IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL REVISION APPLICATION (AGAINST CONVICTION - NEGOTIABLE INSTRUMENT ACT) NO. 494 of 2019

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS. JUSTICE NISHA M. THAKORE

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Approved for Reporting	Yes	No
		NO

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KAPIL MANSUKHBHAI SOJITRA
Versus
STATE OF GUJARAT & ANR.

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Appearance:
MR MEET D PANSURIA(10170) for the Applicant(s) No. 1
MR DIPAN DESAI(2481) for the Respondent(s) No. 2
PUBLIC PROSECUTOR for the Respondent(s) No. 1

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CORAM:**HONOURABLE MS. JUSTICE NISHA M. THAKORE**
Date : 08/07/2026
ORAL JUDGMENT

1. The present application is filed under Section 397 read with Section 401 of the Code of Criminal Procedure, 1973, at the instance of original accused, being aggrieved and dissatisfied with the judgment and order dated 25th April 2019 passed by the learned 2nd Additional Sessions Judge, Jamnagar in Criminal Appeal No. 101 of 2017 and the judgment and order dated 8th August 2017 passed by the learned 3rd Additional Chief Judicial Magistrate, Jamnagar, in Criminal Case No. 4971 of 2015. By the said impugned judgment and order, the learned Sessions Judge has confirmed the conviction of the present applicant for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881, and the sentence of six months along with penalty of

Rs.5,000/- as directed by the learned Magistrate. The learned Sessions Judge has also upheld the order of the learned Magistrate awarding compensation in terms of the cheque amount under Section 357 of the Code. Hence, the present Revision Application at the instance of the original accused.

2. In order to appreciate the controversy raised in the present Revision Application, it would be appropriate to look into the case of the original complainant as averred in the complaint. As per the complainant- respondent No.2 herein, the present applicant was known to him for many years and the accused had approached him seeking financial help for his business and had thereby borrowed an amount of Rs.7 lakhs from him. The accused had assured him to repay the aforesaid amount on the due date and had thereby handed over a cheque of a sum of Rs.7 lakhs dated 5th May 2015. Accordingly, the cheque was deposited by him with the concerned bank, which had returned back on the ground of funds insufficient. In such circumstances, the legal notice was issued upon the accused, thereby cautioning him to make the repayment of the amount borrowed. Despite service of the legal notice, the accused had failed to make repayment of the amount borrowed.

2.1. With such averments made in the complaint, the complainant had approached the Court of learned Chief Judicial Magistrate, Jamnagar. The complaint was presented on 17th June 2015 and was registered as Criminal Case No. 4971 of 2015 under Section 138 of the Negotiable Instruments Act, 1881. The learned Magistrate, upon verification of the statement of the complainant and having perused the documents placed on record along with the complaint being satisfied with the maintainability of such complaint, had issued summons upon the accused. The accused had appeared before the learned Magistrate and had pleaded not guilty. The trial Court had proceeded with the summary trial of the case. The complainant had entered the witness box and his evidence was recorded at Exhibit 30. In support of his case, the list of documents produced on record were referred to and relied upon, which were admitted as an evidence. The details of the documentary evidences produced by the complainant are reproduced as under:

Particulars	Exh. No.
The original disputed cheque dated 5th May 2015.	13
The original memo issued by the concerned bank informing about cheque being bounced dated 15th May 2015.	14
The original legal notice issued to the accused dated 22nd May 2015.	15
The postal slip with regard to the legal notice served upon the accused through Registered Post A.D. dated 22nd May 2015.	16
The original postal acknowledgment slip with regard to the legal notice issued upon accused dated 27th May 2015.	17
The 7/12 extract of the father of the	18

complainant dated 5th June 2015.	
The payment slip of sale of cotton crop by father of complainant dated 4th November 2012	19
There are three other similar receipts for sale dated 8th November 2012, 5th September 2014 and 7th May 2015	20 to 22

