NEUTRAL CITATION
2026:GUJHC:49846

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL APPEAL NO. 1398 of 2011

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE HEMANT M. PRACHCHHAK Sd/-

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Approved for Reporting	Yes	No
	✓	

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HARSHAD U KAMLE
Versus
STATE OF GUJARAT & ANR.

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Appearance:
MR HRIDAY BUCH(2372) for the Appellant(s) No. 1
ADVOCATE NOTICE SERVED for the Opponent(s)/Respondent(s) No. 2
MR RASESH H PARIKH(3862) for the Opponent(s)/Respondent(s) No. 2
MR.HEMANG H PARIKH(2628) for the Opponent(s)/Respondent(s) No. 2
MS JIRGA JHAVERI ADDITIONAL PUBLIC PROSECUTOR for the Opponent(s)/Respondent(s) No. 1

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CORAM: HONOURABLE MR. JUSTICE HEMANT M. PRACHCHHAK

Date : 07/08/2026

JUDGMENT

1. The appellant-original complainant has preferred this appeal under Section 378 of the Code of Criminal Procedure, 1973 against the judgment and order of acquittal dated 08.06.2011 passed by the learned Principal Sessions Judge, Rajkot (hereinafter be referred to as “the First Appellate Court”) in Sessions Case No.149 of 2009 whereby the First Appellate Court has quashed and set aside the order dated

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18.08.2009 passed in Criminal Case No.4509 of 2006 below Exh.58 by learned 5th Additional Senior Civil Judge and Judicial Magistrate First Class, Nadiad (hereinafter be referred to as "the Trial Court") and acquitted the respondent accused from the charges under Section 138 of the Negotiable Instruments Act (hereinafter be referred to as the "N.I. Act") .

2. Brief Facts Giving Rise to the Present Appeal are that Respondent No. 2 was managing the affairs of a trust, namely Tapsvi Charitable Trust, as its trustee. For the purpose of running the affairs of the Trust, Respondent No. 2 required a premises and, therefore, took a portion of the appellant's hospital property on rent. Respondent No. 2 was liable to pay rent for the said premises.

2.1 Respondent No. 2 also borrowed amounts of Rs. 50,000/-, Rs. 2,00,000/-, and Rs. 50,000/- from the appellant, and Rs. 2,00,000/- from the appellant's wife, for the proper management of the Trust and for carrying out its various activities. Besides the said loans, rent amounting to Rs. 1,50,000/- was also payable by Respondent No. 2. Despite repeated demands, Respondent No. 2 failed to repay the amounts due. Upon persistent insistence by the appellant, Respondent No. 2 acknowledged her liability and executed a promissory note and a written undertaking agreeing to repay the outstanding amount.

2.2 As neither the Trust nor Respondent No. 2 repaid the outstanding dues for a considerable period, Respondent No. 2,

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in acknowledgment of her personal liability, issued Cheque No. 235630 dated 01.06.2006, drawn on Bank of Baroda, Kothi Branch, Vadodara, for a sum of Rs. 6,50,000/- in favour of the appellant. The appellant presented the said cheque for encashment through his account maintained with Central Bank of India, Petlad Road Branch, Nadiad. However, the cheque was dishonoured and returned unpaid with the endorsement "Insufficient Funds."

2.3 Consequently, the appellant, through his Advocate, issued a statutory legal notice dated 28.06.2006, calling upon Respondent No. 2 to make payment of the cheque amount within the prescribed period, failing which proceedings under Section 138 of the Negotiable Instruments Act would be initiated.

2.4 The said notice was served upon Respondent No. 2 on 02.07.2006. In reply, Respondent No. 2 denied the contents of the notice. Although she did not dispute the issuance of the cheque, she denied the existence of any legally enforceable debt or liability.

2.5 As Respondent No. 2 failed to make payment despite service of the statutory notice, the appellant was constrained to initiate proceedings under Section 138 of the Negotiable Instruments Act by filing a complaint on 11.08.2006 before the learned Judicial Magistrate First Class, Nadiad.

2.6 Process was issued under Section 204 of the Code of Criminal Procedure, 1973. Respondent No. 2 appeared before

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the trial Court and pleaded not guilty, whereupon the trial commenced.

2.7 To prove his case the appellant has examined one witness namely Dr. Harshad U. Kamli – complainant at Exh.9 and led following documentary evidence:-

Sr. No.	Exhibit No.	Description of Document
1	14	Cheque No. 235630 dated 01/06/2006 for Rs.6,50,000/- issued by the accused to the complainant
2	15	Original Bank Return Memo showing the reason for dishonor of cheque
3	16	Letter/Intimation issued by Central Bank of India to the complainant regarding the return of cheque
4	17	Office copy of the notice issued to the accused
5	18	Original Registered A.D. receipt signed by the accused acknowledging receipt of the notice issued
6	19	U.P.C. Certificate
7	20	Original reply to the notice issued to the accused
8	21	Settlement Agreement
9	23	Letter dated 08/05/2005 written to the accused by the complainant and Dr. Vijaykumar Patel

2.8 Upon completion of the oral and documentary evidence, the appellant filed a closing purshis at Exhibit-43. Respondent No. 2 did not enter the witness box or adduce any oral evidence in her defence. She only furnished her statement under Section 313 of the Code of Cr. P.C.

2.9 After hearing both the parties and after evaluating the evidence placed on record the trial Court vide order dated 18.8.2009 convicted the respondent accused for the offence punishable under Section 138 of the N.I. Act and imposed simple imprisonment for a period of 3 months and fine of

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Rs.1000/- and in default 30 days simple imprisonment. Further the Trial Court has also directed the accused to pay Rs.6,50,000/- to the the present appellant.

2.10 Being aggrieved and dissatisfied with the aforesaid order of Trial Court, the accused approached First Appellate Court by filing Criminal Appeal No.71 of 2009 below Exh.29 wherein the First Appellate Court has quashed and set aside the order dated 18.08.2009 passed by the Trial Court and acquitted the respondent accused from the charges under Section 138 of N.I. Act.

2.11 Being aggrieved and dissatisfied with the order of acquittal passed by the First Appellate Court, the original complainant has filed present appeal.

3. Heard Mr. Hriday Buch, learned counsel for the appellant, Mr. Hemang Parikh, learned counsel for respondent No.2 and Ms. Jirga Jhaveri, learned APP for the State of Gujarat.

4. Mr. Buch, learned counsel for the appellant, has taken this Court through the judgments and orders of the Trial Court and the First Appellate Court. In the wake of his submissions, he contends that the learned Judge of the Appellate Court committed a serious error of law and fact by passing the impugned judgment and order of acquittal, thereby reversing the findings recorded by the Trial Court without providing any cogent reasons and without identifying any illegality in the Trial Court's judgment.

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4.1 Mr. Buch, learned counsel for the appellant has submitted that the Trial Court, after properly appreciating the documentary evidence produced before it, rightly held the respondent guilty of the offense under Section 138 of the Negotiable Instruments (N.I.) Act and held the respondent liable to pay compensation of Rs. 6,50,000/-.

4.2 Mr. Buch, learned counsel for the appellant has submitted that the First Appellate Court has misapplied the law and ignored material evidence, thereby rendering the order perverse and unsustainable. The First Appellate Court failed to appreciate that the respondent No.2 did not discharge the statutory burden under Section 139 of the Act. He has submitted that her signature on the cheque and its contents were never disputed. Even in her reply to the statutory notice, no categorical denial was made. Vague averments cannot rebut the statutory presumption. Dishonest conduct from inception disentitles respondent No.2 from any discretionary relief.

