop payment instructions to the bank but the same has not been done. Therefore considering all the aspects, oral and documentary evidence on record it is clear that the accused failed to prove his defence as probable one by adducing cogent evidence by preponderance of probabilities.

23. The accused can rebut the presumption either by leading direct defence evidence or by relying on the evidence of the complainant on record. The counsel for the accused disputed the transaction and challenged the financial capacity of the complainant to lent huge amount of Rs.21,60,000/- by way of cash. The counsel for the accused cross examined PW.1 in respect of the financial capacity. It was elicited in the cross examination of PW.1 that she has been doing real estate business since 15 years but there is no name to the said business. She has not maintained the account in respect of the real estate business. She

is doing the business of arranging the houses for rent. She is earning Rs.10,000/- to 15,000/- per month from her real estate business. She is the income tax assessee and she has been filing the returns. She did not show the transaction by way of cash in the IT returns. On perusal of the said cross examination, it is clear that the complainant has not produced any documents to show that she is doing real estate business and she is having income from it. Though she has not reflected the transaction in the IT returns, it does not have any bearing on the case. The Supreme Court in the case of Assistant Director of Inspection v. A.B. Shanthi, (2002) 6 SCC 259 has held as follows:--

> "The object of introducing S. 269 is to ensure that a tax payer is not allowed to give false explanation for his

unaccounted money, or if he has given some false entries in his accounts, he shall not escape by giving false explanation for the same. During search and seizure unaccounted money is unearthed and the tax payer would usually give the explanation that he had borrowed or received deposits from his relatives or friends sand it is easy for the so-called lender also to manipulate his records later to suit the plea of the tax-payer. The main object of S. 269 SS was to curb this menace. "

In the light of the observations of the Supreme Court, it cannot but be said that Sec. 269 SS only provided for the mode of acceptance, payment or repayment in certain cases so as to

counteract evasion of tax. Sec. 269 SS does not declare all transactions of loan, by cash in excess of Rs.20,000/- as invalid, illegal or null and void, while as observed by the Supreme Court, the main object of introducing the provision was to curb and unearth black money.

24. It was further elicited in the cross examination of PW.1 that she gave Rs.25,00,000/- to the accused between the period from 10.04.2017 to 25.06.2017. She paid Rs.20,00,000/- by way of cash but she did not know the date. She did not obtain any acknowledgment receipt from the accused. She had the amount to an extent of Rs.20,00,000/- during the month of June 2017 in her account. She got the said amount from her business. Rinku Kumari was working in her parlour and she gave Rs.12,00,000/- to her and she got Rs.6,00,000/- from the lease business. She can examine the Rinku Kumari as a witness. Rinku Kumari gave Rs.12,00,000/- in the month of June 2017. Rinku Kumari is doing work with her and she had been paying Rs.8,000/- as salary to her. Rinku Kumari gave the lease amount of her father. It was further elicited that she transferred Rs.5,00,000/- to the account of the accused and she can produce the documents. She did not remember the date on which she transferred Rs.5,00,000/- through her account. She did not remember through which bank she has transferred the amount. The amount of Rs.12,00,000/- given by the Rinku Kumari is included in the amount of Rs.21,60,000/- lent by her to the accused by way of cash. She did not mention the same in the

complaint. On perusal of the cross examination, it is clear that

PW.1 stated that she had amount in her account but she did not produce the bank statement showing the same. She stated that she can examine the witness Rinku Kumari but she failed to examine her. Therefore adverse inference can be drawn that if the bank statement is produced and the witness is examined, the evidence would go against the complainant.

25. It was further elicited in the cross examination of PW.1 that the audit account took place in respect of her money lending business. When it was asked to PW.1 that whether she has reflected the loan transaction with the accused in the account audit between April 2017 to June 2017, PW.1 answered that Rs.3,40,000/- was reflected in the account audit but the remaining amount was given personally and therefore it is not reflected. She can produce the account audit document. Even though the complainant has not produced the audit account, adverse inference can not be drawn as it is stated by the complainant that the transaction in cash is not reflected in the audit account and the transaction through account is admitted fact.