2.2 Apart from the aforesaid evidence, the complainant has also examined witness named Yogeshbhai Dineshchandra Vaghadia- the Branch Manager of Axis Bank, at Exhibit 31. Through the said witness, the scan copy of the account opening form of the accused with bank seal has been produced on record at Exhibit 32. The PAN Card copy of the accused submitted before the concerned bank has been produced on record and admitted as Exhibit 33. The extract of the PAN card copy of the accused as verified by the bank has also been brought on record at Exhibit 34. The register indicating the details of issuance of cheque book to the accused has also been produced on record at Exhibit 35. The relevant entries in reference to cheque no.002581 to 002600 dated 6th March 2003, has been verified. The statement of account of the accused between the period 1st May 2015 to 31st May 2015 has been produced on record at Exhibit 36. In the aforesaid statement, on 5th May 2015, the zero balance is reported in the account of the accused. The Banker's Books evidence certificate has also been produced on record at Exhibit 37. The said witness has been called upon to verify the disputed cheque produced on record at Exhibit 13, which has been confirmed by him. The complainant has thereafter submitted his closing purshis at Exhibit 38.

2.3. On the other hand, the accused has examined one witness named Ramesh Parshottambhai Molya, whose evidence has been recorded at Exhibit 54. The said witness appears to be the brother-in-law of the accused, who has supported the defence raised by the accused about a land deal. Apart from the aforesaid witness being examined, the accused has also moved an application at Exhibit 56 praying for discovery of document, more particularly, the agreement entered upon by complainant with one Subhash Purjibhai Vasoya with regard to purchase of agricultural land at village Ravshiya, Taluka Kalavad, District Jamnagar. The aforesaid application has been vehemently objected by the complainant at the initial stage. After considering the objections, the learned Magistrate vide order dated 23rd March 2017 has directed the complainant to produce the original agreement on record or alternatively to agree for admitting such document as evidence. From the record, it transpires that the aforesaid document has been later on admitted as an evidence at Exhibit 57, in view of the endorsement made by the advocate for the complainant to be admitted as an evidence. The accused has also entered into the witness box and his evidence has been recorded at Exhibit 58. From the record, it transpires that the application was moved by the accused praying for witness summons to seek the presence of witness Subhashbhai Purjibhai Vasoya of village Ravshiya. It transpires that the learned Magistrate had granted such application; however, the summons could not be effected at the address provided of the said witness. Though, another application was moved praying for similar relief and seeking service of summons at new address, however the same has not been pursue by the accused in view of the pursis submitted by the accused closing his right to lead further evidence at Exh.59. It is required to be noted that the written arguments were permitted to be placed on record. The learned Magistrate upon appreciation of the entire evidence on record and considering the submission made by the learned advocates for the respective parties, by impugned judgment and order has convicted the present applicant for the offence punishable under Section 138 of the Negotiable Instruments Act while imposing sentence of a period of two months simple imprisonment and find of Rs.5000/-, failing which, further sentence of three month imprisonment has been imposed. The learned Magistrate has also provided compensation to the complainant of an amount equal to the cheque amount under Section 357 of the Code of Criminal Procedure.

2.4. Being aggrieved and dissatisfied with the aforesaid judgment and order of conviction passed by the learned Magistrate, the applicant – original accused has approached in appeal before the Court of 2nd Additional Sessions Judge, Jamnagar by filing appeal under Section 374 of the Code of Criminal Procedure. The said appeal was registered on 6.9.2017 as Criminal Appeal No.101 of 2017. Before learned Sessions Judge, it was contended that the cheque in question was misused by the complainant and the accused has been falsely implicated by filing false complaint. The reliance was placed on the agreement to sell produced on record at Exh.57. The impugned judgment and order of conviction was also assailed on the ground that considering the bank statement of the complainant, he was not financially capable to lend a huge amount of Rs.7 Lakhs. It was therefore, submitted that the cheque, which was given for security purposes in regard to the land transaction of the complainant with Subhash Kurjibhai Vasoya, has been utilized by raising a false story of an amount of Rs.7 Lakhs being borrowed by the accused. The learned Session Judge, upon re-appreciation of entire evidence on record, after taking into consideration the settled principle of law that the presumption under Section 118(a) and Section 139 of the Act are rebuttable and the standard of proof required for such rebuttal is preponderance of probabilities and not proof beyond reasonable doubt, was unable to accept the theory of misuse of the blank cheque and the financial capacity of the complainant as challenged by the accused. The learned Session Judge had agreed with the view of the learned Magistrate by holding that the complainant has succeeded to prove that the cheque in question has been issued in discharge of legally enforceable debt and on the other hand, the accused has miserably failed to rebut the presumption under Section 118 and Section 139 of the Act as arosed in favour of the complainant. The learned Session Judge has therefore by impugned judgment and order dismissed the appeal, thereby confirming conviction.

