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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 19.08.2021

PRONOUNCED ON : 22.10.2021

CORAM:

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

Crl.A.No.461 of 2015

M/s.Primus Analytics Limited
represented by its Managing Director
Mr.Amarnath Reddy
No.9, Harleys road, Kilpauk,
Chennai - 600 010. ... Appellant/Complainant

Vs.

1.M/s.ABL Bio Technologies Limited,
represented by its Chairman and Managing Director,
Mr.K.O.Issac
41/44, Solai Vilas, Kalakshetra Colony,
Chennai - 600 090.
2.K.O.Issac
Chairman and Managing Director,
M/s.ABL Bio Technologies Limited.,
414/44, Solai Vilas, Kalakshetra Colony,
Chennai - 600 090. ... Respondents/Accused

Prayer: This Criminal Appeal has been filed under Section 378 (4) of Cr.P.C., against the order passed in C.A.No.227 of 2012, on the file of the learned VI Additional Sessions Judge, Chennai, dated 08.01.2015.

For Appellant : Mr.M.Mohammed Rafi
for Mr.R.Joe Anand

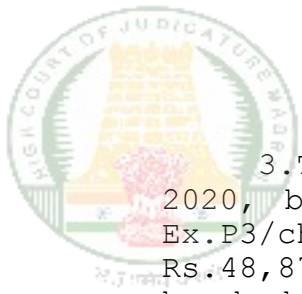
For Respondents: Mr.M.Anbalagan

JUDGMENT

(The case has been heard through Video Conference)

The defeated private complainant is the appellant herein.

2.For the sake of convenience, the parties are referred as per the ranking before the Trial Court.



3.The complainant has filed a case in C.C.No.3023 of 2020, before the Fast Track Court Egmore, Chennai, based on Ex.P3/cheque issued by the accused to the tune of Rs.48,87,000/-, Ex.P4/return memo and Ex.P5/debit advice and he had issued notice under Section 138 of the Negotiable Instruments Act and the same was received by the accused under Exs.P7 & P8/postal acknowledgment cards and the accused has also given a reply notice dated 04.04.2010 under Ex.P9, disputing the fact that the cheque was given only as security. After observing the formalities, the case was taken on file in C.C.No.3023 of 2020.

4.After the trial, in view of Ex.P2/memorandum of understanding between the complainant's company and the accused, the learned Magistrate has held that as agreed upon by the parties under Ex.P2/memorandum of understanding, a sum of Rs.46 lakhs was given by the complainant to the accused and as per the terms, including annualized interest for the period of 90 days, the due payable by the accused is Rs.48,87,300/- and accordingly, the accused had issued a cheque, dated 22.10.2009, bearing No.103562, for the said amount to the complainant. Though, the cheque was dated 22.10.2009, it was presented to the bank on 20.02.2010 as could be seen from Ex.P4/Return Memo. Accordingly, the learned Magistrate has held that in view of the authorization given by the Company to PW1/complainant, the complaint is maintainable and Ex.P3/cheque bearing No.103562 for a sum of Rs.48,87,000/-, was issued for pre-existing legal liability and accordingly held that the accused had committed offence under Section 138 of the Negotiable Instruments Act and sentenced them as

(i)The second accused is sentenced to undergo one year simple imprisonment and to pay a sum of Rs.48,87,000/- as compensation under Section 357(d) of Cr.P.C within a period of one month and in default to undergo three months simple imprisonment.

(ii)First accused being a Company represented by the second respondent, no separate sentence was imposed on the first accused.

5.Aggravated against the said order passed by the learned Magistrate, the respondents had preferred CA.No. 227 of 2012, before the VI Additional District Sessions Judge, Chennai, in which the learned Judge has held that the cheque was given only as a security to ensure the payment and further held that the authorization given to PW1 is not with reference to cheque case and accordingly allowed the appeal and set aside the conviction and sentence passed by the Trial Court. Hence, the present Criminal Appeal has been preferred by the complainant.

6.Heard both the learned counsels and perused the materials placed on record.



7.The learned counsel for the complainant would contend that as per the terms of Ex.P2/Memorandum of Understanding is clear that the amount has been taken for the purpose of running the business by the accused. The terms and conditions envisages for the payment of Rs.48,87,000/- which is inclusive of both principal and interest as contained in the terms of Ex.P2/memorandum of understanding and furthermore in the authorization, there is a specific word of authorizing PW1/complainant to initiate the Criminal Proceedings and the word criminal proceedings in the authorization encloses the proceedings under Section 138 of the Negotiable Instruments Act.

