S.Srinivasan vs M/S. Premier Energy & Infrastructure ... on 6 July, 2022

Author: D.Bharatha Chakravarthy

Bench: D.Bharatha Chakravarthy

Crl.A.No

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 29.06.2022

Judgment Pronounced on : 06.07.2022

CORAM :

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

Crl.A.No.394 of 2022

S.Srinivasan .. Appellant

Versus

1. M/s. Premier Energy & Infrastructure Ltd. (PEIL)
   Tangy Apartments (Now official)
   No.34, P.V.Cherian Crescent Road,
   Egmore,
   Chennai – 600 008.

2. Krishnan Subramaniam
3. M.Narayanamurthy
4. Vikram Mankal
5. K.N.Narayan
   Ramakrishnan Rangaswami – Since deceased on 07.07.2019
6. Malka Komaraiah
7. A.Sriram
8. T.R.Murali .. Respondents

Prayer: Criminal Appeal is filed under Section 378 of Cr.P.C., to al
appeal, set aside the order, dated 20.01.2017 passed by the learned
Magistrate, Fast Track Court Magistrate Level at Thiruvallur in
S.T.C.No.06 of 2016 and convict the accused Nos.1 to 8 for the offen

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under Section 138 r/w 142 of the Negotiable Instruments Act, 1881 an
grant compensation of twice the amount of cheque to the appellant.

For Appellant : Mr.A.Ramesh, Senior Counsel
for Mr.C.Arun Kumar

For Respondent : Mr.A.R.L.Sundaresan,
Senior Counsel
for Mr.M.Mohammed Rafi
for RR-1 to 3

: Mr.V.Balasubramanian, R6

: Notice served for RR-4, 5, 7 and 8

JUDGMENT

The Appeal:

> The appellant is the complainant in a private complaint filed under Section 200 of the Code of Criminal Procedure, complaining that the first respondent and the respondent Nos.2 to 8, being its Directors and officers, committed an offence under Section 138 of the Negotiable Instruments Act, 1881.

2. The said complaint was taken on file by the learned Judicial Magistrate, Fast Track Court, Magistrate Level at Thiruvallur in S.T.C.No.6 https://www.mhc.tn.gov.in/judis of 2016 and by a judgment, dated 20.01.2017, the Trial Court acquitted all the accused holding that the cheque was not issued in discharge of any legally enforceable debt or liability.

3. Aggrieved by the same, the appellant herein had filed Crl.A.No.25 of 2017 and by a judgment, dated 28.03.2018, the Learned I Additional Sessions Judge, Thiruvallur, upturned the finding of acquittal and convicted all the accused Nos.1 to 9 for the offence under Section 138 of the Negotiable Instruments Act, 1881 and sentenced the accused Nos.2 to 9 to undergo Simple Imprisonment for a period of one year and directed all the accused Nos.1 to 9 to pay a compensation of Rs.10,00,00,000/- and in default of payment of the same, directed accused Nos.2 to 9 to undergo Simple Imprisonment for a period of one month.

4. Aggrieved by the said judgment, the accused Nos.1 to 4 filed Crl.R.C.No.509 of 2018, the accused Nos.5 to 8 filed Crl.R.C.No.511 of 2018 and accused No.9 filed Crl.R.C.No.744 of 2018 and by a common judgment, dated 04.09.2018, this Court confirmed the conviction and sentence as imposed by the learned Appellate Judge. https://www.mhc.tn.gov.in/judis

5. Aggrieved by the same, the respondents preferred S.L.P.(Crl.) No.11021 of 2019 and by an order, dated 09.11.2021, the Hon'ble Supreme Court of India found that in view of the full bench decision of this Court in S.Ganapathy Vs. N.Senthilvel1 and subsequently, the full bench judgment in K.Rajalingam Vs. R.Suganthalakshmi 2 that the filing of the appeal against acquittal before the learned Sessions Court, Thiruvallur by itself was not maintainable and the appellant herein ought to have filed an appeal against the acquittal before this Court. Therefore, the Hon'ble Supreme Court of India disposed off the Special Leave Petition with the liberty to the appellant herein to file a fresh appeal against the order of the acquittal passed by the learned Magistrate within a period of four weeks from the date of the order and directed this Court to consider the same on merits without raising the question of limitation. The Hon'ble Supreme Court of India also granted leave to file an appeal against the acquittal and ordered that the appeal be disposed off within a period of six months. As such, this appeal is laid before this Court.

1 (2016) 4 CTC 119 2 2020 SCC Online Mad 1052 https://www.mhc.tn.gov.in/judis The case of the appellant:

> 6. According to the appellant, he promoted a company under the provisions of Companies Act, 1956 in the name and style of M/s. EMAS Engineers and Contractors Private Limited (EMAS). While so, during the year 2009, the third respondent herein, namely Narayanamurthy, acting on behalf of the first accused Company, namely M/s. Premier Energy & Infrastructure Ltd. (PEIL), approached the complainant and mooted a proposal to take over the entire share holding of the complainant in the above mentioned company, namely EMAS.
>
> 7. Accordingly, a Memorandum of Understanding, dated 18.03.2015 (Ex.P-10) and thereafter another Memorandum of Understanding, dated 25.04.2015 (Ex.P-11), replacing the earlier agreement, were entered into.