3. Considering the grounds raised in the revision memo and the submissions made by the learned Advocate for the applicant, this Court, at the stage of admission hearing of the

present revision application, was pleased to admit the application vide order dated 10th May 2019. Subsequently, vide oral order dated 20th June 2019, considering the fact that final hearing of the revision application was not possible, the applicant was directed to be released on bail on furnishing a personal bond with surety of like amount and was also directed to deposit 50% of the cheque amount within a period of two weeks thereafter. It was clarified that in case if the applicant fails to deposit such amount as directed, he shall not be released on bail. The matter was thereafter notified for final hearing under special assignment of old matters. With the able assistance of learned advocates appearing on record, the matter was finally heard. The record and proceedings, as directed, have been received from the respective Courts.

4. Mr. Meet D. Pansuriya, learned Advocate appearing for the applicant original accused, at the outset has submitted that despite there being an order of enlarging the applicant on bail by this Court, pending the present revision application, the applicant having failed to deposit 50% of the cheque amount which was a condition precedent for him being released on bail, the applicant having failed to abide by such condition, has undergone entire sentence period in the jail. He has, however, clarified that the penalty amount of Rs.5,000/- as imposed by the Courts below has been complied with. On merits of the case, learned advocate had submitted that the challenge to the impugned judgment and order is mainly raised on two issues. Firstly, despite cogent material being brought on record by the accused, both the Courts below failed to appreciate the aforesaid documents in its true

perspective in order to appreciate the defence raised by the accused that no amount as contended by the complainant has been borrowed by the applicant. It was therefore submitted that the specific defence of misuse of cheque by the complainant has been erroneously discarded by the Courts. Secondly, the defence of financial capacity of the complainant has been erroneously decided by recording the document in the nature of receipt of sale of crop produced on record by the complainant. Learned advocate had at the outset invited my attention to the agreement to sell executed in the year 2014 by the complainant with one Subhashbhai, which is admitted as an evidence at Exhibit 57. It was submitted that indisputably, the present applicant, being the neighbor of the complainant sharing common boundaries of agriculture field, had stood witness to such land transaction of the complainant. It was further pointed out from the agreement that the brother-in-law of the complainant viz. Rameshbhai had also stood witness to such transaction. The aforesaid land was agreed to be purchased by the complainant for which a token amount of Rs. 4.5 lakhs was paid. It was agreed between the parties to conclude such transaction within a period of nine months.It was submitted that the present applicant had categorically deposed before the Court that he had handed over the blank signed cheque, i.e. the disputed cheque to said Subhashbhai, thereby assuring him of the payment of remaining amount of sale consideration by standing surety on behalf of the complainant. He has further submitted that the said land transaction, however, could not culminate into a final sale deed in absence of the further consideration amount being paid. It was therefore submitted that a specific defence was raised that the cheque was handed over to Subhashbhai for security purpose towards the land transaction which was agreed between the complainant and the third party viz.Subhashbhai. Learned Advocate had further invited my attention to the evidence of Rameshbhai and has submitted that on bare appreciation of evidence of aforesaid witness, the defence has been successful to bring on record the fact that the cheque was handed over to the said third party viz. Subhashbhai. It was therefore submitted that the complainant cannot be termed as holder in due course so as to maintain a complaint under Section 138 of NI Act against the present applicant.

4.1. It was stated before the trial Court that since the said land transaction did not culminate into final sale deed, the cheque was required to be handed over back to the applicant. However, the complainant had retained the cheque and had misused the cheque by raising a false claim of amount of Rs. 7 lakhs being borrowed by the applicant. In this regard, the applicant had challenged the financial capacity of the complainant to lend such huge amount of Rs.7 lakhs. However, the Courts below, have on fallacy ground disbelieved the defence raised by the accused by observing that the theory of misuse of cheque and financial capacity goes contradictory to each other. It was pointed out that the Courts below have mainly taken into consideration the receipt dated 5th May, 2015 of the sale of agriculture produce, in the name of the father of the complainant of in order to show that the complainant had source of income to lend the amount to the accused. However, on close reading of the aforesaid receipt, it clearly suggests that such amount was to be paid upon sale of the agriculture produce. According to learned advocate, the Courts below failed to look into the mind of the complainant who has by bringing on record such false document, have tried to justify his source of income so as to bring home the charge alleged against the accused. He had further submitted that no document worth has been brought on record to prove that the accused has actually borrowed sum of Rs.7 lakhs from the complainant. It was further pointed out that the Courts below failed to take into consideration the fallacy in the evidence of the complaint despite the attention of the Courts being invited to the fact that no specific date on which the amount was lent to the accused and the cheque was handed over to the complainant, has been averred. It is only when the complainant was cross-examined, he has tried to improvise by stating that two months before the issuance of cheque, the amount was borrowed by the accused. The attention of this Court was further invited to the observations made by the learned Judge in this regard which, according to learned Advocate, are contradictory to the evidence on record.