4.3 Mr. Buch, learned counsel for the appellant has submitted that the First Appellate Court erred in holding that the liability was of the trust and hence trustees ought to have been joined as accused. He has submitted that the appellant's case consistently was that respondent No.2 accepted the trust's liability personally and issued the cheque in her individual capacity. Hence, joining of the trust or trustees as parties was unnecessary. The contrary finding is wholly erroneous. Learned counsel for the appellant has relied upon

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the decision passed by The Hon'ble Supreme Court, in case of ***Sankar Padam Thapa Versus Vijaykumar Dineshchandra Agarwal 2025(0) AIJEL-SC 75982***" wherein it is held that "If in a trust, complaint is against trustee and when a cause of action arises due to an alleged dishonor of cheque and a complaint is initiated under NI Act, the same is maintainable against Trustee who has signed cheque, without requirement to array Trust also as an accused."

4.4 Mr. Buch, learned counsel for the appellant has submitted that the First Appellate Court concludes that dues were not personal dues of respondent and that since the trust/other trustees are not joined as party, benefit is extended to accused person. The said view is in complete contradiction with the view taken by the Hon'ble Supreme court in the case of ***Bijoy Kumar Moni Versus Paresh Manna Criminal Appeal No.556 of 2024 2024 AIJEL SC 74454*** more particularly para 52 of the said judgement.

4.5 Mr. Buch, learned counsel for the appellant has submitted that Section 138 NI Act clearly provides that dishonor of a cheque issued towards discharge of any legally enforceable debt or liability constitutes an offence. He has submitted that Respondent No.2 admitted the dues of the trust and accepted liability personally. Issuance of cheque in her name squarely attracts Section 138.

4.6 Mr. Buch, learned counsel for the appellant has submitted that the First Appellate Court wrongly held that the appellant failed to examine his wife Sashiben or prove her capacity to

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lend Rs. 2 lakhs. The appellant's evidence clearly established that Sashiben was employed as Laboratory Assistant, earning salary, and lent the amount from her savings. The finding is contrary to record and perverse.

4.7 Mr. Buch, learned counsel for the appellant has submitted that the First Appellate Court wrongly cast the burden upon the appellant to prove written documentation of the loan. Under Sections 138 and 139 NI Act, presumption operates in favour of the holder of the cheque. It was for respondent No.2 to rebut the presumption, which she failed to do. The finding that no loan was advanced is based on conjecture and contrary to statutory scheme.

4.8 Mr. Buch, learned counsel for the appellant has submitted that the First Appellate Court's discussion on rent receipts and income tax returns is misplaced. Non-production of returns does not render the appellant's case doubtful. Occupation of hospital premises by respondent No.2 is undisputed. No positive evidence of rent payment was produced by respondent No.2. Hence, adverse inference against appellant is unjustified.

4.9 Mr. Buch, learned counsel for the appellant has submitted that the First Appellate Court have misread the agreement (Samadhan Karar) dated 16.03.2005 (Exh.21) and have also misread the "Bahedhari Patra" (Exh.41) (Guarantee Letter), which shows the liability of the respondent No.2 toward the appellant herein. The documents clearly records dues of respondent No.2. The contrary finding is based

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misinterpretation and is erroneous. The First Appellate Court erred in holding that respondent No.2 did not accept liability in her individual capacity. He has submitted that the oral and documentary evidence of appellant was ignored. Respondent No.2 neither examined herself nor produced any evidence. Hence, appellant's evidence ought to have been accepted.

4.10 Mr. Buch, learned counsel for the appellant has submitted that the Learned Session court ought not to have overlooked exhibited document at Exh.41. The existence of the said exhibited document is completely ignored by the First Appellate Court. The said document goes to the root and proves beyond all reasonable doubt with no other possible view except the guilt of the Respondent accused.

4.11 Mr. Buch, learned counsel for the appellant has submitted that the impugned judgment and order passed by the First Appellate Court is illegal, perverse, and contrary to the evidence on record, the provisions of the Negotiable Instruments Act, and the settled principles of law. He has submitted that the First Appellate Court failed to appreciate that respondent No.2 did not rebut the statutory presumption under Section 139 of the Act. Her signature on the cheque and its contents were never disputed, and even her reply to the statutory notice contained no specific denial.

4.12 Mr. Buch, learned counsel for the appellant has submitted that the First Appellate Court erred in holding that the Trust and its trustees ought to have been impleaded. He has submitted that the appellant consistently pleaded that

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respondent No.2 personally accepted the Trust's liability and issued the cheque in her individual capacity. Hence, the complaint was maintainable against her alone under Section 138 of the Act.

4.13 Mr. Buch, learned counsel for the appellant has submitted that the First Appellate Court misapplied Sections 138 and 139 of the Act by casting the burden on the appellant instead of requiring respondent No.2 to rebut the statutory presumption. The finding that no legally enforceable liability existed is contrary to law.

4.14 Mr. Buch, learned counsel for the appellant has submitted that the finding that the appellant failed to prove the loan of Rs.2,00,000/- is erroneous. The appellant's evidence established that his wife, Sashiben, was employed as a Laboratory Assistant, had independent earnings, and advanced the amount from her savings.

4.15 Mr. Buch, learned counsel for the appellant has submitted that the First Appellate Court wrongly insisted upon written proof of the loan. In the absence of rebuttal evidence from respondent No.2, the statutory presumption under Section 139 remained unrebutted.

4.16 Mr. Buch, learned counsel for the appellant has submitted that the First Appellate Court misread the documentary evidence, particularly the Samadhan Karar (Exh.21) and Bahedhari Patra (Exh.41), which clearly establish respondent No.2's liability. The contrary findings are

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based on misinterpretation of the record.

4.17 Mr. Buch, learned counsel for the appellant has submitted that the First Appellate Court exceeded its appellate jurisdiction under Sections 374 and 386 of the Code by reversing the well-reasoned judgment of conviction passed by the Learned Magistrate without any valid legal basis.

4.18 Mr. Buch, learned counsel for the appellant has submitted that the impugned judgment and order of acquittal being illegal, perverse, contrary to law and evidence, deserves to be quashed and set aside, and the judgment of conviction passed by the Trial Court deserves to be restored.

4.19 Mr. Buch, learned counsel for the appellant has referred and relied upon the following decisions:-

1. *Sankar Padam Thapa Versus Vijaykumar Dineshchandra Agarwal (supra)*

2. *Bijoy Kumar Moni Versus Paresh Manna (supra)*

5. On the other hand, Mr. Hemant Parikh, learned counsel for the respondent-accused, has submitted that the appellant (original complainant) failed to prove that the respondent was guilty under Section 138 of the N.I. Act. He contends that the appellant failed to establish the existence of any legally enforceable debt owed by the respondent for which the cheque of Rs. 6,50,000/- was allegedly issued in favor of the appellant.

5.1 Mr. Parikh, learned counsel for the respondent accused

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has submitted that the Trial Court failed to appreciate the documentary evidence produced before it in its true and proper spirit, and thus the conviction recorded by the Trial Court against the respondent was bad in law. Consequently, the First Appellate Court rightly passed the impugned judgment and order of acquittal in favor of the respondent, which is just and proper.

5.2 Mr. Parikh, learned counsel has submitted that since the present appeal is against an order of acquittal, no interference is warranted by this Court unless grave illegality or perversity is established in the impugned judgment of the First Appellate Court.

