

**IN THE HIGH COURT OF SINDH AT KARACHI**

Present: Omar Sial, J

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**Crl. Misc. Application No. 229 of 2022**

Dr. Shahzad Nasim	.....	Applicant
	<b>Versus</b>	
The State & Others	.....	Respondents

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*Dr. Farough Naseem, Moulvi Iqbal Haider, Mr. Amel Khan Kasi, Ms. Saima Anjum and Mr. Farjad Ali Khan, Advocates for applicant.*

*Mr. Omer Soomro, Danish Nayyar, Ahsan Ali Shah, Advocates for respondent assisted by Mr. Muhammad Turhan Khan.*

*Mr. Faheem Hussain Panhwar, Deputy Prosecutor General, Sindh.*

**ORDER**

**BACKGROUND:**

- i. Creek Marina was leased 92,500 square yards of land in Phase VIII, DHA on 05.05.2005 and it was decided that a high rise apartment complex will be built on that land. Siddiqsons offered to invest PKR 2 billion and USD 5 million in the project. The parties penned down the terms which would govern their business relationship on 16.06.2017 through an **Investor Agreement** and a **Share Purchase Agreement**.
- ii. The parties' relationship could not proceed as they had envisioned and as a consequence disputes and differences arose. In an effort to resolve those differences, a **Settlement Agreement** was entered into on 24.11.1019. Clause 3.2 of the Agreement provided that: "*As security for the PKR Investment the Sponsor shall hand over post-dated cheques, duly signed by Mr. Shehzad Nasim, for each of the two installments. Post-dated cheques shall be handed over to the Investor within 2 days of execution of this agreement. Said post-dated cheques shall be returned in the event that the Sponsor makes equivalent payment in any other manner.*" I have specifically referred

to this clause as the two cheques mentioned in it are the bone of contention between the parties and the present proceedings are directly connected to them.

- iii. The Settlement Agreement unfortunately failed to settle the differences that had arisen between the parties. Sometime in July 2020, Creek filed **Suit No. 923 of 2020** seeking declaration, cancellation, permanent injunction and damages against Siddiqsons. This Suit primarily sought a declaration that the Settlement Agreement stood cancelled and that Siddiqsons should be restrained from seeking recovery through the encashment of the cheques given to it pursuant to the Settlement Agreement. An order was passed by this Court restraining Siddiqsons from taking any coercive action against Creek. Siddiqsons, however, the same night when the order was passed, on the pretext that it had not received the restraining order, proceeded to lodge an **F.I.R. registered as No. 80 of 2020** in the Artillery Maidan police station in Karachi alleging that Creek had defaulted on its obligations under the Settlement Agreement and that the 2 cheques, given pursuant to Clause 3.2 of the Agreement had bounced, when presented at the banks counters for clearance. Dr. Naseem has pointed this out to demonstrate *malafide* on the part of Siddiqsons.
- iv. Siddiqsons, also retaliated by filing **Suit No. 805 of 2020** in November 2020. Through this Suit, Siddiqsons prayed that the court declare the Settlement Agreement to be a valid agreement. On 28.07.2020 a consent order in terms of which a status quo in connection with certain allotments to be made pursuant to the agreements between the parties, was made.
- v. Siddiqsons, in July 2020, also filed a Summary Suit No. **1062 of 2020** for recovery based on the disputed cheques. I have been told by counsels that the suit is still pending adjudication however there is a stay order operating in that suit too which was given on 14.12.2021. The stay order was challenged by Siddiqsons through **HCA No. 319 of**

**2021** before a Division Bench of this Court. The Appeal was disposed of with certain directions contained in the order dated 16.12.2021.