4.2. The learned Advocate had mainly referred to and relied upon the evidence of witness Rameshbhai whose evidence has been wrongly discarded by the Courts below essentially on the ground that he was brother-in-law of the accused and was found to be related witness. According to learned advocate, merely because he was related to the accused itself may not be sufficient to discard the evidence. Otherwise, on appreciation of evidence of aforesaid witness, the fact that the blank signed cheque was handed over to Subhashbhai towards the land deal which had taken place with complainant has been brought on record which has remained uncontroverted in the cross-examination. It was further submitted that through the evidence of the accused, it has also been brought on record that the sale transaction had never went through. With such circumstances being remain uncontroverted on record, the Court ought to have believed the defencee of the accused about the cheque being not returned back by the complainant. On the contrary, the fact about non-disclosure of return of token amount was also required to be borne in mind.

4.3. As regards source of money is concerned, the same falls flat as argued earlier, the sole evidence i.e. the voucher of payment of the crops in the name of the father produced on record at Exhibit 22, does not in any manner establish the fact that the applicant was equipped with sufficient means to advance such loan of huge amount of Rs.7 lakhs. With such evidence on record, according to learned advocate, a probable defence has emerged on record and there was rebuttal to the case put forward by the complainant. In order to substantiate his argument, learned advocate has placed reliance upon the following judgments:

(1) **Basalingappa vs. Mudibasappa** reported in **(2019) 5 SCC 418** (Para 24 to 27).

(2). **Rohitbhai Jivanlal Patel vs. State of Gujarat and others**, reported in **AIR 2019 SC 1876 :2019 (18) SCC 106(** Paragraph 4)

(3) Unreported judgment dated 4th November 2025 passed in **Criminal Appeal No. 199 of 2011**, **Mehta Nileshkumar Vishnuprasad vs. State of Gujarat and another (**Paragraph 11).

(4). **M.S. Narayana Menon alias Mani vs. State of Kerala and another**, **(2006) 6 SCC 39**, (Paragraph 33 to 37)

5. On the other hand, learned advocate Mr. Dipan Desai appearing for the respondent no.2- original complainant has apprised this Court about the scheme of Negotiable Instruments Act. It was submitted that admittedly, there is no challenge to the signature of the applicant on the disputed cheque and the fact that the cheque was issued by the accused. With such undisputed facts being on record, the presumption under Section 118 and 139 of the Act are required to be drawn in favour of the complainant that the cheque was received towards discharge of liability. Unless the aforesaid presumption drawn in favour of the complainant is rebutted by leading probable defence on record, the order of conviction for the offence under Section 138 of NI Act is bound to follow. In order to meet with the two-fold arguments/ defence raised by the accused, firstly with regard to the misuse of cheque/cheque being given as security and secondly financial capacity of the accused, learned advocate had invited my attention to the concurrent findings and reasons assigned by the learned Magistrate as well as by the learned Session Judge. Referring to the aforesaid findings and reasons assigned by the Courts below, it was submitted that both the Courts have in detail appreciated the entire evidence on