5.3 Mr. Parikh, learned counsel for the respondent has submitted that there is no perversity or illegality committed by the First Appellate Court in passing the Judgment in Criminal Appeal No. 71 of 2009 whereby the Order passed by the Ld. Trial Court is quashed and set aside and acquitted Respondent No.2. He has submitted that First Appellate Court had not committed any error in appreciating the oral as well as documentary evidence produced in the Criminal Case No. 4509 of 2006. He has submitted that the First Appellate Court had appreciated the evidence in its true and letter spirit and also followed the Judgments declared by this Hon'ble Court as well as by the Hon'ble Apex Court. He has submitted that the Complainant had failed to prove that Rs.6,50,000/- was due and payable by the Respondent No.2 and towards the said debt, that he had received a cheque on 01.06.2006. He has submitted that the First Appellate Court had considered the

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fact that as per the Agreement below Exh. 21, the Complainant and 02 other persons became the Trustees of the Trust and they are administering the Trust.

5.4 Mr. Parikh, learned counsel for the respondent has submitted the Appellant / Complainant had failed to prove and establish his case whereby the necessary ingredients under Section 138 of the NI Act, 1881 are satisfied that the cheque amount of Rs.6,50,000/- is for legal enforceable debt against the Respondent No.2. He has submitted that the First Appellate Court rightly appreciated the fact that Complainant had to prove his case for demand of legal enforceable debt, not produced any account book or examine any independent witness like Vijaykumar A. Patel, Shashikalaben who is a wife of Complainant. He has submitted that the First Appellate Court had also considered the fact that Complainant had neither produced nor examined the best evidence before the Ld. Trial Court to prove his case that Complainant is a creditor / liable to recover the cheque amount from the Respondent No.2. He has submitted that the appellant has not examined his wife who is a Trustee of the Trust and also not authorized the appellant to recover the amount from Respondent No.2.

5.5 Mr. Parikh, learned counsel for the respondent has submitted that the complainant who is a Doctor who is filing an income tax returns and such an amount of Rs.50,000, 2,00,000/- and 50,000 in cash has not been shown in his account book towards the debt of the Respondent No.2. He has submitted that First Appellate Court has also rightly

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appreciated the fact that in all Rs.3,00,000/- has been given in cash as per demand of the complainant in the notice under Section 138 of the NI act, 1881 and the document below Exh. 21 complainant has to take Rs.50,000/- therefore, there is a material contradiction in the contention raised by the complainant in oral as well as in documentary evidence. Therefore, there is no perversity and illegality committed by the First Appellate Court in the impugned judgement and therefore, the same may be upheld.

5.6 Mr. Parikh, learned counsel for the respondent has submitted the Court had while framing the Issue No. 1 not taken into consideration Exh. 20 – Reply to the notice wherein from the beginning the Respondent No.2 had disputed the cheque and the amount of cheque. Therefore, the Complainant has no benefit of presumption under Section 139 of the NI Act, 1881 cheque was issued towards consideration. Therefore, complainant had failed to prove legal enforceable debt. (refer cross examination of complainant). The said fact is admitted.

5.7 Mr. Parikh, learned counsel for the respondent has submitted that the Complainant had summarily failed to prove his case that he is in holder in due course of the cheque of Rs.6,50,000/- from the Respondent No.2. The Complainant had in his notice, demanded the cheque amount on the following heads :-

Rs. 50,000/-	Cash given by Complainant (no date)
Rs.2,00,000/-	Cash given by Complainant (no date)

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Rs. 50,000/-	Cash given by Complainant (no date)
Rs.2,00,000/-	Shashiben Kamle wife of Complainant (no date)
Rs.1,50,000/-	Towards the arrears of rent.

5.8 Mr. Parikh, learned counsel for the respondent has submitted the above mentioned facts have been demanded and pleaded in the notice which has been denied and disputed by the Respondent No.2 in her reply to the notice below Exh. 20 from beginning. He has also submitted that the Complainant had not disputed the fact that his wife Shashiben Kamle was the Trustee of the Trust and she is administering the Trust. He has submitted that the Complainant had produced below Exh. 26 to 37, the rent receipts issued by him and sanctioned by Dr. Vijaykumar A. Patel as the Complainant had contended that an amount of Rs.1,50,000/- towards the arrears of rent has not been received. He ha submitted that the Complainant had made a false statement and though he had received the amount of rent, before the Ld. Trial Court, he had pleaded and deposed that he had not received the amount of rent. The Complainant had admitted that as per the Exh. 21, since 01.02.2005, Complainant was in charge of the Trust and its affairs and for the month of February – 2005 and March – 2005, rent have been paid and for that rent receipts are issued by complainant. *He has submitted that under the circumstance, it cannot be believed that the Complainant had not received the amount towards the rent. Complainant had admitted fact no recovery of notice was issued. (reference-cross examination).* He has submitted that the Complainant had also admitted in his cross examination that Accused had

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not paid rent of 15 months and for that he had not issued any notice for recovery of the said amount. The amount of rent is to be recovered from the Trust and not from the Respondent No.2. The Trial Court had summarily failed in appreciating the oral evidence of the Complainant and therefore, the First Appellate Court had appreciated the said evidence in letter and true spirit. Therefore, impugned judgement is in consonance of settled law of appreciation of evidence.

5.9 Mr. Parikh, learned counsel for the respondent has submitted the Ld. Trial Court had failed to consider the fact that since, 01.02.2005, the Respondent No.2 is not in affairs of the Trust and she is not a Trustee. There is no occasion for her to issue a cheque on 01.06.2006 towards the arrears of amount of cheque. The First Appellate court had rightly appreciated facts and circumstance. The First Appellate Court had rightly appreciated the documentary evidence and the oral evidence and conduct of the Complainant and set aside the order of the Ld. Trial Court. He has submitted that the controversy raised by the Complainant under the NI Act is to be proved by documentary evidence. The cheque has been issued towards the liability or debt. Once the Accused disputes the amount of cheque, in that circumstances, the Complainant has to prove the cheque amount by producing cogent evidence like Account Books wherein the Accused has been shown as debtor. In the present case, the Complainant has not produced any Account Books or ITR which shows that the Accused is the debtor of Rs.6,50,000/- in the Account Books.

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5.10 Mr. Parikh, learned counsel for the respondent relies upon the cross examination of Complainant at Exh. 9 wherein he had admitted that in his Account Books, he has not shown that the Respondent No.2 is a debtor though he maintains the Account Books. He has submitted that the Complainant had not produced any Account Books to show that he had given total Rs.3,00,000/- in cash to Respondent No.2.

5.11 Mr. Parikh, learned counsel for the respondent has submitted that as the Respondent No.2 was not a Trustee pursuant to the Agreement dated 01.02.2005, Dr. Vijaykumar A. Patel and Complainant had written a letter on 08.05.2005 to the Respondent No.2 stating that the signature of the Respondent No.2 may be deleted from the Bank record. From on record proves that Respondent No.2 was not in charge of trust and complaint and other trustees are in charge and administering trust.

5.12 Mr. Parikh, learned counsel for the respondent has submitted that the complainant has produced the document at Exh.21 wherein it has been mentioned the amount of payment and the said liability has been accepted by the Complainant and other Trustees. Perusal of the said document, it has not been mentioned that Rs.6,50,000/- are outstanding and has to be paid. The Complainant has not proved the said document.

5.13 Mr. Parikh, learned counsel for the respondent has

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submitted that as per the evidence on record, it clearly proves that complainant had made a false and frivolous case against the respondent and hence and the present appeal may be dismissed.