- vi. Siddiqsons in January of 2022 filed **C.P. No. 9 of 2021** praying that Creek be restrained from filing an F.I.R. against them. The order passed on 05.01.2022 by this Court ordered that no F.I.R. be registered. Both counsels are at odds over the interpretation and spirit of this order. Dr. Naseem has argued that the order itself reveals that the primary ground taken by Siddiqsons in the petition was that as a number of civil proceedings were pending between the parties, Creek should be restrained from initiating a criminal action. Learned counsel argued that what is good for the goose should surely be good for the gander. Mr. Soomro has however argued that Creek had wanted to register an F.I.R. for an isolated and not connected occurrence. With much respect I tend to agree with the argument advanced by Dr. Naseem. The unpleasantness which arose between the parties, at its heart, had the unpleasantness from a failed business venture.
- vii. Mr. Shehzad Nasim, is a resident of Singapore, and when F.I.R. No. 80 of 2020 (referred to at serial (iii) above, was registered against him under section 489-F P.P.C., he was not in the country at that stage. Apparently, he is out of the country to date. This is the point where the difference in opinion between the parties, leading to the present litigation, emerged. Dr. Naseem has argued that the criminal proceedings arising from F.I.R. No. 80 of 2020 be stayed until the decision of the civil litigation. Mr. Soomro, on the other hand, has argued that criminal and civil proceedings can proceed simultaneously and indeed that is what the Supreme Court and Highs Courts of Pakistan have repeatedly held in a number of cases. While a reference to those cases was not cited, I tend to agree with Mr. Soomro that there is plenty of case law where it has been held that indeed the two actions can continue side by side.

## **ARGUMENTS OF COUNSEL**

2. The parties have argued extensively. Perhaps a little bit too extensively. Both learned counsels have delved into areas in their respective arguments which were not within the ambit of the cause before the Court. The sole issue that requires determination is whether civil and criminal proceedings could continue simultaneously? And if yes, could there be a situation for them not to so run in parallel? Be that as it may their respective submissions are appreciated. For the sake of brevity I am not reproducing their arguments, however, the same are reflected in my observations and findings below.

## **THE ARGUMENT ON ABSCONCION**

3. Mr. Shehzad Nasim has been referred to as an “absconder” by the learned counsel for Siddiqsons. Indeed, one ground which was raised by the learned counsel in support of his argument was that as Mr. Shehzad Nasim was an absconder from law, he is entitled to no concession. Dr. Naseem on the other hand has referred to a number of cases which include, **The State vs Hussain and others (PLD 2002 Kar 1)**, **Mst. Mubarak Salman vs The State (PLD 2006 Kar 678)**, **Mumtazuddin vs The State (2020 YLR 760)**, **2022 SCMR 1148**), **Khalid Mehmood vs The State (2022 SCMR 1148)**, **Noor Mohammad Khatri vs The State (2005 P.Cr.L.J. 1889)**, **Mohammad Sadiq vs Najeeb Ali (1995 SCMR 1632)**, **Ali Khan vs The State (1980 SCMR 474)**. I am however of the view that the case law cited is not applicable. My reason to so conclude is that the basic principle enunciated in these cases is that abscondence in itself is not sufficient to deny a person bail or to punish him. This is not an issue in the current case. In particular, Dr. Naseem has stressed on the case of **Noor Mohammad Khatri (supra)** where a learned Single Judge of this Court was of the view that a person cannot be declared an absconder even for the purpose of issuing a proclamation under section 87 Cr.P.C., if he had already left the country. This argument was made because Mr. Shehzad Nasim was ostensibly not in the country when proceedings under section 87 Cr.P.C. were initiated against him. With much respect and humility I tend to hold a different view than the learned Single

Judge did in that case. Nonetheless, the position is clear and to me the label of “absconder” used for Mr. Nasim, is not correct. The record reflects that though proceedings under section 87 commenced, the same along with proceedings under section 88 Cr.P.C. have not been concluded to date. In the case of **Khan Mir vs Amal Shirin (1989 SCMR 1987)**, it was observed: *“On a query made by us, the learned counsel for the petitioner frankly stated that no proceedings under sections 87 and 88 Cr.P.C. were taken against the respondents in respect of their alleged abscondence. This is by now well settled that if no such proceedings are taken, the abscondence is not of much consequence.”* In the same case the Court also referred to **Fazal Muhammad vs Muzaffar Hussain etc. (1981 SCMR 959)** where it was observed: *“As for the alleged abscondence of the accused, there is nothing on the record to show that they had been declared proclaimed offenders. It cannot, therefore, be said that they had ‘absconded’ merely because they were not readily available to the police.”*

#### **CRIMINAL AND CIVIL PROCEEDINGS INITIATED SIMULATANEOUSLY**

4. Mr. Soomro has referred to a number of cases to support his argument that civil and criminal proceedings can proceed simultaneously. I am however not satisfied that the cases cited by Mr. Soomro are applicable in the present circumstances. The case cited and my reason for concluding their inapplicability are as follows:

- (i) **Director-General, Anti-Corruption Establishment, Lahore and others vs Mohammad Akram Khan and others (PLD 2013 SC 401)**. This is a case where the Supreme Court had held that once a trial court had taken cognizance of a challan submitted before it, the remedy for a person aggrieved was to file a section 256-H or 249-A Cr.P.C. application and not an application seeking quashment of an F.I.R. In the case at hand, quashment of the F.I.R. is not an issue and hence the case not applicable.
- (ii) **Raja Khurshid Ahmed vs Mohammad Bilal (2014 SCMR 474)**. This case pertains to re-investigation of cases and that the same is not

barred unless the case has been disposed of. Re-investigation is not being sought in the current case hence the judgment not applicable.

- (iii) **Mian Iftikhar Ahmed vs D.S.P. Range Crime and 2 others (2016 YLR 495)**. This case states that there is no bar on further investigation in a case. This is also not an issue in the current proceedings.
- (iv) **Mohammad Ajmal Khan and 15 others vs Syed Asif Shah, Inspector General of Police, AJ&K and 6 others (PLJ 2003 SC (AJK) 172)**. Yet another case on re-investigation. As mentioned above, re-investigation has not been sought in the case in hand.
- (v) **Yasin Baig and others vs The State (2019 YLR 2746)**. The portion of the judgment referred to deals with quashment of an F.I.R. That has not been sought in the present case.
- (vi) **Mohammad Khalid Mukhtar vs The State (PLD 1997 SC 275)**. This case pertains to quashment of proceedings. Quashment of proceedings has not been sought in the present case.
- (vii) **Samiuddin vs Nadeem Ahmed and 2 others (2013 YLR 2218)**. Another case on quashment of an F.I.R. Quashment has not been sought.
- (viii) **Dr. Shehzad Muneer vs SHO, Police Station Township (2005 P.Cr.L.J. 2022)**. This is a case where the Lahore High Court expounded on the powers of a criminal court under Article 199 of the Constitution. It was a case where quashment of an F.I.R. was sought by a person not present in Pakistan; however, by invoking the writ jurisdiction of the High Court. The Court held that the writ jurisdiction could not be invoked for the quashment of an F.I.R. the question decided in this case is one which was also subsequently addressed in the case listed at serial (i) above.

5. The issue however involved in the present case is somewhat different than what is in issue in the above mentioned cases. Quashment of an F.I.R., nor quashment of proceedings, have been sought by the applicants, though oblique references to it were made by Dr. Naseem.

What they however primarily seek is that the proceedings in the criminal case be suspended until the decision of the civil cases between the parties. In this regard, the position however is clear and well settled i.e. civil and criminal proceedings can continue in tandem; however, no case has been cited before me which would show that this must necessarily be the case irrespective of the facts of the matter before a Court and that there is a complete bar to do so. In fact, in **Abdul Ahad vs Amjad Ali (PLD 2006 SC 771)**, it was observed: *“There is now consensus of opinion that there is no invariable rule that a criminal proceeding should be stayed pending the decision of civil suit but the matter is one of discretion entirely. While exercising discretion the guiding principle should be to see as to whether the accused is likely to be prejudiced if the criminal proceedings are not stayed in case of dispute regarding title where it is difficult to draw a line between a bona fide claim and the criminal action.”*

6. The case filed against Mr. Shehzad Nasim is for having committed an offence under section 489-F P.P.C. In order for a person to be guilty of an offence under that section, the following ingredients must be satisfied: (i) the cheque in question should have been issued dishonestly, and (ii) it was issued for the satisfaction of a loan or fulfillment of an obligation, and (iii) that the cheque was dishonored upon presentation, and (iv) the issuer had not made alternative arrangements for its encashment. The cheques having been issued and it being dishonored appear to be obvious, in fact the issuance of the cheques is not denied by the learned counsel for the applicant. Obviously no alternate arrangements were also made. The 2 key questions which thus need to be proved before Mr. Shehzad Nasim can be held culpable is (i) the *mens rea* of dishonesty and (ii) the purpose for the issuance of the cheques. Both parties are at a divergence of opinion as to both these factors. While, adjudication on the *mens rea* aspect by a criminal court of law is perhaps possible, it is the purpose for which the cheques were issued, that is not so clear from the record. Dr. Naseem has argued that the cheques were given as security and indeed section 3.2 of the Settlement Agreement also prima facie states the same. Mr. Soomro,

on the other hand, has argued passionately that the cheques were given for the satisfaction of an obligation. I am inclined to agree with the arguments advanced by Dr. Naseem, and my reasons for so concluding are as follows:

- (i) There is no doubt that the transaction at the core of all the unpleasantness between the 2 parties is the investment of a substantial amount of capital by Siddiqsons into the project being executed by Creek. Both parties are reputable business concerns and both feel that they have been wronged by the other. But, even in such adverse conditions, it was expected of both parties to have sorted out their differences without having to initiate the criminal law. Both the parties have attempted to do so. When established business concerns, such as the two contesting parties, cannot resolve disputes through commercial dispute resolution forums, and criminal cases are filed against each other, inevitably it is the economy of the country that is impacted. Such negative impacts on an already frail and struggling economy, may not necessarily be in our national interests nor in our quest to improve the country's business environment. Criminal litigation should be the last resort between respectable and established business, such as those of the two contesting parties. Courts seized of jurisdiction over such commercial transactions, arbitration and mediation procedures available to the parties should be the first port of call in such matters. Indeed, it is appreciated that the parties, have resorted to such forums, as the brief details of the litigation pending between them, given above in this opinion, reflects.
- (ii) In cases where the underlying transaction is a complex commercial transaction that is documented through complex commercial agreements, it would be naïve to think that contractual rights and obligations of parties to such agreements can so easily be deciphered. I have not an iota of doubt in my mind that Mr. Soomro, with his immensely vast experience in the corporate law, would agree with this statement. This is a task best left to the civil courts



and alternate dispute forums dealing with such matters rather than left to a criminal court to decide. In such commercial disputes it would not be logical or fair to do so. The purpose for which a cheque was issued is an important ingredient for the commission of an offence under section 489-F PPC. It should be for the satisfaction of a loan or fulfillment of an obligation. I fail to understand that how, in such a complex commercial transaction, with orders having been passed in so much litigation, can rights and obligations of the parties be determined by a criminal court. Perhaps, determination of such questions may also be beyond the jurisdiction of a criminal court. When one looks at the current case in the backdrop of the foregoing observations, then it appears that the current case falls within the ambit of such cases where the general principle of civil and criminal proceedings can proceed simultaneously, may be diverted from. I have also kept in mind that the standard of proof in criminal cases is far higher than that in civil cases. This has further swayed my inclination towards the decision in these proceedings. If a criminal court decides that one party owed an obligation to another of such a nature that it has imposed criminal liability, then what is the point of the civil litigation? This is a question that was argued on by Dr. Naseem, and I agree with his submission, that effectively, a material issue in the civil proceedings would have then be decided by a criminal court, albeit with all rights of appeals and revisions. In my very humble opinion, this would not be the appropriate path to follow and would cause prejudice to the accused persons. Indeed the Supreme Court in the Abdul Haleem case (referred to below) has also expressed a similar view.

7. Dr. Naseem has referred to a number of precedents in his arguments, the ones however that have impacted my decision in this case are the following:

8. The Court in **Akhlaq Hussain Kayani vs Zafar Iqbal Khan (2010 SCMR 1835)** observed: *“There is now consensus of opinion that there is no*

*invariable rule that a criminal proceeding should be stayed pending the decision of civil suit but the matter is one of discretion entirely. While exercising discretion the guiding principle should be to see as to whether the accused is likely to be prejudiced if the criminal proceedings are not stayed in case of dispute regarding title where it is difficult to draw a line between a bona fide claim and the criminal action.”* (though the case pertained to property, the general principle would still be applicable).

9. In **Sajjad Hussain Mukhi vs The State and others (2014 SCMR 1741)** the Court observed: *“Where the suits are pending between the parties on the subject, criminal court will obviously stay its hands in entering upon the dispute as deciding the dispute with regard to properties squarely falls within the domain of Civil Court in respect of which parties have already initiated proceedings.”* (though the case pertained to property, the general principle would still be applicable).