26. It was further elicited in the cross examination of PW.1 that she paid the amount of loan to the accused in old notes. She gave the amount before the ban of notes. She could not say the denomination of the notes. Rinku Kumari gave the lease amount in the denomination of notes of Rs.500 and Rs.1,000/- and the said amount was given to the accused. The counsel for the

accused argued that as per the complaint she has stated that she has given hand loan Rs.25,00,000/- to the accused from 10th April 2017 to 25th June 2017 but the Government of India on 08th November 2016 announced ban of the notes of the denomination of Rs.500 and Rs.1,000/- of the Mahathama Gandi Series. She has stated in cross examination to given Rs.500 and Rs.1,000/- old notes to the accused but on that time there is no such a denomination of the notes available in India. The complainant has given contradictory statement and produced created document. The counsel for the complainant argued that the complainant has clearly stated in her cross examination that the said amount is given to accused through old notes (as per the complainant version-used notes and not banned notes). During the cross examination of PW.1 the counsel for the accused never put the question that the money given to the accused by complainant was old notes means banned notes. It is pertinent to note that after completion of the evidence, when the case was posted for argument on the accused side, the PW.1 was recalled for further cross examination and during the said cross examination, the counsel for the accused asked about the denomination of notes and whether the complainant paid the amount to the accused by way

of cash in the old notes or new notes. PW.1 stated that she gave the amount by way of cash in old notes of Rs.500/- and Rs.1,000/-. The said amount was given by Rinku Kumari and she gave the said amount to the accused. As per the notification dated 08.11.2016, the Government of India banned the old notes. The transaction alleged in the present case is of the year 2017.

Therefore there is no question of availability of banned notes during that period. Further the matter is pertaining to the year 2018 and the further cross examination of PW.1 was conducted in the year 2023. Therefore there are chances of discrepancies in the evidence. The Court has to consider the whole of the evidence and not any portion of it. If the whole of the evidence is considered, the answers elicited in respect of the banned notes, would not have any bearing on the case of the complainant.

27. The accused failed to prove his specific defence by preponderance of probabilities. Therefore the burden has not shifted on the complainant either to prove her case or to prove her financial capacity as per the settled law. Even then in order to prove her financial capacity, the complainant produced Ex.P7 to 11. It is undisputed fact that the complainant is carrying on the business of money lending as per Ex.P7 and 8. The accused also admitted that the complainant is doing money lending business. The complainant paid Rs.3,40,000/- through account as per Ex.P9. Though the documents at Ex.P10 and 11 are not concerned to the case in hand, they are produced to show the financial capacity of the complainant. On perusal of Ex.P10 it is clear that it is the lease agreement executed by the accused in favour of the complainant on 22.05.2017, wherein the lease amount is shown as Rs.6,00,000/-. It was suggested to PW.1 that it is created document as it does not bear the signature of accused on all the pages. On perusal of Ex.P10, it is found that the accused signed on the first page i.e., stamp paper and on the last page. The

stamp paper at Ex.P10 is purchased by complainant on 22.05.2017. The accused did not dispute his signature on the stamp paper and on the last page of the document. The accused has not explained as to when the said stamp paper was signed by him and for what purpose. It is his specific defence that he gave signed blank cheque, signed blank stamp paper at Ex.P6 and signed blank white sheet. However there is no mention in the defence evidence about the signature being made on the stamp paper purchased by the complainant. Further there is no suggestion in the cross examination of PW.1 as to under what circumstances the accused

signed Ex.P10. Such being the case, the burden is on the accused to explain the things and disprove the document.

28. Similarly on perusal of Ex.P11, it is clear that it is the lease agreement executed by the accused in favour of the Rinku Kumari on 06.01.2018, wherein the lease amount is shown as Rs.12,00,000/-. It was suggested to PW.1 that it is created document as it does not bear the signature of accused on all the pages. On perusal of Ex.P11, it is found that the accused signed on the last page of the document. It is pertinent to note that not only the accused but also the wife of the accused by name Naseera Khanum signed the document at Ex.P11. The stamp paper at Ex.P11 is purchased by accused and his wife on 06.01.2018 with the description lease agreement and the stamp duty is paid by accused and his wife. The accused did not dispute his signature on the document. The accused has not explained as to when the said stamp paper was signed by him and his wife and for what

purpose. It is his specific defence that he gave signed blank cheque, signed blank stamp paper at Ex.P6 and signed blank white sheet. However there is no mention in the defence evidence about the signature being made on document for which the stamp paper was purchased by him and his wife. Further there is no suggestion in the cross examination of PW.1 as to under what circumstances the accused signed Ex.P11. Such being the case, the burden is on the accused to explain the things and disprove the document.