The essence of the agreement referred to above was that the first accused Company will purchase the complainant's 49.9% share holding in EMAS on or before 30.09.2015 and in satisfaction of part of consideration payable, the first respondent/accused offered to pay a sum of Rs.10,00,00,000/- on or before 30.09.2015. The third respondent, namely M.Narayanamurthy, apart from signing the agreement, offered to stand as surety/guarantor. The first https://www.mhc.tn.gov.in/judis accused Company, represented by accused Nos.2 to 9, who were all the persons incharge of the day to day conduct of business of the first accused/Company, in discharge of their commitment and obligation issued a cheque for Rs.10,00,00,000/-, dated 30.09.2015, bearing No.519169, drawn on Axis Bank Limited, Chennai – 600 004, at the time of signing the Memorandum of Understanding, in favour of the appellant.

8. The cheque was signed by the accused Nos.8 and 9 as the duly authorized signatories for the first accused Company. The cheque was issued on instructions of the rest of the accused persons, particularly M.Narayanamurthy, the accused No.3 and such authorisation was based on duly certified copy of board resolution of the first respondent Company, dated 25.03.2013 and supported in addition by a letter, dated 05.05.2015, signed by accused No.4, confirming the validity of such

authorisation for the two signatories to issue the cheque bearing No.519169 to the appellant for Rs.10,00,00,000/-. This, according to the appellant, was issued in discharge of a legally enforceable debt.

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9. The appellant, as per the terms of the Memorandum of Understanding, dated 25.04.2015, resigned as Managing Director and Director of EMAS and withdrew the nomination of his two independent Directors and released all the cheque signing authority and in effect lost control of the board and continued merely as a consultant till 30.09.2015. The appellant had discharged his obligation under the Memorandum of Understanding.

10. The appellant, therefore, presented the said cheque for realisation with his bankers, namely Canara Bank, Thiruvallur Branch on 30.09.2015, but, to his dismay and disappointment, the cheque was returned on 01.10.2015 with an endorsement "payment stopped by the drawer". However, the accused Company never maintained such an amount in their bank and therefore, they have willfully and wantonly instructed the bankers to stop payment only to escape their criminal liability and thus, by the dishonour of the cheque, the first accused Company and the other accused Nos.2 to 9, who are the officers of the first accused Company in control of the day-to-day affairs, have committed an offence punishable under Section 138 of the Negotiable Instruments Act, 1881. Therefore, the complainant https://www.mhc.tn.gov.in/judis issued a statutory notice on 09.10.2015. After receipt of the notice, the accused did not make payment, but, in turn, sent a reply notice, dated 20.10.2015 containing untenable averments and therefore, the accused are liable for punishment and hence the complaint.

The Trial & The Judgment:-

> 11. Upon recording of the sworn statement, the case was taken on file as S.T.C.No.06 of 2016 and upon service of summons and furnishing of copies, the accused denied committing the offence and stood trial.

Thereafter, one Santhosh Kumar, Manager of Axis Bank, Thiruvallur, was examined as P.W.1 and the complainant, namely Srinivasan, was examined as P.W.2. On behalf of the complainant, Exs.P-1 to P-55 were marked.

12. Upon being questioned under Section 313 of the Code of Criminal Procedure about the material evidence and incriminating circumstances on record, the accused denied the same as false. On behalf of the defence, one Sathyan, Manager of the Courier service was examined as D.W.1 and Exs.R-1 to R-11 were marked. The Trial Court, thereafter, heard the https://www.mhc.tn.gov.in/judis learned Counsel on either side and by a judgment, dated 20.01.2017, held as follows:-

> (i) From the testimony of P.W.1 and on a perusal of the Ex.P-10, it is clear that the complainant and his wife were jointly holding the 100% shares in the EMAS and

subsequently, in the 2009, the accused No.3, through M/s.

Shriram Autho Finance, had invested and acquired 50.1% shares in EMAS and the balance of 49.9% shares is held by the complainant and his wife and these factors are admitted by both the sides;

(ii) By Exs.P-10 and P-11, the merger/transfer of shares were agreed and by considering the recitals of Ex.P-11, it is mutually agreed that the transaction could be completed on or before 30.09.2015 and in respect of the cash consideration of Rs.10,00,00,000/-, agreed to be paid by the first respondent, a post-dated cheque, dated 30.09.2015 was issued at the time of entering into the Memorandum of Understanding dated 25.04.2015 as a security and therefore, it is found that the Ex.P-12 cheque is given as a security to the appellant in the event of merger which shall take place in future;

(iii) By taking into consideration the recitals of Exs.P-10 and P-11, which are the most important documents to decide the case and the https://www.mhc.tn.gov.in/judis existence of legally enforceable debt, it is found that the merger of the companies did not take place and the cash consideration of Rs.10,00,00,000/- is not paid by the first accused by 30.09.2015 and 65,96,840 number of shares in the other companies which were given to the appellant as guarantee, will be enforced;