record and has thereafter concurrently held that no probable defence has been brought on record so as to shift the onus upon the complainant to prove his case beyond reasonable doubt. It was submitted that though the theory of misuse of cheque or the cheque being given as security has been raised by the accused, the Courts have in its right perspective appreciated the evidence of the complainant, the evidence of the accused (Exhibit 58), the evidence of the witness Rameshbhai (Exh.54) as well as the documentary evidence in the nature of agreement to sell (Exhibit 57). On close appreciation of the aforesaid evidences, no error can be found with the findings of the Courts below in holding that the cheque in dispute has not been mentioned in the agreement to sell (Exhibit 57). In absence of any documentary evidence to justify the defence raised by the accused, the Court upon appreciation of the oral evidence has rightly found that no evidence has been led on record to suggest that the cheque in question was handed over to Subhashbhai as security cheque. Admittedly, the witness Subhashbhai has not been examined by the accused in this regard. In such circumstances, the Court has looked into the evidence of the Rameshbhai Moliya (Exh.54), however on re-appreciation of the witness who is otherwise brother in law of the accused, it has transpired that he was not well versed with the transaction in question, for which, he has been called upon as witness. As regards the defence of financial capacity of the complainant is concerned, the very fact that the complainant had agreed to purchase the agriculture land as borne out from the agreement to sell produced on record at Exh.57, it suggests that the complainant had paid token sum of Rs.4,50,000/- towards said land transaction, to which, the accused had signed as witness. Though, it is argued that there is contradiction in deposition of the complainant as against the documentary evidence produced on record at Exh.20 which is voucher issued in the name of the father, the fact remains that the family which was residing jointly, the complainant was well settled in life with good means. It is an undisputed fact that the father of the complainant is holding 35 vighas of agriculture land. Apart from the fact that the complainant is also owing factory. On the contrary, accused in his cross examination has admitted to the fact that the complainant is well settled in life. It was further submitted that the very fact that the accused has failed to deposit the 50% of the cheque amount as directed by this Court in the present proceedings suggest that the accused was in need of financial help. From the findings and reasons assigned by the learned Sessions Judge, it was pointed that the Courts below have referred to and relied upon Bank Statement of the complainant (Exh.45) as produced on record. Learned advocate has therefore submitted that in absence of any reply given to the legal notice issued by the complainant under Section 138 of the NI Act, a prudent man whose cheque has been misused would immediately move to the concerned police station to lodge a complaint or at least to report to the concerned bank for stop payment, the Courts below have rightly arrived at a conclusion that the defence raised as an afterthought raised the story of having handed over the cheque towards security. In light of the concurrent findings and reasons assigned by the Courts below, learned advocate submitted that considering the scope of revisional jurisdiction under Section

397 read with Section 401 of the Code, this Court may not interfere with the impugned judgment and order of conviction and has prayed for dismissal of the revision application. In support of his submission, learned advocate has placed reliance upon the following judgments:

(1). **Jagannath Choudhary and Others vs. Ramayan Singh and Another** reported in (**2002) 5 SCC 659 (para 9 to 11.**
(2). **Sanjaysinh Ramrao Chavan vs. Dattatray Gulabrao Phalke** reported in **(2015) 3 SCC 123 (Para 14).**
(3). **Rohitbhai Jivanlal Patel vs. State of Gujarat and Another** reported in **(2019) 18 SCC 106 (Para 5, 15, 16,17, 18 & 25)**

6. I have heard the learned advocates appearing for the respective parties at length. I have carefully considered their arguments in light of the findings and reasons assigned by the Courts below. I have carefully gone through the binding precedents as relied upon by the learned advocates during the course of the hearing. On careful re-appreciation of the entire evidence on record in light of the submissions made by the learned advocate for the respective parties, the question which arises for consideration of this Court in the present revision application is as to whether the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, in the facts of the case and the evidence brought on record so as to quash

and set aside the impugned judgment and order of conviction passed by the Courts below under Section 138 of the Negotiable Instruments Act, 1881?

7. In order to appreciate the aforesaid determination of the point, this Court being examining the impugned judgment and order in the revisional jurisdiction, is required to look into the twofold basic questions. Firstly, as to whether the complainant has established the ingredients of Sections 118 and 139 of the NI Act, so as to justify drawing of the presumption envisaged therein. Secondly, whether the applicant -accused has been able to displace such presumption and to establish a probable defence whereby it could have been said that the onus has once again shifted upon the complainant to prove his case beyond reasonable doubt. At this stage, it would be appropriate to consider the scheme of the special enactment as considered by the Hon'ble Supreme Court in the case of **Rohitbhai Jivanlal Patel (supra)**. Profitably, it would be appropriate to reproduce the relevant observations with regard to the appreciation of the provisions contained in Section 118 and Section 139 of the Act. The same reads as under:

> *"14. We may usefully take note of the provisions contained in Sections 118 and 139, being the special rules of evidence applicable to the case as follows8:*
>
> *8 The principal and charging part of Section 138 NI Act may also be extracted for ready reference as follows:*
>
> *"138 Dishonour of cheque for insufficiency, etc., of funds in the account.*

Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act ,be punished with imprisonment for [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both;

"118. Presumption 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;

(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 endorsements 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 course----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 of fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him."

