IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Crl. Revision Application No.S–38 of 2022

(Muzaffar Ali Soomro Vs. The State)

DATE OF HEARING	ORDER WITH SIGNATURE OF JUDGE.

For direction.

Date of hearing: 13-05-2024
Date of Order: 27-05-2024

Mr. Imdad Ali Malik, advocate for the applicant.
Mr. Sundar Khan Chachar, advocate for the complainant.
Mr. Gulzar Ahmed Malano, Assistant, P.G for the State.

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O R D E R.

Adnan-ul-Karim Memon J:- The applicant Muzaffar Ali Soomro was convicted under 489-F PPC by learned IIIrd Civil Judge and Judicial Magistrate Sukkur and sentenced to undergo R.I for two years with a fine of Rs. 50,000/-, in default whereof to undergo simple imprisonment for three months with benefit of section 382-B Cr. P.C vide judgment dated 14-03-2022, which was impugned by the applicant by preferring an appeal bearing No. 07 of 2022 which was also dismissed by learned Vth Addition Sessions Judge Sukkur vide judgment dated 08-04-2022, which is impugned by the applicant before this Court by preferring the instant Crl. Revision Application.

2. The main theme of the submissions of the applicant is that there was the agreement of sale and purchase of two plots bearing No. 302 and 535 situated in Sukkur Township, between the parties executed on 21.4.2020; and the respondent/complainant obtained the signature of the applicant on such agreement by receiving Rs. 13,00,000/- (Rupees Thirteen lac) and also obtained a cheque of Rs. 24,00,000/- (Rupees Twenty four lac) to be drawn in his favor on 5.6.2020. He also received the original property papers of the house of the applicant as a guarantee to secure the business transaction. However, due to a dispute between the parties on the subject transaction, and upon refusal of the respondent/complainant to deliver the property files to the applicant as per terms of the agreement, the subject cheque was presented with the Habib Bank with mala fide intention which was later on dishonored on 15.7.2020 due to insufficient funds in the account of the applicant. As per the applicant the respondent/complainant breached the terms of the agreement as discussed

supra and the cheque in question was just a guarantee cheque which factum was disclosed in the agreement which was conditional, subject to delivery of the possession along with papers of the subject plot. As per the applicant, the respondent/complainant failed to return the token amount received by the complainant; even his property papers were retained without reason and the complainant succeeded in lodging FIR under Section 489-F PPC and obtained the conviction of the applicant by both courts below, though no case under Section 489-F PPC was made out, the trial and appellate courts failed to appreciate the evidence.

2. The prosecution case is that complainant Ubedullah Sirohi lodged the FIR on 13-10-2020 alleging therein that he invested in the business of real estate and had sold two plots bearing No. 302 and 535 situated in Sukkur Township to the applicant/accused Muzaffar Ali Soomro for a sale consideration of Rs. 37,00,000/-, out of which he paid Rs. 13,00,000/- to him as an advance payment and for the remaining amount, he issued one cheque of Rs.2,400,000/- (Twenty-Four Lacs only) of his account No. 00827991833803 of HBL Frere Road Sukkur. The complainant deposited the said cheque in his account with Muslim Commercial Bank March Bazar Sukkur which was dis-honored as per the Memo of the Bank, hence the complainant approached the applicant, but he refused to return of remaining amount, ultimately complainant lodged such FIR at PS against the applicant on 13.10.2020, though the cheque was issued on 15.7.2020. After completion of the investigation Police submitted a challan against the applicant before the trial. After supplying case papers to the applicant, the formal charge was framed against him, to which he pleaded not guilty and claimed for his trial.

3. At the trial prosecution examined the complainant namely Ubedullah Sirohi at Ex.3, he produced the original cheque at Ex...3/A, its memo at Ex. 3 / B original agreement at Ex. 0.3 / C and his FIR at Ex...3/D.