(iv) From the answers of the complainant in the cross-examination, it is clear that these 65,96,840 number of shares have already been transferred in the name of the appellant. Therefore, the appellant, having got 65,96,840 number of shares, cannot again prosecute the accused under Section 138 of the Negotiable Instruments Act, 1881 and the appellant ought to have chosen either the transfer of the above said shares or preferring the above complaint and his action amounts to “Double Jeopardy” as the accused cannot pay twice for when it has not bought the balance of 49.9% of shares;

(v) The consideration of Rs.10,00,00,000/- is fixed for the purchase of 49.9% of shares and the said shares were not purchased by the accused and they were not transferred in the name of the accused and therefore, no liability accrued or arose for payment of the said cheque amount and even as per the evidence on record, the said shares are still held by the complainant and his wife.

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(vi) Therefore, from the evidence of P.W.1 coupled with Exs.P-10, P- 11 and P-25, the Trial Court came to the conclusion that there is no legally enforceable debt on the part of the accused to contract criminal liability and held that the prosecution is bound to fail and acquitted the accused under Section 255(1) of the Code of Criminal Procedure. The contentions of the appellant:-

> 13. Mr.A.Ramesh, learned Senior Counsel, appearing on behalf of the appellant, taking this Court in detail through the complaint, the oral testimony of P.W.1 and the exhibits filed in this case, more importantly to Exs.P-10 and P-11, would submit that as per the terms and conditions, which were finalised, the appellant resigned from

the Board of Directors along with his nominee Directors and the control was taken over by the PEIL. It is the consideration of such an exercise, which was fixed as Rs.10,00,00,000/- cash and 5 lakh number of shares of PEIL to Srinivasan, the appellant. The appellant fufilled his obligation by resigning and stepping out of the board and as the first respondent could not make the payment immediately, has issued post-dated cheque (Ex.P-12) for the value of Rs.10,00,00,000/- which was to be honoured on 30.09.2015. However, https://www.mhc.tn.gov.in/judis when the same was presented, it was returned unpaid with an endorsement that "payment stopped by the drawer". When the complainant issued Ex.P-

25 statutory notice, clearly mentioning about the liability, vexatious replies were sent under Exs.P-28 and P-31.

14. Taking this Court through the said reply notices, the leaned Senior Counsel would submit that even ostensibly, the respondent/accused were not able to point out the company's reason for not going further with the transaction except to simply and baldly allege as if the appellant suppressed the pending N.P.A issue with its bankers in respect of EMAS. The learned Senior Counsel, taking this Court through Ex.P-9, which is a letter by the accused No.3 himself, dated 16.09.2014, which clearly speaks about the solving impediments and pending NPA issues of the EMAS with its bankers.

Thus, there were absolutely no proper explanation in the reply. According to the learned Senior Counsel, the cheque was not issued towards any charity, but, was issued in discharge of their liability.

15. The contention of the respondents that the cheque was issued only as a security can no longer be taken as a defence because even the post- https://www.mhc.tn.gov.in/judis dated cheque, which is issued as a security, in discharge of the legally enforceable liability, is a valid cheque, enabling the appellant to present it before the bank and the respondents/accused are liable for punishment for the dishonour.

16. The learned Senior Counsel, placing strength on Ex.P-11, more specifically Clauses 8, 9 and 10, would submit that it is clear that as per the agreement, in the event of the merger happening before 30.09.2015 and the first respondent/accused Company allotting 5 lakh number of shares to the appellant, two contingencies were drawn under Clause 8(a) and 8(b) of the Memorandum of Understanding. If the first respondent completes the payment of cash consideration of Rs.10,00,00,000/-, the appellant shall release the pledge of 65,96,840 number of shares. If the cash consideration of Rs.10,00,00,000/- was not paid by the first respondent by 30.09.2015, the said 65,96,840 number of shares shall be transferred in the name of the appellant and after realising the cash consideration of Rs.10,00,00,000/-, such shares will be transferred back to the pledgors. In the event of merger does not happen before 30.09.2015, which was the case, the first respondent Company shall purchase all the shares of the appellant for a cash https://www.mhc.tn.gov.in/judis consideration of Rs.10,00,00,000/- by 30.09.2015, being part of the total agreed consideration of

Rs.10,00,00,000/- and 5 lakh number of shares of the first respondent. On payment of such cash consideration of Rs.10,00,00,000/- by the first respondent Company, the said 65,96,840 number of shares pledged will be released by the appellant.

17. The third contingency, as per the Clause 10, is that in the event of the first respondent Company not purchasing the shares of EMAS, as aforesaid, by 30.09.2015, which was the case on hand, the appellant shall be entitled to enforce the pledge and transfer the said 65,96,840 number of shares into his name and will have all the guarantees enforced. Thereafter, if the appellant realised the said Rs.10,00,00,000/- due, the appellant shall release 60,96,840 number of shares back to the pledgors after retaining 5 lakh shares to himself. Therefore, the learned Senior Counsel would submit that the enforcement of the guarantee does not end the obligation of the respondent Company and still the agreement provides realisation of Rs.10,00,00,000/- and therefore, the cheque, which was presented to encash towards the said liability, cannot be said to be without any liability or legally enforceable debt. Therefore, he would submit that the judgment of https://www.mhc.tn.gov.in/judis the Trial Court was fallacious and the finding of the acquittal is perverse and is not a possible view.