29. The accused took inconsistent and contradictory defences and failed to prove that the defence raised by him is probable one. Such being the case, he can not question the financial capacity of the complainant. Though there are discrepancies in the evidence of the complainant, it is not that the complainant has not produced any documents to prove her financial capacity. The payment made as per Ex.P9 is admitted. The document at Ex.P6, which is the loan agreement executed by accused in favour of the complainant is proved. Apart from that though the complainant failed to produce any document to show that she is running real estate business, it is undisputed fact that she is money lender having licence during that period. Though the complainant has not produced any document to show that she has beauty parlour, the accused admitted in the cross examination that she is doing the said business. When the accused was cross examined and suggested that the complainant has financial capacity, he pleaded ignorance by stating that he did not know. If at all the complainant has no financial capacity to lend the

amount, the accused would have stated that she has no such capacity but the accused pleaded ignorance. He stated that he has no such capacity to borrow the loan. It is forthcoming from the evidence of the accused as per his version that he is doing construction business, hollow blocks factory and mineral water agency. He admitted that he has transactions in lakhs in the construction business. Therefore the version of the accused is not believable. Further the accused failed to take any action against the complainant for either misuse of cheque or for creating documents at Ex.P6, 10 and 11. He kept quiet without taking any action. No prudent man would keep quiet if the amount of Rs.25,00,000/- is involved, which is huge amount as per the accused himself. He failed to mention about the loan transaction and cheque and other document at least in the Ex.D4 and 5. However there is no whisper of any word about the same in Ex.D4 and 5. Therefore the defence of the accused that the complainant has no financial capacity is not tenable.

30. It is the defence of the accused that he issued signed blank cheques as security at the time of loan. On perusal of cheque, it is found that the signature and the contents are written with same ink. However even if the blank signed cheque was given and it was filled up later, it attracts the ingredients u/sec.138 of N.I Act. As per Section 20 of the N.I.Act, if the person signs and delivers Negotiable Instrument and it is left incomplete and thereby he authorizes the holder to complete the Negotiable Instrument and thereby he is liable for the amount

mentioned in the Negotiable Instrument. In the Judgment rendered by the Hon'ble Supreme Court of India in Bir Singh V/s.Mukesh Kumar reported in AIR 2019 SC 2446, it was held by the Hon'ble Apex Court that "If a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque. The onus would still be on the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence. Even a blank cheque leaf, voluntarily singed and handed over by the accused, which is towards some payment, would attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt." Therefore the blank signed cheque also attract the provision U/s.138 of NI Act, if some amount due is shown. In the case on hand the complainant proved that the amount is due. Hence the accused is liable. Therefore the defence of the accused is not tenable.

31. It is the defense of the accused that there is no transaction as alleged in the complaint and the complainant misused the blank signed cheque issued to him at the time of borrowing the loan. The counsel for the accused made several suggestions but the suggestions are denied by the complainant. Mere suggestions are not sufficient. On perusal of the entire cross examination of PW.1 nothing was elicited in support of the specific defence of the accused. The issuance of cheque and

signature on the cheque at ExP.1 are admitted. The drawer's signature on the cheque attracts the ratio laid down by the Hon'ble Supreme Court of India in its decisions reported in 2011 (11) SCC - 441 - Rangappa V/s.Sri.Mohan and SCC 2015 (8) Page No.378 - T.Vasanthakumar V/s.Vijayakumari and the recent Judgment delivered in Crl. Appeal No.508/2019 - Rohit Bhai Jeevanlal Patel V/s. State of Gujarath and another. The ratio is that the cheque shall be presumed to be for consideration unless and until the court forms a belief that the consideration does not exist or considers the non-existence of consideration was tenable that a prudent man would under no circumstances act upon the plea that the consideration does not exist.