"139. Presumption in favour of holder ---- It shall be presumed, unless the contrary is proved, that the holder is a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, if any debt or other liability."

15. So far the question of existence of basic ingredients for drawing of presumption under Sections 118 and 139 the NI Act is concerned, apparent it is that the accused-appellant could not deny his signature on the cheques in question that had been drawn in favour of the complainant on a bank account maintained by the accused for a sum of Rs. 3 lakhs each. The said cheques were presented to the Bank concerned within the period of their validity and were returned unpaid for the reason of either the balance being insufficient or the account being closed. All the basic ingredients of Section 138 as also of Sections 118 and 139 are apparent on the face of the record. The Trial Court had also consciously taken note of these facts and had drawn the requisite presumption. Therefore, it is required to be presumed that the cheques in question were drawn for consideration and the holder of the cheques i.e., the complainant received the same in discharge of an existing debt. The onus, therefore, shifts on the accused-appellant to establish a probable defence so as to rebut such a presumption."

8. Keeping in mind the aforesaid principles, if one looks at the facts of the case, admittedly, there is no challenge to the signature endorsed on the disputed cheque by the applicant. It is also established on record that the cheque in question

had been drawn from the bank account maintained by the accused. The said cheque was presented to the bank concerned within the period of its validity and has returned unpaid for the reason of funds insufficient. With such evidence on record, the basic ingredients of Section 138 as also of Sections 118 and 139 are apparent on the face of the record. With such material on record, in view of Section 118(a) read with Section 139 of the Act of 1881, the Courts were bound to raise a presumption in favour of the complainant that the cheque in question was drawn for consideration and the holder of the cheque i.e. the complainant, had received the same in discharge of an existing debt. Having satisfied with the aforesaid basic ingredients, the onus was shifted upon the accused to establish a probable defence so as to rebut such presumption.

9. As regards the aspect of preponderance of probability is concerned, it is a well-settled principle that the accused is not required to meet a strict standard of proof to establish his defence. Even a preponderance of probability in the nature which creates doubt about the existence of a legally enforceable debt or liability, if raised, the case of the prosecution fails. Thus, what was expected from the accused was to bring on record such facts and such circumstances which would have led the Court to conclude either that the consideration did not exist or that its non-existence was so probable that a prudent man would, under the circumstances of the case, act upon the plea that consideration did not exist.

10. From the record, it is evident that the accused himself has entered into the witness box as well as has also examined a witness and has led documentary evidence in order to justify his two-fold defence. The core contention which has been raised by the learned advocate for the applicant is mainly based on the agreement to sell and the evidence of witness Rameshbhai Moliya (Exhibit 54). I have carefully considered the agreement to sell admitted as evidence at Exhibit 57. On bare appreciation of the contents of the agreement to sell, it is evident that the complainant in the year 2014 had agreed to purchase various parcel of agriculture land from a third party named Subhashbhai for a consideration amount. As against the aforesaid land transaction, the complainant had paid a token amount of Rs.4,50,000/- in cash to the owner of the said lands. It is also evident from the said agreement to sell that the present applicant as well as the witness named Rameshbhai Parshottam Moliya (Exhibit 54) had stood witness to such agreement. However, it is also apparent that there is no reference to any blank cheque signed by the accused-present applicant herein being handed over to the said Subhashbhai as security. Merely the witness Rameshbhai Moliya (Exhibit 54) having deposed before the Court about the aforesaid fact may not be treated as substantive evidence to draw an inference about such defence of the cheque being handed over to Subhashbhai as security. It is required to be noted that the Courts below have rightly appreciated the evidence of the said witness bearing in mind the fact that he was a related witness to the accused and having admitted the fact that he was not aware of the present transaction. As