18. The learned Senior Counsel, in support of his submissions, relied upon the judgment of the Hon'ble Supreme Court of India in Tedhi Singh Vs. Narayan Dass Mahant3 for the proposition as to the presumption under Section 139 of the Negotiable Instruments Act, 1881 shall remain intact unless a probable defence is proved by the accused. The learned Senior Counsel relied upon the judgment of the Hon'ble Supreme Court of India in Sumeti Vij Vs. M/s.Paramount Tech Fab Industries4 for the proposition that the accused, in order to rebut the presumption under Section 139 of the Negotiable Instruments Act, 1881, has to adduce the evidence of his probable defence to the level of preponderance of probability. The learned Senior Counsel would also rely upon the judgment in M/s. Kalamani Tex & Anr. Vs. P.Balasubramanian5, whereunder, the Hon'ble Supreme Court of India restated the law of presumption under Sections 118 and 139 of the Negotiable Instruments Act, 1881 and held that the probable defence must meet the standard of preponderance of probability and not mere possibility. 3 2022 SCC OnLine SC 302 4 2021 SCC OnLine SC 201 5 (2021) 5 SCC 283 https://www.mhc.tn.gov.in/judis Similarly, for the said proposition as to the presumption under Sections 118 and 113 of the Negotiable Instruments Act, 1881 and for the purpose that all the officers of the company are jointly and severally liable for prosecution, the learned Senior Counsel relied upon the judgments in Bhupesh Rathod Vs. Dayashankar Prasad Chaurasia and Anr.6, K.S.Ranganatha Vs. Vittal Shetty7, APS Forex Services Pvt. Ltd. Vs. Shakti International Fashion Linkers & Ors.8, T.P.Murugan (Dead) thr. L.Rs. and Ors. Vs. Bojan9, Guru Dutt Pathak Vs. State of Uttar Pradesh10, and Uttam Ram Vs. Devinder Singh Hudan and Anr.11 The contentions of the respondents/accused:-

> 19. Per contra, Mr.A.R.L.Sundaresan, learned Senior Counsel, appearing on behalf of the respondents 1 to 3, would submit that in the instant case, the only question to be decided by the Court is that whether the finding of the Trial Court that there is no legally enforceable debt or liability is a possible view or not. He would submit that the case entirely rests on Exs.P-10 and P-11. He would submit that Ex.P-10 being the agreement,

6 (2022) 2 SCC 355 7 2021 SCC OnLine SC 1191 8 (2020) 12 SCC 724 9 (2018) 8 SCC 469 10 (2021) 6 SCC 116 11 (2019) 10 SCC 287 https://www.mhc.tn.gov.in/judis dated 18.03.2015, is totally replaced by Ex.P-11 agreement, dated 25.04.2015 and the case is covered by Clauses 8, 9 and 10 of Ex.P-11. As per Ex.P-11, the merger did not take place, therefore, Clause 8 is not applicable. As per Clause 9, PEIL, the first respondent Company is entitled to purchase the share and if only it had purchased the shares, the sum of Rs.10,00,00,000/- and 5 lakh number of shares have to be paid as consideration. A day before the period mentioned for transaction i.e., 30.09.2015, on 29.09.2015, the respondents/accused had repudiated the contract and informed the appellant that they are not interested in buying the shares and had issued a letter to stop payment and instructed the complainant not to present the said cheque.

20. According to the learned Senior Counsel, howsoever flimsy the reason may be or even in the worst case, assuming that the respondent Company is at fault in repudiating the contract, still there was no existing liability for the cheque to be presented. Once there was no any existing liability, the accused cannot be prosecuted under Section 138 of the Negotiable Instruments Act, 1881. In support of his submission, the learned Senior Counsel would rely upon the judgment of the Hon'ble Supreme Court https://www.mhc.tn.gov.in/judis of India in M/s. Indus Airways Pvt. Ltd. & Ors. Vs. M/s. Magnum Aviation Pvt. Ltd. & Anr.12, for the proposition that there should an existing debt or liability as on the date of the drawal of the cheque and if there is no such liability, the cheque, issued for any advance payment or future contingency, cannot be said to be issue for an existing legally enforceable debt or liability.

21. The learned Senior Counsel relied upon the judgment of the Hon'ble Supreme Court of India in B.Krishna Reddy Vs. Syed Hafeez (Died) Per Lr. Smt. Naseema Begum & Anr.13, wherein, it is held that when a cheque was issued towards consideration of purchase of property, but, when no documents were produced on record and when no conveyance was executed, the cheque cannot be issued towards an existing liability.