8.Mr.M.Anbalagan, learned counsel for the accused would contend that as per Ex.P2/Memorandum of Understanding entered between the complainant and the accused-Company on 22.07.2009, it is only an investment and not a borrowal of loan as contended before the Trial Court. Further, he would also draw my attention to the various points said to have been taken under Ex.P2/memorandum of understanding and also relied upon Ex.D5/email send by the private complaint to the accused, wherein, reference has been made to Ex.P2 & Ex.P10 and that emails were marked as Exs.D2 & D5.

9.In short, the case of the accused is that the amount paid by the private complainant is only an investment in the Company for which there was an agreement under Ex.P2/memorandum of understanding that the said amount of investment was carry 90 days interest and interest calculated for 90 days viz., Rs.2,87,000/- will be given and as a security, this Ex.P3/cheque was issued and therefore, since it is only an investment, there is no pre-existing legally enforceable debt so as to raise presumption under Section138 of the Negotiable Instruments Act.

10(a).After hearing rival submissions, perusing records and documents filed before the Trial Court, it is seen that the complainant company is a knowledge service provider in the area of business and market research for Pharmaceutical and Bio-technology Medicine. The first accused company namely M/s.ABL Biotechnologies Ltd., is a company incorporated in Indian and having their registered office at Thiruvannamipur, Chennai-41, was in the business of manufacturing soft gel capsules and other bio-technology pharmaceutical medicines. The first accused is being represented by the second accused viz., K.O.Isaac, who has signed the cheque in question in the capacity of Managing Director of M/s.ABL Bio-Technologies Limited. The dishonoured cheque is dated 22.10.2009 and is for a sum of Rs.48,87,000/- in favour of the appellant.



10(b).Further, it is seen that in the first week of July 2009, the accused company had approached the complainant and informed them that they had sales order in hand, amounting to Rs.69,32,800/- from various customers and informed the complainant that they did not have enough funds to execute the sales orders and hence, the accused had requested the complainant company to extend financial assistance to them so that they would be able to execute the sales order. The accused company further promised that the production of soft gel would result in good returns on the amount funded. The accused company also ensured and promised that the processing, manufacturing, billing and collection of the sale proceeds shall be completed in maximum period of 90 days from the date of commencement of production and a gross profit of 28.06% was assured. The accused company further promised that they would pay 25% annualized interest at the end of 90 days period to the complainant.

10(c).On these promises made, the complainant company had lend an amount of Rs.46,00,000/-. They had the funds transferred from their account to the accused company. A sum of Rs.25,00,000/- was transferred on 30.07.2009 and another sum of Rs.21,00,000/- was transferred on 20.08.2009 from the account of the complainant to the account of the accused. The accused company represented by its Managing Director and the appellant company entered into a Memorandum of Understanding dated 22.07.2009, which was marked as Ex.P2, wherein all the above details have been mentioned. In the said MOU it has been clearly mentioned that the accused company would pay a sum of Rs.2,87,000/- as annualized interest calculated for a period of 90 days for the sum of Rs.46,00,000/- lent. Therefore, the accused company had issued a cheque for a sum of Rs.48,87,000/-(Rs.46,00,000/- (principle)+ Rs.2,87,000/- (interest)) in favour of the complainant.

10(d).The said cheque bearing No.103562 dated 22.10.2009, drawn on Indian Bank, LB Road branch, Thiruvamiyur and when the cheque was presented in the complainant's bank, the same was returned on 20.02.2010. Thereafter, the complainant had sent a statutory legal notice dated 20.03.2010 through RPAD and the said notice was received by the accused on 22.03.2010. The accused did not make any payments within 15 days time, but sent a reply dated 04.04.2010 for which the appellant had sent a rejoinder dated 27.04.2010.

11.The complainant's company had paid a sum of Rs.46,00,000/- to the accused company to execute their sales order and in order to return the same along with the interest of Rs.2,87,000/- for a period of 90 days, the accused company



12. According to the private complainant the cheque was issued from A1's account signed by A2 in the capacity of Managing Director. The cheque amount is Rs.48,87,000/-, dated 22.10.2009. As per the terms the accused has forwarded the loan of Rs.46,00,000/- along with interest for 90 days viz., Rs.2,87,000/-, which is equal to the cheque amount Rs.48,87,000/-. The complainant has paid amount to the accused through bank transactions dated 30.07.2009 and 20.08.2009. The cheque was dated October and as per the version of PW1, Ex.P3/cheque has to be classified as "post dated cheque". The post dated cheque is encashable only on the date found in the cheque and hence become enforceable.