32. For the reasons mentioned herein above, it is crystallized that the accused has utterly failed to prove that there was no existence of legally enforceable debt/liability between him and the complainant and he has not at all issued the instant cheque towards the discharge of legally enforceable liability of Rs.25,00,000/-. On the other hand, the complainant has proved that the accused issued the cheque for the legally enforceable liability; the cheque was dishonored due to the reason 'Funds Insufficient' and the notice issued by her was deemed to have been served on the accused. The complainant proved her case beyond all reasonable doubts. The accused failed to rebut the statutory presumptions U/s.118(a) & (b) and 139 of the N.I.Act. Accordingly the accused is found guilty for the offence punishable

U/s.138 of the N.I.Act. Hence, I proceed to answer the Point No.1 in Affirmative and Point No.2 in the Negative.

33. Point No.3 : In view of the reasons assigned in Point No.1 and 2 and under the facts and circumstances of the present case, I proceed to pass the following:-

ORDER

As per the provisions of Sec.255(2) Cr.P.C. the accused is hereby convicted for the offence punishable u/s.138 of NI Act, 1881 and sentenced to pay fine Rs.27,50,000/- (Rupees Twenty Seven Lakhs Fifty Thousand Only). On deposit of fine amount, the complainant is entitled for compensation of Rs.27,40,000/- (Rupees Twenty Seven Lakhs Forty Thousand Only). The remaining balance amount of Rs.10,000/- is to be forfeited to the State.

In default of payment of the fine amount accused shall undergo simple imprisonment for three months.

The personal bond executed by the accused is hereby stands cancelled and cash surety of Rs.5,000/- furnished by the accused shall be refunded to him after expiry of appeal period.

The copy of the judgment shall be furnished to the accused at free of cost.

(Dictated to the Stenographer, transcript thereof is computerized and printout taken by him, is verified and then pronounced by me in Open Court on this the 28th day of April-2023.) (Lokesh Dhanapal Havale) XV Addl. CMM., Bangalore.

53 CC.10324/2018(J) ANNEXURE Witnesses examined for the Complainant:-

PW.1 : Smt. Reshma Banu Documents marked for the Complainant:-

Ex.P1	: Cheque
Ex.P1(a)	: Signature of the accused
Ex.P2	: Bank endorsement
Ex.P3	: Office copy of the legal notice
Ex.P4	: Postal receipt
Ex.P5	: Postal envelope
Ex.P6	: Hand loan agreement
Ex.P6(a)	: Signature of the accused
Ex.P7 & 8	: 2 certified copies of money lending licences.
Ex.P9	: Bank statement
Ex.P10 & 11	: 2 lease agreements

Witnesses examined For Defence:-

DW.1 : Sri. Parveez Pasha Documents marked for Defence:-

Ex.D1 : C/c of order sheet in CC.No.59448/2018 Ex.D2 : C/c of Charge sheet Ex.D3 : C/c of FIR Ex.D4 to 6 : C/copies of 3 statements

54 CC.10324/2018(J) Ex.D7 : C/c of Spot Mahazar Ex.D8 : C/c of further statement of the accused Ex.D9 &10 : C/c of statements of 2 witnesses Ex.D11 : C/c of wound certificate Ex.D12 : Notarized copy of Aadhaar card Ex.D13 : Notarized copy of Pass port Ex.D14 : Statement of Axis bank Ex.D14(a) : Relevant portion in Ex.D14 Ex.D15 : Cheque record slip of Axis bank account (Lokesh Dhanapal Havale), XV Addl.CMM., Bengaluru.

55 CC.10324/2018(J) 28.04.2023 (Judgment Pronounced in the Open Court Vide Separate Order sheet) ORDER As per the provisions of Sec.255(2) Cr.P.C. the accused is hereby convicted for the offence punishable u/s.138 of NI Act, 1881 and sentenced to pay fine Rs.27,50,000/- (Rupees Twenty Seven Lakhs Fifty Thousand Only). On deposit of fine amount, the complainant is entitled for compensation of Rs.27,40,000/- (Rupees Twenty Seven Lakhs Forty Thousand Only). The remaining balance amount of Rs.10,000/- is to be forfeited to the State.

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XV Addl.CMM., Bengaluru.

56 CC.10324/2018(J)