22. The learned Senior Counsel relied upon the judgment of the High Court of Kerala in K.P.Raveendranath rep. by His Power of Attorney Holder & wife A.K.Lalitha Vs. K.P.Padmanabha Kurup & Anr.14 for the proposition that any agreement relating to transfer of shares, the sale is 12 (2014) 12 SCC 539 13 (2020) 17 SCC 488 14 2017 SCC OnLine Ker 9219 https://www.mhc.tn.gov.in/judis concluded only if the shares are transferred in the name of the purchaser. The learned Senior Counsel relied upon the judgment of the Hon'ble Supreme Court of India in M.S.Narayana Menon @ Mani Vs. State of Kerala and Anr.15 for the proposition that the presumption under Sections 118 and 139 of the Negotiable Instruments Act, 1881 can be rebutted by saying that the consideration does not exist from direct and circumstantial evidence or on presumption of law or facts. The learned Senior Counsel relied upon the judgment of the Hon'ble Supreme Court of India in Rev. Mother Marykutty Vs. Reni C.Kottaram & Anr.16 for the same proposition.

23. The learned Senior Counsel relied upon the judgment of the Hon'ble Supreme Court of India in N.Vijayakumar Vs. State of Tamil Nadu17 for the proposition that when the respondents have already been acquitted by the Trial Court, there is double presumption of innocence. The learned

Senior Counsel also relied upon the judgment of the Hon'ble Supreme Court of India in Chandrappa & Ors. Vs. State of Karnataka18 for the same proposition and submitted that if the view of the Trial Court is a possible view, the same cannot be upturned even if the Appellate Court is of 15 (2006) 6 SCC 39 16 (2013) 1 SCC 327 17 (2021) 3 SCC 687 18 (2007) 4 SCC 415 https://www.mhc.tn.gov.in/judis another view upon the re-appreciation of evidence. Therefore, he would submit that the appeal against an acquittal be dismissed. Point for consideration:-

> 24. Upon listening to the arguments of the learned Senior Counsel on either and perusing the material records of this case, the following question arises for consideration in this case:-
>
> (i) Whether the Ex.P-12 cheque is issued for any legally enforceable debt or liability?

25. A perusal of the entire evidence on record in this case, it would be clear that the question has to be decided by considering the agreements between the parties, that is Ex.P-10 and Ex.P-11 and it is relevant to extract the salient covenants of Ex.P10 which read as hereunder:-

> " Whereas EMAS is a company originally promoted by SS • And whereas SAF, at the instance of NM, had invested in the equity capital of EMAS and had entered into a SHA with SS dated 13th November 2009, in respect of their shareholding in EMAS. • And whereas SAF had subsequently transferred it's shareholding in EMAS to PEIL an affiliate company.
>
> https://www.mhc.tn.gov.in/judis • And whereas SS and PEIL are the only shareholders of EMAS – PEIL holding 50.1% and SS the balance 49.9%.
>
> • And whereas for business exigencies, both PEIL and EMAS feel that a merger of the two companies is in their mutual interest. • And whereas PEIL, as part of the merger scheme, undertakes to offer in exchange for SS' stake of 49.9% in the equity capital of EMAS. • And whereas SAF and SH, are substantial and controlling stake holders in PEIL.
>
> • And whereas the parties hereto are desirous of completing the merger of EMAS with PEIL at the earliest.
>
> • AND in the circumstances the parties are entering into this MoU to reflect the agreement reached between them.
>
> This MOU between the parties witnesses as follows:
>
> 1) EMAS will be merged with PEIL, subject to the approval of the Board of Premier Energy and Infrastructure Ltd.

> 2) SS consents for the merger with PEIL and resign from Managing Directorship and Directorship of EMAS and also withdraws the nomination of the two directors of EMAS, Mr.V.Seshadri and Mr.M.R.Khapali. The scheme of merger of EMAS and PEIL will be filed with the high court of Chennai on or before May 31, 2015."

26. Thereafter, Ex.P-11 was again entered into by the parties on 25.04.2015 which replaces the earlier agreement and the Clause relating to the construction of the agreement reads as hereunder:-

> https://www.mhc.tn.gov.in/judis "This Agreement sets forth the entire agreement and understanding among the parties with respect to the subject matter hereof and merges all past understandings agreed vide the agreement dated 18th March 2015 among them. Accordingly, all the parties shall be bound by the conditions, warranties, understandings or representations with respect to such subject matter as per terms expressly provided herein in this agreement. Notwithstanding the foregoing, in the event of any inconsistency between the terms of this Agreement and the terms of the agreement dated 18th March 2015, the terms of this Agreement shall prevail."
>
> 27. The Clauses 1 and 2 of the Memorandum of Understanding evidencing the transaction and issue of the said cheque is extracted hereunder:-
>
> 1) "EMAS will be merged with PEIL. The exchange ratio for the shareholders of EMAS (other than PEIL) for the 49.9% stake of SS in EMAS shall be 5 lac fully paid up shares of Rs. 10 each in the capital of PEIL and Rs. 10 Crs. cash consideration to be paid by PEIL.
>
> 2) While the 5 lac shares shall be issued upon merger, the cash consideration of Rs. 10 Crs.