5.14 Mr. Parikh, learned counsel for the respondent has referred and relied upon the decision of this Court in the case of ***Nitin Vrujlal Kakkad vs. State of Gujarat and another dated 4.11.2025 in Criminal Appeal No.35 of 2012*** and he emphasized he relied upon paragraph Nos. 10 and 11 which read as under:-

> *"10. At this juncture, it would be fit to reproduce the provisions of section 118 and section 139 of the Negotiable Instruments Act which read as under.*
>
> *"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;*
> *(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 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 indorsement—that the indorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;*
> *(f) as to stamp—that a lost promissory note, bill of exchange or cheque was duly stamped;*
> *(g) that the holder of a negotiable instrument is a holder in due course:*
> *Provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of*

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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 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."

11. It is pertinent to note that section 138 of the N.I.Act stipulates that to constitute an offence under the Act, the complainant must prove that the cheque was issued by the accused in discharge of a legally enforceable debt or any other liability and the cheque was presented into the bank and it was returned unpaid on account of insufficiency of funds or because it exceeded the amount arranged to be paid by the drawer of the cheque by an agreement with the bank. The accused thereafter must have failed to pay the amount of cheque within 15 days of receipt of the statutory notice and the presumption as enumerated in section 139 of the N.I.Act is rebuttable in nature. The complainant is to prove that the cheque was issued for a legally enforceable debt and the legally enforceable debt must be in existence on the date when the cheque was issued and the drawing of the cheque in discharge of the existing or past liability is a sine qua non for bringing an offence under section 138 of the N.I.Act."

5.15 Mr. Parikh, learned counsel for the respondent has also referred and relied upon the decision of the Hon'ble Apex Court in the case of ***Babubhai Ambalal Patel vs. State of Gujarat reported in 2023(0) AIJEL-HC249100*** and more particularly paragraph Nos. 8 and 12 which read as under:-

"8. The Negotiable Instruments Act including the cheque carries presumption of consideration as provided under Sections 118(a) and
139 of the Act, which reads as under:

Section 118 in The Negotiable Instruments Act, 1881 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;

Section 139 in The Negotiable Instruments Act, 1881

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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. It has transpired in evidence of the witness namely Hasmukhbhai Jashubhai Patel, who is the Bank Manager of the concerned Bank, that the letter dated 04.05.2006 was addressed by the accused to the concerned bank about cheque being lost. Though the statutory presumption under Sections 118 (a) and 139 of the Act, is available in favour of the complainant, the burden was upon the accused. However, with specific defence of loss of cheque, the presumption drawn in favour of the complainant , in my opinion, stood rebutted. At one stage, in the cross-examination of the Bank Manager who has entered the witness box, has admitted that the details entered in the cheque and the signature put in the disputed cheuqe varies. So far as the submissions made by learned advocate for the appellant with regard to shifting of the burden to establish the case beyond reasonable doubt by the complainant is concerned, the Court finds support from the decision of the Hon'ble Supreme Court in the case of Tedhi Singh (supra) as relied upon by learned advocate for the appellant. The relevant observations of the aforesaid decision, has reproduced as under:

> *"9. The Trial Court and the First Appellate Court have noted that in the case under Section 138 of the N. I. Act the complainant need not show in the first instance that he had the capacity. The proceedings under Section 138 of the N. I. Act is not a civil suit. At the time, when the complainant gives his evidence, unless a case is set up in the reply notice to the statutory notice sent, that the complainant did not have the wherewithal, it cannot be expected of the complainant to initially lead evidence to show that he had the financial capacity. To that extent the Courts in our view were right in holding on those lines. However, the accused has the right to demonstrate that the complainant in a particular case did not have the capacity and therefore, the case of the accused is acceptable which he can do by producing independent materials, namely, by examining his witnesses and producing documents. It is also open to him to establish the very same aspect by pointing to the materials produced by the complainant himself. He can further, more importantly, achieve this result through the cross examination of the witnesses of the complainant. Ultimately, it becomes the duty of the Courts to consider carefully and appreciate the totality of the evidence and then come to a conclusion whether in the given case, the accused has shown that the case of the complainant is in peril for the reason that the accused has established a probable defence."*

5.16 Over and above the above cited decisions, Mr.

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Parikh, learned counsel for the respondent has also referred and relied upon the following decisions:-

1. *B. Krishna Reddy vs. Syed Hafeez (Died) Per Legal Representative Naseema Begum and another reported in (2020) 17 SCC 488.*

2. *Nalinbhai H Vyas Food Inspector vs. Kishorbhai Ghelaram Khushlani For Paris Confectionary Works reported in 2024 AIJEL-HC 249388 – Parameters (2007) 4 SCC 415 followed and same is followed in 2009 (0) AIJEL-HC 222261 by appellate court.*

3. *Rajco Steel Enterprises vs. Kavita Saraff and another reported in (2024) 9 SCC 390*

4. *Sureshchandra Chandrashankar Joshi vs. State of Gujarat reported in 2010 (1) GLH 271*

5. *Shanku Concretes Private Limited vs. State of Gujarat reported in 2000 (2) GLR 1705*

6. *Chandrappa and others vs. State of Karnataka reported in (2007) 4 SCC 415*

7. *Reverend Mother Mary Kutty vs. Reni C. Kottaram and another reported in (2013) 1 SCC 327.*

8. *Pukharaj Achaldas (The Proprietor of the Firm) vs. Kantilal Bhimraj Shah (Proprietor of Firm) reported in 2021(0) AIJEL.HC 243542*

6. Upon hearing learned counsel appearing for both the sides and on perusal of the impugned judgment and order of acquittal passed by the First Appellate Court and the conviction order passed by the Trial Court and upon close examination of the depositions of the witnesses recorded by the First Appellate Court, the issues that arise for determination by this Court are as below:

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Whether the First Appellate Court was right and justified in reversing the judgment rendered by the Trial Court in the facts of the present case;

Whether the First Appellate Court while reversing the impugned judgment and order of the Trial Court has committed any illegality or any perversity;

Whether the First Appellate Court failed to appreciate the reasoning recorded by the Trial Court while recording the conviction against the present respondent;

Whether the impugned judgment passed by the First Appellate Court suffers from any illegality or any perversity;

7. Now, in light of the above-mentioned issue, the facts of the case are required to be looked into that the present respondent was the Managing Trustee of Tapasvi Charitable Trust, which was established in the year 2000 with several trustees for the purpose of running a de-addiction centre. The Trust was functioning through public donations and government grants. The de-addiction centre was being operated from the premises known as Mamta Hospital, which is owned by the present appellant. Initially, the Trust was functioning smoothly under the administration of the present respondent with the assistance of the other trustees. However, over a period of time, the financial condition of the Trust deteriorated. Consequently, it was decided to induct new trustees into the Trust with a view to strengthening its administration and financial management.

8. Thereafter, owing to his ill health, the present respondent handed over the administration of the Trust to the

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other trustees, namely, the wife of the present appellant, along with two other trustees, namely Mr. Vijay Kumar Patel and Mr. Manoj B. Rao. Thereafter, in the year 2005, the present appellant, along with Mr. Vijay Kumar Patel and Mr. Manoj B. Rao, executed a Memorandum of Understanding, which is produced at Exhibit 21. The said Memorandum of Understanding, inter alia, records as under:

"MEMORANDUM OF UNDERSTANDING

We, the undersigned Managing Trustee of Tapasvi Seva Charitable Trust, Nadiad, and the parties of Jagrut Vyasan Mukti Hospital...