14. The suggestive case of the defence is that a sum of Rs.46,00,000/- invested is not a loan and the understanding between the parties to the effect that the investment of Rs.46,00,000/- by the private complainant is entitled for interest calculated for a period 90 days is Rs.2,87,000/- and after three months the accused has to pay a sum of Rs.48,87,300/-(including interest) and hence, a post dated cheque was issued by the accused. In other words Ex.P3/cheque was not supported by any consideration, it is only for the "investment made by the private complainant" since he is entitled for return the money along with interest, as a matter of clarity, the cheque was given and it is not for encashment. Since the investment was not properly done as per the schedule and there is a violation much less.

15. According to the accused the cheque was given only as a security for the said sum of Rs.48,87,000/- and the said amount Rs.46,00,000/- was not a loan as projected by the private complainant, it is for investment and that is the reason why instead of having a separate account, the accused along with private complaint has open escrow account so that while releasing the fund the private complainant will have control over the expenses since it is an investment. In short, Rs.46,00,000/- is an investment along with interest and not a loan.

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while the Appellant Court has accepted it and reversed the conviction and thus, the present Criminal Appeal.

17.To consider and to determine the nature of the amount deposited namely Rs.46,00,000/- "whether it is investment" as contended by the accused or 'a loan' as contended by the private complainant. The terms of Ex.P2/MOU and the causes contended therein are relevant. The clause (3) of the Memorandum of Understanding, reads as follows:

"The party of the First Part after making a thorough assessment of the requirement of the funds by the party of the second part has accepted to invest an amount of Rs.46,00,000/- (Rupees Forty Six Lakhs only) towards cost of executing the orders which include purchase of raw materials, packing materials and job works/conversion charges.

11.The party of the second part shall provide demand promissory note for Rs.48,87,000/- and issue post dated cheques for Rs.48,87,000/- to the party of the first part in order to secure the interest of the party of the first part."

And thus, I find that as per clause (11) of Ex.P2/Memorandum of Understanding, the accused in order to pay the said amount has issued post dated cheque for a sum of Rs.48,87,000/-. In other words, the word mentioned in the clause (11) of Ex.P2/Memorandum of understanding viz., "in order to secure interest of the party of the first part" in Ex.P9/legal notice issued by the complainant to the accused dated 05.04.2010 also speaks as follows:

"Our clients state that your client and out client entered into a Memorandum of Understanding on 22.07.2009 under which your client agreed to invest a sum of Rs.26,00,000/- towards the cost of executing the sales orders. Our clients' further state that it was agreed under the said Memorandum of Understanding that the cycle time for production of soft gel capsules would be 90 days for processing/manufacturing/billing/collection period. Our clients state that it was further agreed by your client that the investment of Rs.46,00,000/- would be compensated with 25% annualized interest for the period of 90 days. As per the said Memorandum of Understanding out clients issued a post-dated cheque for a sum of Rs.48,87,000/- and a demand promissory note in favour of your client to secure the interest of your client." (emphasis supplied)



It is specifically mentioned therein that "your client agreed to invest a sum of Rs.26,00,000/- towards the cost of executing the sales order". There is no denial by the complainant in the reply dated 27.04.2010.

18.The accused who was examined as DW2 had categorically stated that

"the current bank account shall be treated as the "Escrow Bank account" and the same shall be operated upon exclusively for the specific purposes of the investment made by the party of the First part. The said bank account shall be operated jointly by the Authorize Signatory of the Party of the Second part and Authorized representative of the party of the First part as mentioned in this agreement."

19.Thus, on a combined reading of the recitals in Exs.P2, P3, P10, P11 coupled with the evidence of DW2(accused), the accused was having existing account that should be considered as escrow account. Ex.P2/Memorandum of Understanding entered on 22.07.2009 assumes significance. On a perusal of the clause (3) of Ex.P2/MOU between parties, the complainant has invested a sum of Rs.46,00,000/- for the development of the accused business for which, 90 days interest is calculated and fixed at Rs.2,87,000/-.

20.It is the specific version of PW1 in his complaint as well as evidence that the first installment of Rs.25,00,000/- was given to the accused on 30.07.2009 and balance amount of Rs.21,00,000/- was given on 20.08.2009 and even before the expiry of 90 days from the second payment, Ex.P3/Cheque was issued. Hence, it can be considered only as a security not as a repayment for the loan.