shall be paid on or before the 30th September, 2015. Simultaneously with signing of the MoU, PEIL shall issue a cheque dated 30th September 2015 for the consideration of Rs. 10 Crs. payable by it to SS." https://www.mhc.tn.gov.in/judis

28. The Clauses 8, 9 and 10 in which, further transaction, pursuant to the agreement, is detailed, are extracted hereunder:-

> "8) In the event the merger happens before 30- 09-2015 and PEIL allotting 5 Lac shares to SS as part of merger scheme.
>
> a. Upon PEIL completing the payment of cash consideration of Rs.
>
> 10 Crs. to SS, SS shall release the pledge on the 65,96,840 number of Shares of Rs. 10 each fully paid of PEIL. All graduates as well as the Post Dated Cheques issued will be cancelled and returned.

b. Where however, the cash consideration of Rs. 10 crores is not paid by PEIL by 30-09-2015, the 65,96,840 number of Shares of Rs. 10 each fully paid, pledged by partners of SAF, SH and the affiliates Yogya Investment & Finance Co. Ltd., Crimson Investments Ltd. and Mrs. Vatsala Ranganathan with SS shall be transferred to the name of SS at his will and all guarantees will be enforced.

Upon SS realizing the consideration of Rs. 10 crores due, SS shall release the pledge on the 65,96,840 number of shares of PEIL and/or the said 65,96,840 number of shares will be transferred back to the pledgors.

9) In the event the merger does not happen before 30-09-2015, PEIL shall purchase all of SS's shares in EMAS for a cash consideration of Rs. 10 Crs by 30-09-2015, being part of the total agreed consideration of Rs. 10 Crs and 5 lac https://www.mhc.tn.gov.in/judis shares of PEIL. On payment of such cash consideration of Rs. 10 Crs by PEIL, the 65,96,840 of shares of PEIL (less 5 lac shares) pledged will be released by SS. The said Five lac shares will be transferred to SS.

10) In the event of PEIL not purchasing the shares of EMAS as aforesaid by 30-09-2015, SS shall be entitled to enforce the pledge and transfer the said 65,96,840 shares into his name and all guarantees will be enforced. Upon SS realizing the consideration of Rs. 10 crores due, SS shall release the pledge on the 65,96,840 number of shares of PEIL (less 5 lac shares) and/or 60,96,840 number of shares will be transferred back to the pledgors. The said Five lac shares will be transferred to SS." Thus, on a reading of the agreement between the parties, it is clear that originally, the respondents/accused through their other concern, namely Shriram Auto Finance, had invested in the company of the appellant, namely EMAS. In consideration thereof, already of the 100% shares owned by the appellant and his wife, 50.1% shares have been transferred to the said concern, which, thereafter, the said concern transferred the same to the first respondent Company, namely PEIL. Thereafter, the appellant and the said PEIL and the other accused decided to merge the said company, by name EMAS, with the first respondent Company, PEIL and for this purpose, Ex.P- 10, Memorandum of Understanding was entered into, whereby, the appellant consented to resign from the Managing Directorship and https://www.mhc.tn.gov.in/judis Directorship and withdraw the nomination of two Directors and it was originally agreed that the scheme of merger will be filed before this Court on or before 31.05.2015. However, subsequently, both the parties entered into Memorandum of Understanding, dated 25.04.2015, by which, they replaced the earlier agreement.

29. As per the later agreement, the company of the appellant, namely EMAS, has to be merged with PEIL and for the balance share of 49.9% stake held by the appellant, it was agreed that Rs.10 Crores cash and 5 lakh shares in PEIL will be given to the appellant. The 5 lakh shares will be issued upon the merger and Rs.10,00,00,000/- will be paid on or before 30.09.2015 and it is said that on signing of the Memorandum of Understanding, PEIL shall issue cheque, dated 30.09.2015 for the consideration payable by it to the appellant. Therefore, it is clear that the cheque was issued post-dated towards the consideration payable on merger. However, in this case, the merger did not take place, as agreed between the parties and as a matter of fact, the respondents repudiated the contract. Thus, the cheque was not issued towards any existing debt or liability, but, towards a

future contingency of merger.

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30. Even in respect of the merger, Clause 8(a) further clarifies that the cheque was issued only as a guarantee for the payment and upon merger and receiving the payment of Rs.10,00,00,000/-, the other guarantees, namely 65,96,840 number of shares pledged and the post-dated cheque, will be canceled and returned. In any event, Clause 8 does not come into operation in this case since the merger did not take place. Agreement itself contains default Clauses. In the event of the merger not taking place on or before 30.09.2015, Clause 9 comes into operation. As per the same, in the absence of the merger not taking place, PEIL is entitled to purchase the balance of 49.9% shares for the total consideration of Rs.10,00,00,000/- and 5 lakh shares in the PEIL and upon payment of the said consideration and purchase of the said shares, the appellant shall release the pledged 65,96,840 share back to the first respondent Company. In this case, the respondents opted out Clause 9 also as they did not purchase the shares.