First Party:	(1) Smt. Janvikaben Harishbhai Purohit 107, Krishna Township, Vaniyavad, Nadiad
Second Party:	(1) Dr. Harshadbhai Y. Kamle Mamta Hospital, Nadiad. (2) Dr. Vijaykumar A. Patel 14, Jalaramdeep Society, Kapadvanj Road, Nadiad. (3) Manojbhai B. Rao, Nadiad

We, both parties, through a mutual understanding on 01/02/2005, in accordance with Resolution No. 24 of the trust meeting, have appointed you, the Second Party for the overall administration and management of Jagrut Vyasan Mukti Hospital, run by Tapasvi Seva Charitable Trust. This appointment is made subject to the following conditions, which are binding, accepted, and approved by both parties.

(i) Jagrut Vyasan Mukti Hospital, run by Tapasvi Seva Charitable Trust, shall be considered a separate unit. All government aid, public donations, and funds generated through other means received for it, as well as the entire management, administration, and bank financial transactions, shall be carried out by the Second Party.

(ii) The Second Party has accepted the following financial liabilities. Payments shall be made from government aid received hereafter as well as from remaining past grant balances:

(a) 1,50,000	Rent	(a) 1,50,000
(b) 50,000	To Dr. Kamle (towards	(b) 50,000

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	personal loan taken by First Party)	
(c) 2,00,000	To Sashiben Kamle	(c) 2,00,000
(d) 3,50,000	To Raghubhai Patel	(d) 3,50,000
(e) 2,70,000	To Dr. Vijaybhai Patel	(e) 2,70,000
(f) 2,30,000	To Manojbhai Rao	(f) 2,30,000
12,50,000	Twelve Lakh Fifty Thousand Rupees	12,50,000

(iii) Other than those specified above, the Second Party shall have no other financial liability. Any financial, social, or other liabilities related to the trust or hospital prior to 01/02/2005 shall not be the responsibility of Party-2.

(iv) Independent authority for the management and administration of Jagrut Vyasan Mukti Center (Hospital) is granted to Party-2 from 01/02/2005 onwards.

(v) Necessary proceedings shall be initiated in the Charity Commissioner's office to appoint the Second Party members as honorary members of the Tapasvi Seva Charitable Trust.

(vi) Out of clause (illegible), Rs. 30,000/- shall be treated as common expenses upon receipt of the grant and accounted for accordingly.

(vii) All the above liabilities will be accepted upon receipt of the grant. This agreement is executed while the hospital's current grant is active, and no instructions have been received from the government to close the hospital to date. Full cooperation shall be provided to secure the hospital grant. Audit has been conducted recently and the hospital must continue operating as per the instructions (as per manual).

The above facts and (illegible) have been agreed upon with everyone's consent, which shall remain binding upon all.

(1) Sd/- (2) Sd/- (3) Sd/-	Sd/- 16/03/2005”

9. After the execution of the aforesaid Memorandum of Understanding, the responsibility for running the Trust and bearing its day-to-day expenses, including payment of rent

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and other liabilities, was transferred to the newly inducted trustees, who were the parties of the Second Part under the Memorandum of Understanding. The said Memorandum of Understanding came into force with effect from 01.02.2005.

10. Pursuant to the said Memorandum of Understanding, a letter issued by Jagrut Vyasan Mukti Hospital, which was being run by the present respondent through Tapasvi Charitable Trust, is produced at Exhibit 23. By the said letter, Mr. Vijay A. Patel, the addressee/assignee thereof, informed the present respondent that the newly inducted trustees had already assumed the responsibility of managing the Trust and the de-addiction centre. It was further stated that, for the purpose of day-to-day administration, they were required to sign various documents, including cheques and other financial instruments. However, as the present respondent continued to be the authorised signatory in the bank records, the respondent was requested to issue a consent letter authorising the said assignee to operate the bank account and sign the relevant documents on behalf of the Trust.

11. The said letter is produced at Exhibit 23, at page 129 of the paper book, and reads as under:

"C.C. NO. 4509/06
Exhibit No. : 23
Signature : Illegible
Judi. First Class

JAGRUT VYASAN MUKTI HOSPITAL

(Unit of Tapasvi Seva Charitable Trust Regd. No. E/5541/ Kheda)
Funded by Min. of Social Justice & Empowerment, Govt. of India.

Hospital Address: Mamta Hospital Building, Nana Kumbhnath

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Road, Nadiad - 387001
Email : tsctd1@ncdap.org, Ph 0268-3091309 (Hosp.) 0268-2527166

Ref No:

Date: 08/05/2005
Dr. Vijaykumar Patel
Dr. H. U. Kamle

To,
Smt. Janvikaben
Managing Trustee

Subject: Regarding handing over independent financial management for bank transactions in Jagrut Vyasan Mukti Hospital Account No. 50038.

Respected Madam,
It is respectfully submitted that, we have undertaken the guarantee to run the hospital along with the responsibility of paying expenses at the hospital. However, we are unable to handle the financial administration independently without your signature. Therefore, it is requested you to cancel your mandatory signature requirement and grant us independent financial management in writing, so that bank transactions and other work can proceed smoothly.

Yours faithfully,
1. Signature : Illegible
2. Signature : Illegible"

12. Thereafter, the newly inducted trustees addressed a letter dated 13.07.2005 to the Manager, State Bank of India, Saloon Bazaar Branch, Nadiad, which is produced at Exhibit 24. By the said letter, they informed the Bank that they intended to withdraw certain amounts from the Trust's current account to meet its day-to-day administrative and operational expenses. Similarly, another letter dated 10.06.2005, produced at Exhibit 25, was also issued by the said trustee, namely, Mrs. Vijaya Patel, concerning the administration and operation of the Trust.

13. In the backdrop of the aforesaid facts, the present appellant obtained a personal cheque for Rs. 6,50,000/- from

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the present respondent. According to the notice issued by the appellant, the said amount represented the aggregate of various sums allegedly advanced by the appellant and his wife for the administration of the Trust, namely: (i) Rs. 50,000/- allegedly advanced by the present appellant in the year 2005 for the administration of the Trust; (ii) Rs. 2,00,000/- allegedly advanced by the wife of the present appellant; (iii) a further sum of Rs. 50,000/- allegedly advanced by the wife of the present appellant, Mrs. Shashiben, who was also a trustee and was in charge of the administration of the Trust; and (iv) Rs. 1,50,000/- allegedly paid towards the rent of the premises in which the de-addiction centre of the Trust was being operated.

14. Thus, the personal cheque of the present respondent came to be obtained by the present appellant on the premise that the aforesaid amounts were recoverable from the respondent, although the liabilities pertained to the administration and functioning of the Trust after its management had been handed over to the newly inducted trustees.

15. Admittedly, the liability to pay the rent was that of the Trust. A perusal of the documentary evidence produced at Exhibits 26 to 35 reveals that these are rent receipts issued by the present appellant in favour of Tapasvi Charitable Trust, acknowledging receipt of Rs.10,000/- towards monthly rent. The said rent was admittedly paid by Mr. Vijay Kumar A. Patel, who was the Project Director of Jagrut Vyasan Mukti Hospital and who had assumed the responsibility of managing the Trust pursuant to the Memorandum of Understanding.