against that, if the evidence of the accused is examined closely, it is stated that the land deal had failed on the ground that the said seller, Subhashbhai Kurji, was unable to correct the land records by carrying out appropriate succession entries. It is further stated that the said Subhashbhai had not repaid the token amount of Rs.4.5 Lakhs and the cheque handed over to Subhashbhai Kurji was taken back by the present applicant. If the aforesaid evidence of the accused is to be accepted then, as a prudent man, the conduct of the applicant expected was to either immediately lodge a criminal complaint against the complainant without waiting for the complainant to issue any legal notice under Section 138 of the NI Act. The conduct of a prudent man would be to issue appropriate instructions to the bank for stop payment of such cheque before it is presented for encashment. It is apparent from the cross-examination of the accused that he has not initiated or pursued any of this remedy though he had raised a specific grievance of misuse of the cheque being given as security. In absence of the examination of witness Subhashbhai, who otherwise would have been a star witness to the defence of the accused of the cheque being entrusted to the said witness and not to the present complainant and the cheque being misused, which was otherwise given as security, with such evidence of the accused and the witness at Exhibit 54 being appreciated, no error can be found with the Courts below in holding that the accused has failed to prove its probable defence. In the absence of such conduct of the applicant, the Courts below have rightly arrived at a conclusion that the applicant has failed to bring on record a probable defence justifying his specific defence of misuse of the cheque given as security.

11. As regards the second argument of financial capacity is concerned, admittedly, no reply was given by the applicant-original accused to the legal notice despite being served. Learned advocate for the applicant has emphasized much on the fact that the document produced on record at Exhibit 22-the voucher of the acknowledgment of payment towards cash crop. I have carefully appreciated the content of the said voucher as against the crucial date i.e. 5th of May 2015 being the date on which the cheque was issued. It is required to be noted that though initially in the complaint the complainant has not disclosed the exact date on which the amount of Rs.7 Lakhs was borrowed by the applicant-original accused, however in his cross-examination he has responded to the question put forward by the counsel for the defence that such amount was borrowed two months prior to the date of issuance of the cheque. Thus, it is apparent that the amount was borrowed nearby in the month of March 2015. As against that, the complainant has brought on record the statement of account at Exhibit 45 between the period 1st April 2013 to 31st May 2015. It shows the transaction of credit/debit entry of around Rs.7 Lakhs. Apart from the aforesaid transactions, it is an admitted fact that the applicant is earning income from agriculture resources as well as from the factory owned by him at Jamnagar. The father of the applicant is also holding a huge parcel of agriculture lands admeasuring 35 vighas. The fact which has borne out on record is that the family is

residing together and as per the own admission of the accused in his cross-examination, the family of the complainant is well settled financially. With such evidence on record, in absence of any contradictory evidence being brought on record, in my view, the Courts below have rightly not entertained the defence of the financial capacity of the complainant as being challenged by the accused.

12. Having appreciated the entire evidence on record in light of the arguments advanced by the learned advocate for the respective parties and in absence of any irregularity in the procedure adopted by the Courts below, any neglect of proper precaution or any illegality or impropriety in passing the impugned judgment and order of conviction being noticed, this Court is not inclined to exercise its revisional jurisdiction to interfere with the impugned judgment and order of conviction.

13. For the foregoing reasons, the impugned judgment and order dated 25th April 2019 passed by the learned 2nd Additional Sessions Judge, Jamnagar in Criminal Appeal No. 101 of 2017 upholding the judgment and order dated 8th August 2017 passed by the learned 3rd Additional Chief Judicial Magistrate, Jamnagar, in Criminal Case No. 4971 of 2015 is hereby confirmed. Resultantly, the revision application fails.

14. The record and proceedings be sent back to the respective Courts below forthwith along with the writ of the

judgment.

15. At this stage, it is required to be noted that the applicant – original accused has already undergone sentence as imposed by the concerned Court. In light of the same, the applicant- original accused is directed to deposit the amount of cheque towards the compensation as awarded by the Court below in view of Section 357 of the Code of Criminal Procedure, 1973 within a period of 8 weeks from today, failing which, it shall be open for the respondent no.2-original complainant to pursue the appropriate remedy available under the law.

16. With these observations, present Criminal Revision Application stands disposed of.

sd/-

(NISHA M. THAKORE,J)

RATHOD KAUSHIKSINH