31. There is default Clause in respect of the Clause 9 also, which is Clause 10. As per the Memorandum of Understanding, in the event of the PEIL not purchasing the shares as per Clause 9 also by 30.09.2015, the https://www.mhc.tn.gov.in/judis appellant is entitled to enforce the pledge and transfer the said 65,96,840 shares into his name and enforce the guarantees. Thereafter, if the appellant realises the Rs.10,00,00,000/- due, he shall release the pledge i.e., the entire shares after retaining 5 lakh shares to himself. Thus, it may be seen that the consideration between the parties is, (a) for the respondents, (i)the investment made by the first respondent through its sister concern, by name Shriram Auto Finance; and (ii) pledging of 65,96,840 shares of PEIL which are transferable in name of the complainant. (b) For the complainant, (i) transfer 50.1 % shares in EMAS; and (ii) resign from the Board of Directors and withdrawn the nominee of his Directors and handed over the entire control to the first appellant Company. The appellant will be entitled to the further sum of Rs.10,00,00,000/- and 5 lakh shares, if only PEIL purchases the balance 49.9% share. As a matter of fact, it is the admitted case of the parties that the pledged shares have been transferred in the name of the appellant by enforcing the guarantee as per Clause 10 of the contract. Therefore, there was no existing liability for the appellant to present the cheque. Therefore, the judgment relied upon by the learned Senior Counsel appearing for the respondents 1 to 3 in M/s. Indus Airways Pvt. Ltd. & Ors. Vs. M/s. Magnum Aviation Pvt. Ltd. & Anr. (cited supra) squarely applies https://www.mhc.tn.gov.in/judis to the instant case and if the cheque is only presented as an advance payment of towards a purchase, which the purchaser does not want to go ahead, then, there is no existing liability and it is useful to extract paragraph No.15 of the said judgment:-

> " 15. The above reasoning of the Delhi High Court is clearly flawed inasmuch as it failed to keep in mind the fine distinction between civil liability and criminal liability under Section 138 of the NI Act. If at the time of entering into a contract, it is one of the conditions of the contract that the purchaser has to pay the amount in advance and there is breach of such condition then purchaser may have to make good the loss that might have occasioned to the seller but that does not create a criminal liability under Section 138. For a criminal liability to be made out under Section 138, there

should be legally enforceable debt or other liability subsisting on the date of drawal of the cheque. We are unable to accept the view of the Delhi High Court that the issuance of cheque towards advance payment at the time of signing such contract has to be considered as subsisting liability and dishonour of such cheque amounts to an offence under Section 138 of the NI Act. The Delhi High Court has travelled beyond the scope of Section 138 of the NI Act by holding that the purpose of enacting Section 138 of the NI Act would stand defeated if after placing orders and giving advance payments, the instructions for stop payments are issued and orders are cancelled. In what we have discussed above, if a cheque is issued as an advance payment for purchase of the goods and for any reason purchase order is not https://www.mhc.tn.gov.in/judis carried to its logical conclusion either because of its cancellation or otherwise and material or goods for which purchase order was placed is not supplied by the supplier, in our considered view, the cheque cannot be said to have been drawn for an existing debt or liability." (Emphasis Supplied)

32. The principle in the above judgment was clarified and enlarged by the Hon'ble Supreme Court of India in Sunil Todi and Ors. Vs. State of Gujarat and Anr.19, that the cheque should be issued for the existing liability as on date of drawal of the cheque or future liability which should have actually arisen as on date of presentation. The relevant paragraphs are extracted below:-

" 30. Thus, the term debt also includes a sum of money promised to be paid on a future day by reason of a present obligation. A post-dated cheque issued after the debt has been incurred would be covered by the definition of 'debt'. However, if the sum payable depends on a contingent event, then it takes the color of a debt only after the contingency has occurred. Therefore, in the present case, a debt was incurred after the second respondent began supply of power for which payment was not made because of the non-acceptance of the LCs'. The issue to be determined is whether Section 138 only covers a situation where there is an outstanding debt at the time of the drawing of the cheque or includes drawing of a cheque for a 19 2021 SCC OnLine 1174 https://www.mhc.tn.gov.in/judis debt that is incurred before the cheque is encashed.

...

35. The submission which has been urged on behalf of the appellants, however, is that the fact that the cheques in the present case have been issued as a security is not in dispute since it stands admitted from the pleading of the second respondent in the suit instituted before the High Court of Madras. The legal requirement which Section 138 embodies is that a cheque must be drawn by a person for the payment of money to another "for the discharge, in whole or in part, of any debt or other liability'. A cheque may be issued to facilitate a commercial transaction between the parties. Where, acting upon the underlying purpose, a commercial arrangement between the parties has fructified, as in the present case by the supply of electricity under a PSA, the presentation of the cheque upon the failure of the buyer to pay is a consequence

> which would be within the contemplation of the drawer. The cheque, in other words, would in such an instance mature for presentation and, in substance and in effect, is towards a legally enforceable debt or liability. This precisely is the situation in the present case which would negate the submissions of the appellants." (Emphasis Supplied) Thus, so long as there was no liability as on drawal of the cheque and the commercial transaction between the parties having failed to fructify even as on date of presentation, the cheque was not mature for presentation.

https://www.mhc.tn.gov.in/judis Therefore, the finding of the Trial Court holding that there was no legally enforceable liability is in order and in any event definitely a possible view.