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The said Memorandum was executed by, inter alia, Mr. Vijay Kumar A. Patel and Mrs. Shashiben, the wife of the present appellant. Thus, the documentary evidence clearly establishes that the liability to pay the rent, as well as the other liabilities referred to in the Memorandum of Understanding, was that of the Trust and not of the present respondent in her personal capacity. According to the appellant, an aggregate sum of Rs.6,50,000/- had become due and payable towards the Trust. However, instead of obtaining a cheque from the Trust, the present appellant obtained a personal cheque from the present respondent, drawn on her personal bank account. The said cheque, upon presentation, came to be dishonoured by the Bank on the ground of "insufficient funds." and returned vide return memo dated 07.06.2006.

16. Consequently, the present appellant issued a statutory legal notice dated 28.06.2006, which is produced at Exhibit 17 (page 103 of the paper book). In the said notice, it was specifically stated that the outstanding rent of Rs.1,50,000/- for the year 2005 formed part of the consolidated claim of Rs.6,50,000/-. By clubbing the alleged advances and the rent dues, the appellant demanded payment of the total sum of Rs.6,50,000/- from the present respondent. The notice further asserted that, although the amount was allegedly due and recoverable in connection with the affairs of the Trust, the present respondent had issued, in her personal capacity, a cheque bearing the said amount, drawn on Bank of Baroda, Kothi Branch, Vadodara, which was received by the appellant on 01.06.2006.

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17. The said notice was duly served upon the present respondent, who submitted a detailed reply, which is produced at Exhibit 20. In the said reply, the respondent specifically stated that, with effect from 01.02.2005, she had ceased to be in charge of the administration of the Trust and was no longer responsible for its day-to-day affairs. It was further pointed out that, by virtue of the Memorandum of Understanding produced at Exhibit 21, the present appellant, along with Mr. Vijay Kumar A. Patel and Mr. Manoj B. Rao, had accepted and undertaken the responsibility for managing the Trust and discharging its liabilities.

18. The respondent further referred to the correspondence exchanged pursuant to the said Memorandum of Understanding, including the letter requesting the respondent to issue her consent for changing the authorised signatory in the bank records, as well as the letters produced at Exhibits 24 and 25 addressed by the newly authorised trustees to the Manager, State Bank of India, Saloon Bazaar Branch, Nadiad, seeking permission to operate the Trust's bank account and to withdraw amounts required for the day-to-day administration of the Trust. The respondent, therefore, categorically asserted that the liabilities referred to in the statutory notice were those of the Trust and the persons who had taken over its management under the Memorandum of Understanding, and not her personal liabilities. The respondent also produced copies of the rent receipts issued by the present appellant acknowledging payment of rent deposited by Dr. Vijay Kumar Patel, who was a signatory to the Memorandum of

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Understanding and had been inducted as a trustee of Tapasvi Charitable Trust. The said receipts demonstrate that Dr. Vijay Kumar Patel had paid the rent for the relevant period in accordance with the responsibilities assumed under the Memorandum of Understanding.

19. A perusal of the exhibited rent receipts further reveals that, for the period from June 2004 to March 2005, the present appellant had accepted the rent in cash and had issued corresponding receipts. Even during the year 2005, the appellant acknowledged receipt of the rent by issuing duly stamped revenue receipts.

20. During his cross-examination before the Trial Court, the present appellant admitted that the signatures appearing on the said revenue receipts were of him, and that he had issued those receipts acknowledging the rent. However, he sought to qualify his admission by stating that, although he had signed and issued the revenue receipts, he had not actually received the amounts mentioned therein. Such a stand taken by the appellant is wholly inconsistent with the documentary evidence on record, as the issuance of duly signed revenue receipts acknowledging receipt of rent prima facie establishes that the rent was accepted by the appellant.

21.This conduct itself is doubtful, inasmuch as, without receiving the amount of rent, whether any prudent person would issue a revenue receipt in advance. It is an admitted fact that, with effect from 01.02.2005, the present respondent had no liability whatsoever towards the administration of the

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Trust, as the charge of the Trust had subsequently been taken over by the newly inducted trustees, including the wife of the present appellant and two others. Therefore, the liability to pay the said amount cannot be fastened upon the present respondent. However, without considering these facts, the Trial Court has recorded the conviction against the present respondent.

22. The further fact required to be mentioned is that the amount shown as due and payable by the present respondent includes the amount allegedly advanced by the wife of the present appellant, for which the wife has neither issued any legal notice nor demanded the said amount from the present respondent. Whereas, the said amount was not at all payable to the present appellant. However, in the legal notice, it was mentioned that the amount advanced by his wife was also included in the total amount of Rs.6,50,000/-. Without examining his wife as a witness, this fact cannot be proved, namely, whether such amount was in fact advanced by the wife, whether she had issued any legal notice, or whether the present respondent was liable to repay the said amount.

23. It is also further to be noted that the amount which is due and payable towards the rent for the premises used by the Trust is the liability of the trustees of the Trust. Therefore, without joining all the trustees, the prosecution has been instituted only against the present respondent. It appears that the cheque of the present respondent was obtained, and since the cheque bore the signature of the present respondent, the remaining particulars in the cheque were either filled in by

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the present appellant. The Trial Court has also not examined this aspect, namely, that except for the signature appearing on the cheque, the remaining writings on the cheque were not examined. The Trial Court has failed to consider or adjudicate upon this aspect.

24. At this stage, it is appropriate to refer the provision of Sections 138, 118, 139 and 141 of the NI Act, which read as under:-

> ***"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 provision 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:*
>
> *Provided that nothing contained in this section shall apply unless—*
>
> *(a) thecheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;*
>
> *(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice; in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and*
>
> *(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.*
> *Explanation.—For the purposes of this section, "debt of other liability" means a legally enforceable debt or other liability.*

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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;

(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 naturity;

(e) as to order of indorsements:—that the indorsements appearing upon a negotiable instrument were made in the order in which they appear then on;

(f) as to stamp:— 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 instrutment has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him.

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 section138 for the discharge, in whole or in part, of any debt or other liability.*

141. Offences by companies.—(*1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall*
be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was

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committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:

[Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.]

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section, —

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm."

25. In view of the above, the question arises as to whether there was any legally enforceable debt against the present respondent. In the absence of the necessary facts required to be proved by corroborative evidence, the Trial Court has committed a serious error of law as well as on facts. It is also required to be noted herein that the Trial Court, while passing the impugned judgment of conviction against the present respondent, failed to consider the fact that, in criminal jurisprudence, there is no provision of residuary capacity whereby a person can recover an amount on behalf of a third person. In the present case, the appellant is seeking to recover the amount on behalf of his wife.

26. At this juncture, it is also required to be noted herein that from 2000 to 2005 following income tax slab was in

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operation:-

Up to Rs.50,000	: Nil (Tax-free)
• **Rs. 50,001 to Rs. 60,000**	: 10% of the amount exceeding Rs. 50,000
• **Rs. 60,001 to Rs.1,50,000**	: Rs. 1,000 + 20% of the amount exceeding Rs. 60,000
• **Above Rs. 1,50,000**:	: Rs.19,000 + 30% of the amount exceeding Rs.1,50,000

27. In view of the above facts, if the wife of the appellant had advanced Rs.2,00,000/- in cash in the year 2005, it was not a small amount, and for such an amount, the same was required to be reflected in the income tax records. In this regard, the appellant was examined, and in response to the said question, he replied that whether the amount was mentioned he was not aware about it. It was further stated that the account books and other account-related documents maintained by the wife of the present appellant were lost due to theft, and an FIR in that regard was registered in the year 2007. However, the said FIR, which was referred to by the appellant, was not produced before the Court to establish that the account books and other relevant documents were lost due to theft.