10. In **Abdul Haleem vs The State (1982 SCMR 988)** it was observed: *“In support of these submissions Mr. Muhammad Nawaz, learned counsel for the appellant, has drawn our attention to Ghulam Muhammad v. Muzammal Khan (PLD 1967 SC317), Muhammad Akbar v. State (PLD 1968SC281), Muhammad Ahmad v. State (1972 S C M R 85), Dodo Khan v. Jalaluddin and another (P L D 1973 Kar. 564), Manzoor Hussain and another v. Manzoor Hussain (P L D 1974 Lah. 202), Ghulam Akbar v. Muhammad Ilyas (P L D 1975 Kar. 231) and Muhammad Tufail v. The State and another (1979 S C M R 437), all of which purport to lay down that the mere pendency of civil litigation does not have the effect of negating the criminal liability of the accused, if the facts alleged disclose the commission of criminal offences, even if the impugned documents are the same in both civil and criminal cases. The general rule approved in these authorities is to the effect that it may, however, be advisable to stay criminal proceedings until the conclusion of civil litigation between the parties so as to avoid a conflict of findings on the same questions by civil and criminal Courts.”*

11. The Court in **Mohammad Akbar vs The State (PLD 1968 SC 281)** observed: *“Normally it is true, that criminal proceedings should not be*

*postponed pending the disposal of civil litigation connected with the same subject-matter. But where it is clear that the criminal liability is dependent upon the result of the civil litigation or is so intimately connected with it that there is a danger of grave injustice being done in the case if there be a conflict of decision between the Civil Court and the Criminal Court. In such event it is equally clear that the Criminal Court has not only the right to but should also stay its hands until the Civil litigation is disposed of, for, it is not desirable that when the title to the property itself is in dispute, the Criminal Courts should give a finding in respect of the same question.”*

12. It was observed in **Mohammad Shafi vs The State and another (1981 SCMR 237)** that: *“We find that the question raised in the present appeal has been considered on several previous occasions by this Court, namely in Muhammad Akbar v. The State and another (PLD 1968 SC 281), N. Manak Ji v. Fakhar Iqbal and another (1969 SCMR 198), Syed Muhammad Ahmad v. The State (1972 SCMR 85) and Abdul Hayee v. The State (1972 SCMR 473). It is, therefore, not necessary for us to embark upon any elaborate examination of the legal position except to respectfully adopt the view previously taken, namely, that normally criminal proceedings should not be postponed pending the disposal of civil litigation connected with the same subject-matter ; but where it is clear that the criminal liability is dependent upon the result of the civil litigation, or is so intimately connected with it that there is a danger of grave injustice being done in the case if there be a conflict of decision between the civil Court and the criminal Court, then in such event, the criminal Court should stay its hands until the civil litigation is disposed of, for, it is not desirable that when title to property itself is in dispute, the criminal Court should give a finding in respect of the same question; and further, as observed in the case of Muhammad Akbar, there is no invariable rule that a criminal proceeding should be stayed pending the decision of the civil suit but the matter is one of discretion entirely. In exercise in this discretion the guiding principle should be to see as to whether the accused is likely to be prejudiced if the criminal proceeding is not stayed.”*

13. The above precedents demonstrate that the rule is that normally criminal proceedings should not be stayed pending the disposal of civil litigation connected with the same subject matter; however, this rule can be departed from if the criminal liability is dependent upon the result of the civil litigation or so is so intimately connected with it that there is a danger of grave injustice being done in the case if there be a conflict of decision between the Civil Court and the Criminal Court. In such event it is equally clear that the Criminal Court has not only the right to but should also stay its hands until the civil litigation is disposed of. In the present case, the interpretation of the various agreements entered into between the parties to determine the purpose for which the cheques were given, is so intertwined with the issue in the criminal proceedings i.e. whether the cheques were given for the fulfillment of an obligation, that the wisdom expounded by the Supreme Court of Pakistan in the above cases becomes applicable to it.

#### **CONCLUSION**

14. Because of the above reasons, the application is allowed on the ground that the question whether the disputed cheques were issued or not for the "satisfaction of an obligation", as is required by section 489-F P.P.C., in the circumstances of the present case, is best left first answered by a civil court before criminal liability can be imputed. Proceedings in the criminal case arising out of F.I.R. No. 80 of 2020 are therefore suspended for a period of 36 months. It is hoped that the parties would have obtained some material decision in the civil proceedings between them. It is further hoped that the parties will also consider resolution of their differences through amicable means for the overall benefit of the business sector.

**JUDGE**