4. PW - 2 Haq Nawaz Chachar was examined at Ex...4/A, and he produced a memo of the place of incident at Ex...4/A.

5. PW-3 Abdul Wahab Branch Operation Manager was examined at Ex...5, and he produced the letter of police for verification of the cheque at Ex. 0.5 / A

and also produced a verification/confirmation letter issued to SHO PS B--Section, Sukkur at Ex. 0.5 / B

6. PW-4 ASI Abdullah Abbasi was examined at Ex...6, and he produced entry No.9, and entry No.12. Thereafter the learned ADPP for the State closed the side of the prosecution vide his statement at Ex...7.

7. The statement of the applicant under section 342 Cr.P.C. was recorded at Ex...8, in which he denied the allegations. The applicant also claimed as innocent and was not examined on oath, nor lead any evidence in defense as required under the law.

8. The trial court after recording the evidence convicted the applicant and the appeal preferred thereon was also dismissed by the learned appellate court as discussed supra.

9. The learned counsel for the applicant has submitted that the applicant is innocent and has been falsely implicated in this case by the complainant as both parties were jointly working as Brokers in the market, however, the complainant offered him two plots viz Survey No.302 Area 120 Sq. Yards Sector IV and Survey No.535 Area 120 Sq.yards Sector III situated in Arif Builders for a total Rs.3,700,000/- (Thirty-Seven Lacs only). He further submitted that during business dealing, the applicant had paid Rs. 1,300,000/- (Thirteen lacs only) in cash to the complainant and issued a cheque of Rs.2,400,000/- (Twenty-Four Lacs only) as a guarantee to secure the transaction; and he also handed over the original documents of his house No.C-105/225 as surety on the premise that as and when complainant would handover him the physical possession of above said two plots and their original documents, then he could encash the cheque of Rs.2,400,000/- (twenty-four lacs rupees). As per learned counsel, the complainant being a friend of the applicant had obtained his signature on the agreement on the purported plea that possession of both plots and files were handed over to him, though physically he did not do so. As per the applicant, the complainant fraudulently took his signatures on the agreement, and till today no possession of both plots nor its documents has been given to him for three months and finally succeeded in lodging a case against him based on a surety cheque. He added that his cash amount of Rs.1,300,000/- (thirteen lacs) and,

original documents of his house were/are lying with the complainant, therefore no case of 489-F PPC was/is made out.

5. The learned counsel for the complainant has refuted the assertion made by the applicant and vehemently opposed the appeal on the ground that the applicant intentionally and deliberately issued the cheque to the complainant, which was later dishonored due to insufficient funds, thereafter the applicant kept the complainant on false hopes and also issued threats of dire consequences, compelling him to lodge a report with the police, which case culminated into the conviction of the applicant and the appellate court dismissed his appeal and the same is the position of the case of the applicant before this court. he prayed for the dismissal of the Revision Application of the applicant.

6. Learned APG, representing the State adopted the submissions made by the learned counsel for the complainant and further argued that the name of the applicant was mentioned in the FIR and neither transaction of funds nor issuance of cheque and agreement has been denied by the applicant. All ingredients as required for constituting an offense punishable under Section 489-F PPC were fully available in the instant case and keeping in view the material available on record the trial Court rightly convicted the applicant and the appellate court concurred with the view of the trial court. He, therefore, prayed that this Appeal of the applicant is liable to be dismissed on the same analogy.

7. I have heard the learned counsel for the parties and perused the record with their assistance.

8. The question is whether the cheque was issued towards repayment of the loan or fulfillment of an obligation within the meaning of Section 489-F PPC.