28. Further, in his cross-examination, the appellant specifically stated and contended that he did not want to examine his wife as a witness, nor did he want to produce any documents to show whether the said amount was reflected in the account books or not. However, the Trial Court, without considering this aspect, proceeded to pass the impugned judgment and order of conviction, whereby the present

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respondent was convicted for the alleged offence.

29. Even without joining the other trustees, the complaint itself was not maintainable, for which learned counsel Mr. Buch has relied upon the judgment of the Hon'ble Apex Court in the case of ***Mr. Bijoy Kumar Moni (supra)*** more particularly the observations made in paragraph 52 of the said judgment which read as under.

> *"52.Section 138 of the NI Act does not envisage that only those cases where a cheque issued towards the discharge of the personal liability of the drawer towards the payee gets dishonoured would come within the ambit of the provision. The expression "of any debt or other liability" appearing in Section 138 when read with the Explanation to the provision is wide enough to bring any debt or liability which is legally enforceable within its fold. Thus, the requirement under the provision is that the debt or any other liability has to be legally enforceable and the emphasis is not on the existence of such debt or other liability between the drawer and the payee. A number of decisions of this Court have clarified that even those cases where a person assumes the responsibility of discharging the debt of some other person, and in furtherance thereof draws a cheque on an account maintained by him, which subsequently gets dishonoured upon being presented before the drawee, would be covered by Section 138 if the payee is able to establish that there was some sort of an arrangement by way of which the debt was assumed by the drawer."*

30. I am in agreement with the ratio laid down by the Hon'ble Apex Court, wherein the learned counsel for the appellant, relying upon the observations made by the Hon'ble Apex Court, submitted that the expression "any debt or other liability" is required to be considered. Since the present respondent was not under any actual debt, but the cheque was issued towards some other liability, the question arises before this Hon'ble Court as to whether, in respect of such other liability, when the said liability was accepted by the other trustees, the present respondent can be held liable and

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guilty for the same. This important issue was not considered by the Trial Court while recording the conviction against the present respondent.

31. Thus, the First Appellate Court, while reversing the judgment of the Trial Court, has observed from paragraph No. 9 onwards that the present respondent was not liable and that no legally enforceable debt was established against the present respondent by the appellant. Therefore, in the absence of the other trustees of the Charitable Trust, the complaint itself was not maintainable, particularly because, after 01.02.2005, the liability was taken over by the assignees under the said document, i.e., Exhibit 21.

32. The First Appellate Court, after considering all the documentary as well as oral evidence produced by the appellant, has discussed in detail the reasons for reversing the findings recorded by the Trial Court. The First Appellate Court, after considering the evidence on record and the decisions of the Hon'ble Apex Court, has rightly arrived at the conclusion while reversing the judgment of the Trial Court.

33. At this stage, it is appropriate to refer the decision of the Hon'ble Apex Court in case of ***Kamala S. vs. Vidhyadharan M.J. and Anr. Reported in 2008(1) GLR 423*** more particularly head note and paragraph Nos. 4, 17 and 18.

> *"Heard note:-*
>
> *Negotiable Instruments Act, 1881 (XXVI of 1881) Sec. 118(a),Secs. 138 & 139- Presumption that the cheque was issued for discharge of "any debt or other liability" -Burden of proof in the matter on the accused to rebut the presumption is of "preponderance of probability" - Inference therefor can be drawn from the*

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circumstances -On facts found that defence of accused was probable -Held, High Court had wrongly reversed the acquittal.

4. According to the appellant, Smt. Sathyabhama owned a property bearing old Survey No. 1363/3-1-1 measuring an area of 47 cents. She had executed two Sale Deeds, one in favour of Mr. Ramchandran Nair and another in favour of Thankamony conveying to them 20 cents and 27 cents respectively. The Sale Deeds were allegedly executed in favour of the aforementioned persons as a security in lieu of some amount paid in her favour. However, when the Thankamony and Ramchandran Nair demanded the money back from the wife of the respondent, the appellant was approached for purchase of the said property for a consideration of Rs. 5 lakhs. On 05.09.1997, the said Thankmony executed a Deed for Sale in favour of the appellant wherefor she had withdrawn a sum of Rs. 4 lakhs from bank. The said amount was paid to Sathyabhama which in turn was paid to Thankamony and Ramchandran Nair. However, as there was a dispute in regard to the exact area of the property and measurement therefor had not been taken, she had given a cheque to Sathyabhama in the name of her husband as demanded by Sathyabhama on an understanding that the consideration shall be reduced if the area found in the Sale Deed is found short. As upon measurement, the area of the property conveyed in his favour was found to be short by 4 cents, the appellant paid a sum of Rs. 20,000/- to the respondent on 27.11.1997. Allegedly, however the respondent had asked for a sum of Rs. 10,000/- more from the appellant, but a sum of Rs. 5,000/- was only given to him on 18.12.1997 towards full and final settlement thereof and in that view of the matter no further amount was due from her.

8. On the said finding, the learned Trial Judge recorded a judgment of acquittal. On an appeal preferred by the respondent herein thereagainst, the High Court, however, reversed the said finding, opining that the appellant had not been able to discharge the burden of proof laid down under Sections 138 and 139 of the Act, which read as under :

> *"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 provision of this Act, be punished with*

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imprisonment for a term which may extend to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid, and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability."

"*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, or any debt or other liability.*"

17. This Court clearly laid down the law that standard of proof in discharge of the burden in terms of Section 139 of the Act being of preponderance of a probability, the inference therefor can be drawn not only from the materials brought on record but also from the reference to the circumstances upon which the accused relies upon. Categorically stating that the burden of proof on accused is not as high as that of the prosecution, it was held;

"*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.*"

18. It was further observed that ;

" *38. If for the purpose of a civil litigation, the defendant may not adduce any evidence to discharge the initial burden*

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> *placed on him, a "fortiori" even an accused need not enter into the witness box and examine other witnesses in support of his defence. He, it will bear repetition to state, need not disprove the prosecution case in its entirety as has been held by the High Court.*
>
> *39. A presumption is a legal or factual assumption drawn from the existence of certain facts.*"

34. It is also appropriate to refer the decision of the Hon'ble Apex Court in case of ***Sureshchandra Chandrashankar Joshi vs. State of Gujarat and Anr. reported in 2010(1) GLR 271*** more particularly paragraph Nos. 11 and 12 and the decision in case of ***Shanku Concretes Pvt. Ltd. and Others vs. State of Gujarat and Another reported in 2000(3) Crimes 602***.

35. Even as per the decision of the Hon'ble Apex Court in the case of Babubhai (supra), the accused has been successful in bringing on record a probable defence, which has ultimately resulted in the shifting of the burden upon the complainant by putting questions regarding legal dues in the cross-examination.

36. On perusal of the record of the appeal, it transpires that the respondent-accused has established his innocence before the First Appellate Court and that, after due appreciation of the oral as well as documentary evidence and other material placed on record, the First Appellate Court has rightly passed the impugned judgment and order of acquittal. The findings recorded by the First Appellate Court are just, proper and in accordance with the settled principles of law and, therefore, no interference is warranted by this Court.

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37. It is well settled by catena of decisions that the First Appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded. However, First Appellate Court must bear in mind that in case of acquittal there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. Secondly, the accused having secured his acquittal, the presumption of their innocence is further reinforced, reaffirmed and strengthened by the trial Court.