33. There is yet another reason to concur with the findings of the acquittal by the Trial Court. The contention of the learned Senior Counsel is that the complainant has made part performance and as a matter of fact, has performed his part of the liability and therefore, the liability on the part of the respondents arise to pay the said sum of Rs.10,00,00,000/-. In this regard, it may be seen that the instant case relates to the purchase of shares. The Constitution Bench of the Hon'ble Supreme Court of India in Life Insurance Corporation of India Vs. Escorts Ltd and Ors.20 has held that in respect of the agreement for sale and purchase of the shares, the provisions of the Sale of Goods Act, 1930 is applicable and it is useful to extract the paragraph No.74 which reads as hereunder:-

> " 74. We have to further notice here that the Sale of Goods Act also applies to stocks and shares. Section 2(7) of the Sale of Goods Act defines "goods" as meaning "every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be sold before sale or under the contract of sale." 20 (1986) 1 SCC 264 https://www.mhc.tn.gov.in/judis

34. It is necessary to extract Section 4 of the Sale of Goods Act, 1930, which is as follows:-

> " 4. Sale and agreement to sell.— (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price.

There may be a contract of sale between one part-owner and another.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred."

35. A reading of the Clause (3) of the Section 4 of the Act, it is clear that one has to read the agreement between the parties and if the shares have already been transferred in the name of the purchaser, then, it is a sale of goods and if the shares are not transferred and still are in the name of the seller, it would amount to Agreement of Sale. In this context, the remedy open for the seller under the Sale of Goods Act, 1930, when the contract https://www.mhc.tn.gov.in/judis does not go through, is under Section 56 of the Sale of Goods Act, 1930, which is as hereunder:-

> "56. Damages for non-acceptance.—Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for damages for non-acceptance."

36. On the other hand, it is only the purchaser, who is entitled for specific performance under Section 58 of the Sale of Goods Act, 1930, which is as hereunder:-

> " 58. Specific performance.—Subject to the provisions of Chapter II of the Specific Relief Act, 1877 (1 of 1877), in any suit for breach of contract to deliver specific or ascertained goods, the Court may, if it thinks fit, on the application of the plaintiff, by its decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, or otherwise, as the Court may deem just, and the application of the plaintiff may be made at any time before the decree."

37. In this case, the contention of the learned Senior Counsel under Clause 10 also does not hold water, since, the contract is also not specifically enforceable. Thus, there is neither any existing debt or liability https://www.mhc.tn.gov.in/judis nor there is enforceable entitlement for the payment to specifically perform the contract so that the cheque may be said to have been issued for the liability for carrying out the merger or purchase of share as on 30.09.2015. Therefore, on this score also, the case of the appellant is unsustainable.

38. Further, a clear reading of Clauses 2 and 8(a), extracted above, it is clear that only with respect of the transaction of merger as a security, the post-dated cheque was issued. The cheque or its presentation or return are specifically not mentioned in respect of the default Clauses in Clause 9 and

10. Clause 2 specifically states that it is in respect of merger and Clause 8 alone speaks with the return of post dated cheque. Therefore, claims to the contrary are unsustainable.

39. For all the forgoing reasons, I answer the question in favour of the respondents that there was no legally enforceable debt. The Result:-

40. In the result, as there are no merits in this Criminal Appeal, the same is accordingly dismissed.

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41. After the judgment was pronounced, the learned Senior Counsel brought to the notice of this Court that by virtue of conditional orders of this Court as well as the Hon'ble Supreme Court of India in the earlier rounds, a total of sum of Rs.5,60,00,000/- is deposited in Crl.R.C.Nos.509, 511 and 744 of 2018. Of the said sum by furnishing a bank guarantee, a sum of Rs.2,00,00,000/- was already withdrawn by the appellants. Therefore, the following orders are passed in respect of the said sum :-

> (i) the sum lying to the credit of the said Crl.R.C.s along with accrued interest is permitted to be withdrawn by the respondents after a period of 30 days from today;
>
> (ii) the appellant is directed to re-deposit a sum of Rs.2,00,00,000/- within a period of 30 days, failing which, the bank guarantee shall be invoked by the Registry and realize the said sum of Rs.2,00,00,000/- and upon the said realization, the same shall paid over to the respondents.

06.07.2022 Index : yes Speaking order grs https://www.mhc.tn.gov.in/judis To The Judicial Magistrate, Fast Track Court Magistrate Level, Thiruvallur.

https://www.mhc.tn.gov.in/judis D.BHARATHA CHAKRAVARTHY, J., grs Pre-Delivery Judgment in 06.07.2022 https://www.mhc.tn.gov.in/judis