21.In the Judgment reported in 2006 (2) ACR 2710 - M.S.Narayana Menon @ Mani Vs. State of Kerala and another, in the Criminal Appeal No. 1012 of 1999, the Hon'ble Apex Court has held as under:

"Evidence adduced by parties before trial court - Leading to one conclusion that appellant able to discharge his initial burden - Burden thereafter shifted to complainant to prove his case But he failed to do so - Appellant clearly stated that nothing was due to complainant - And cheque was issued by way of security - Said defence accepted as probable - Hence, cheque cannot be held to have been misused in discharge of debt - If cheque issued



for security or for any other purpose - it would not come within purview of Sec.138 - Impugned judgment unsustainable - And set aside."

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22.Thus, this Court finds that on a reading of clause (11) of Ex.P2/Memorandum of Understanding, since the cheque was issued before 90 days on due payment, it can be considered only as a security not for the encashment.

23.It is elicited during the cross examination of DW1 that for a sum of Rs.46,00,000/- along with interest for a period of 90 days viz., Rs.2,87, 000/-, a cheque for a sum of Rs.48,87,200/- was issued and thus, this Court finds that the accused has issued the cheque only as a security not for encashment since 90 days period as agreed between the parties under Ex.P2/MOU has not been completed, besides the agreed amount of Rs.46,00,000/- was not transfer to the escrow account also assumes significance.

24.No doubt it is true that Ex.P3/cheque in dispute was not drawn from escrow account but was drawn from account maintained by the accused in a separate account. As rightly pointed out by the Lower Appellate Court that the escrow account was opened as a joint account and it is only for the investment of the amount of Rs.46,00,000/- by the complainant for the improvement of the company of the accused. Therefore, Ex.P3/cheque was not issued for repayment of the loan, it is issued only as a security for the investment made by the private complainant, which matures only after 90 days.

25.As per the Ex.P1/MOU escrow account was open in Kotak Mahindra bank, wherein, the complainant will be the first signatory while the accused is second signatory such arrangement has been made so that the withdrawal from the escrow account will be monitored by the private complainant who has made the investment.

26.The first amount ought to have been made on 22.07.2010 but the first installment payment was made only on 30.07.2010, whereby, the complainant has withdrawn Rs.11,00,000/- from the escrow account as could be seen from Ex.D15. Thereafter, second installment payment was made on 20.08.2009. Hence, as stated supra as per the terms of Ex.P2/memorandum of understanding, the cheque in issue can be utilized and deposited only after 90 days from the date of the investment and hence, the cheque is prematured and not came into force dated 22.10.2009.



27. On a perusal of E-mails sent by the learned counsel for the private complainant, it is seen that the amount is only as an investment not as a loan as projected by PW1 in the witness box assumes significance.

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28. Ex.D1 is exchange of email between the respective counsels. In Ex.D2/E-mail sent to the accused from the complainant, it is specifically mentioned in Clause (2) in reply namely mail given by the complainant is to help us to move forward to consider investing in ABL as a whole. Under Ex.D5, in third page, it is mentioned as investment not as a loan. Even under Ex.D10/series of email sent by defacto complainant to the accused it refers to investment proposals only. Thus, this Court finds that Ex.P3/cheque was issued only as a security for the investment and not for the hand loan as projected by PW1.

29. The Lower Appellate Court has considered the same and has arrived at the similar conclusion that in the absence of anything reflecting on the transaction as a loan, which is only an investment made therefor, for which it was agreed to pay Rs.48,87,200/- [principle amount Rs.46,00,000/- along with interest for 90 days viz., Rs.2,87,200/-] and hence, the amount deposited by the private complainant in escrow account is only an investment for the company, for which by way of security a cheque in issue has been issued by the accused and the said cheque does not represented any legal consideration or does not support by any legally enforceable debt and hence, presentation of cheque for encashment itself is under cloud and hence, similar findings rendered by the Lower Appellate Court is justified and the same is hereby confirmed.

30. Accordingly, this Criminal Appeal stands dismissed and the order passed in C.A.No.227 of 2012, by the learned VI Additional Sessions Judge, Chennai, dated 08.01.2015, is hereby confirmed.

Sd/-
Assistant Registrar(CS-CCC)

//True copy//

Sub Assistant Registrar

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To:

1. The VI Additional Sessions Judge,



2. The Metropolitan Magistrate,
Fast Track Court No.I,
Egmore, Chennai.

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The Section Officer,
Criminal Section,
High Court, Madras.

+1cc to Mr.SS.Swaminathan, Advocate SR.No.54360

Crl.A.No.461 of 2015

SMI (CO)
GMY (15/11/2021)