38. Further, if two reasonable conclusions are possible on the basis of the evidence on record, the First Appellate Court should not disturb the finding of acquittal recorded by the trial Court. Further, while exercising the powers in appeal against the order of acquittal, the Court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower Court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the Court of appeal would not take the view which would upset the judgment delivered by the Court below. However, the First Appellate Court has a power to review the evidence if it is of the view that the conclusion arrived at by the Court below is perverse and the Court has committed a manifest error of law and ignored the material evidence on

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record. A duty is cast upon the First Appellate Court, in such circumstances, to re-appreciate the evidence to arrive to a just decision on the basis of material placed on record to find out whether the accused are connected with the commission of the crime with which he is charged.

39. At this stage, it is appropriate to refer the decision of the Hon'ble Apex Court in the case of ***Dattatraya vs. Sharanappa reported in (2024) 8 SCC 573,*** wherein the Hon'ble Apex Court has observed as under:-

> "33.1 Criminal jurisprudence emphasises on the fundamental essence of liberty and presumption of innocence unless proven guilty. This presumption gets emboldened by virtue of concurrent findings of acquittal. Therefore, this court must be extra-cautious while dealing with a challenge against acquittal as the said presumption gets reinforced by virtue of a well-reasoned favourable outcome. Consequently, the onus on the prosecution side becomes more burdensome pursuant to the said double presumption.
>
> 33.3 Where two views are possible, then this Court would not ordinarily interfere and reverse the concurrent findings of acquittal. However, where the situation is such that the only conclusion which could be arrived at from a comprehensive appraisal of evidence, shows that there has been a grave miscarriage of justice, then, notwithstanding such concurrent view, this Court would not restrict itself to adopt an oppugnant view.
>
> 33.4 To adjudge whether the concurrent findings of acquittal are 'perverse' it is to be seen whether there has been failure of justice. This Court in Babu v. State of Kerala clarified the ambit of the term 'perversity' as:
>
> > "20……if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/admissible material. The finding may also be said to be perverse if it is 'against the weight of evidence', or if the finding so outrageously defies logic as to suffer from the vice of irrationality."
>
> 33.6 Furthermore, such interference is necessitated to safeguard interests of justice when the acquittal is based on some irrelevant grounds or fallacies in re- appreciation of any fundamental

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evidentiary material or a manifest error of law or in cases of non-adherence to the principles of natural justice or the decision is manifestly unjust or where an acquittal which is fundamentally based on an exaggerated adherence to the principle of granting benefit of doubt to the accused, is liable to be set aside. Say in cases where the court severed the connection 12 (2023) 10 SCC 148. between accused and criminality committed by him upon a cursory examination of evidences. [Vide State of Punjab v. Gurpreet Singh and Others and Rajesh Prasad v. State of Bihar]

34. Upon perusal of the aforementioned principles and applying them to the facts and circumstances of the present matter, it is evident that there is no perversity and lack of evidence in the case of the respondent- accused. The concurrent findings have backing of detailed appraisal of evidences and facts, therefore, do not warrant interference in light of above enlisted principles. In a similar set of facts as in the present case, involving criminal liability arising out of dishonour of cheque, this Court in M/s Rajco Steel Enterprises v. Kavita Saraff dejected from reversing the concurrent findings of acquittal of the accused therein and underscored the principle of non-interference, unless such findings are perverse or bereft of evidentiary corroboration or lacks question of law."

40. It is appropriate to refer the decision of the Hon'ble Apex Court in the case of ***Rajco Steel Enterprises vs. Kavita Saraff and another reported in (2024) 9 SCC 390,*** wherein the Hon'ble Apex Court has observed as under:-

"12. We are dealing with a case where the First Appellate Court exercising its jurisdiction under Section 374(3) of Code of Criminal Procedure, 1973, ongoing through the analysis of evidence, acquitted the accused/respondent no.1. The acquittal was further upheld by the High Court in an appeal against acquittal under Section 378 of the 1973 Code. The whole question involved in this proceeding is as to whether the cheques were issued in discharge of a debt and if it was so, then whether the accused/respondent no.1 was able to rebut the presumption in terms of Section 118 read with Section 139 of the 1881 Act. In the light of the judgment of this Court in the case of Narendra Pratap Narain Singh -vs- State of U.P. the jurisdiction of this Court under Article 136 of the Constitution of India to interfere with concurrent findings of fact is not in question, when such findings are based on no evidence or are perverse. The question, we have to address thus, is as to whether the findings of the First Appellate Court and the High Court are on no evidence or perverse. Both these Courts have examined the evidence threadbare and in the opinion of these two fora, go against the complainant/petitioner."

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41. It is also appropriate to have a glance of the decision of the Hon'ble Apex Court in the case of ***Basalingappa vs. Mudibasappa reported in (2019) 5 SCC 418, Rangappa vs. Sri Mohan reported in (2010) 11 SCC 441.***

42. Further, in case of ***Babu Sahebagouda Rudragoudar Vs. State of Karnataka, reported in AIR 2024 SC 2252 = (2024) 8 SCC 149,*** the Hon'ble Apex Court has dealt with the similar issue, more particularly, in paragraph Nos. 37 to 40. Hence, I am in complete agreement with the findings recorded by the trial Court.

43. It is also worthwhile to refer to the recent decision of the Hon'ble Supreme Court in the case of ***Ramesh vs. State of Karnataka, reported in [2024] 9 SCC 169***, wherein the Hon'ble Supreme Court has held and observed in paras-20 and 21 as under:-

> *"20. At this stage, it would be relevant to refer to the general principles culled out by this Court in Chandrappa and others vs. State of Karnataka , regarding the power of the appellate Court while dealing with an appeal against a judgment of acquittal. The principles read thus:*
>
> *"42. .... (1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.*
>
> *(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.*
>
> *(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the*

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nature of "flourishes of language" to emphasize the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.

21. In Rajendra Prasad v. State of Bihar, a three-Judge Bench of this Court pointed out that it would be essential for the High Court, in an appeal against acquittal, to clearly indicate firm and weighty grounds from the record for discarding the reasons of the Trial Court in order to be able to reach a contrary conclusion of guilt of the accused. It was further observed that, in an appeal against acquittal, it would not be legally sufficient for the High Court to take a contrary view about the credibility of witnesses and it is absolutely imperative that the High Court convincingly finds it well-nigh impossible for the Trial Court to reject their testimony. This was identified as the quintessence of the jurisprudential aspect of criminal justice. Viewed in this light, the brusque approach of the High Court in dealing with the appeal, resulting in the conviction of Appellant Nos. 1 and 2, reversing the cogent and well-considered judgment of acquittal by the Trial Court giving them the benefit of doubt, cannot be sustained."

44. Considering the entire evidence on record, it clearly appears that there is no credible evidence to connect the present accused with the alleged crime and the evidence on record is not so convincing to prove beyond reasonable doubt that the accused has committed the alleged crime. Therefore, the accused cannot be convicted on the evidence on record.

45. On perusal of the impugned judgment and order, it clearly transpires that the First Appellate Court has not

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committed any error of fact and law in appreciating the evidence on record and in acquitting the accused from the charges levelled against them. Even on re-appreciation of the evidence, it clearly transpires that the prosecution has miserably failed to prove the charge levelled against the accused beyond reasonable doubt. Therefore, the impugned judgment and order of the First Appellate Court is sustainable and the present appeal is liable to be dismissed.

46. In view of the above, the present appeal is devoid of merits and it deserves to be dismissed. Resultantly, it is dismissed. The impugned judgment and order of acquittal passed by the First Appellate Court is hereby confirmed. Bail bond stands cancelled. Record and proceedings be sent back to the concerned First Appellate Court forthwith.

Sd/-
(HEMANT M. PRACHCHHAK,J)

SURESH SOLANKI

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