9. To give the background of the Section 489-F, P.P.C. which was originally inserted in the Pakistan Penal Code, 1860 by Ordinance LXXII of 1995, providing conviction for counterfeiting or using documents resembling National Prize Bonds or unauthorized sale thereof and while the same was part of the statute, again under Ordinance LXXXV of 2002, another Section under the same number viz. 489-F of P.P.C. was inserted on 25.10.2002 providing conviction and sentence for the persons guilty of dishonestly issuing a cheque towards repayment of loan or fulfillment of an obligation, which is dishonored on its presentation. In that

newly inserted Section 489-F of P.P.C., the maximum relief for the complainant of the case is the conviction of the responsible person and punishment as a result thereof, which may extend up to 3 years or with a fine or both. The cheque amount involved in the offense under such a section is never considered stolen property. Had this been treated as stolen property, the Investigating Agency would certainly have been equipped with the power to recover the amount also as is provided in Chapter XVII of P.P.C. relating to offenses against property. The offense under Section 489-F, P.P.C. is not made part of the said Chapter providing the offenses and punishments of offenses against property, rather in fact the same has been inserted in Chapter XVIII of P.P.C., regarding offenses relating to documents and to trade of property marks. When on 25.10.2002, Section 489-F, P.P.C. was inserted in P.P.C., Order XXXVII, C.P.C. was already a part of the statute book providing the mode of recovery of the amounts subject-matter of negotiable instruments, and a complete trial is available for the person interested in the recovery of the amounts of a dishonored cheque, therefore, not only that the complainant in a criminal case under Section 489-F, P.P.C. cannot ask a Criminal Court to effect any recovery of the amount involved in the cheque, but also the amount whatsoever high it is, would not increase the volume and gravity of the offense.

10. In the instant case, the circumstances indicate that the cheque in question was issued to the complainant on 15.7.2020 towards payment of some sale and purchase of plots, however, the complainant lodged FIR for offense under Section 489-F PPC, after a delay of more than two months. It appears that the complainant had tried to recover his amount by invoking penal action against the applicant and converted a civil dispute into a criminal case by lodging an F.I.R. of the incident under section 489-F PPC. It has already been clarified by the Supreme Court in the cases of *Shahid Imran v. The State and others* (**2011 SCMR 1614**) and *Rafiq Haji Usman v. Chairman, NAB and another* (**2015 SCMR 1575**) that the offenses are attracted only in a case of entrustment of property and not in a case of investment or payment of money. In the case in hand, it is the prosecution's case that the complainant agreed with the applicant about the sale and purchase of the subject plots, and in lieu thereof he received the subject cheque and property documents of the applicant. That being so, one of the foundational elements of Section 489-F P.P.C. is missing due to peculiar facts and circumstances of the case, as the essential pre-requisites to attract the provisions of Section 489-F, P.P.C. are;

(i) that the cheque was duly issued,

(ii) such an issuance was with dishonest intent,

(iii) that the issuance of the cheque was for repayment of a loan or fulfillment of an obligation and,

(iv) the cheque so issued was dishonored on presentation.

11. Section 489-F, P.P.C. criminalizes dishonest issuance of the cheque. It would be apt to reproduce Section 489-F P.P.C.:-

> ***"489-F. Dishonestly issuing a cheque.---Whoever dishonestly issues a cheque towards repayment of a loan or fulfillment of an obligation which is dishonoured on presentation, shall be punishable with imprisonment which may extend to three years, or with fine, or with both, unless he can establish, for which the burden of proof shall rest on him, that he had made arrangements with his bank to ensure that the cheque would be honoured and that the bank was at fault in not honouring the cheque."***

12. A bare reading of the above-quoted Section makes it crystal clear that it does not attract in every case where a cheque is dishonored. The foundational elements to constitute an offence under the said Section as discussed supra. The said pre-conditions to make out an offence under section 489- F, P.P.C. was also determined by the Supreme Court in the case of "*Muhammad Sultan v. The State",* reported in **2010 SCMR 806**. The absence of even one of these elements as discussed in the case law discussed supra, would take the case out of the ambit of Section 489-F, P.P.C. Section 489-F, P.P.C. does not stipulate any period within which the holder must present the cheque to the bank for encashment. According to the Supreme Court of Pakistan in *Mian Muhammad Akram v. The State and others* (**2014 SCMR 1369**) and *Mian Allah Ditta v. The State and others* (**2013 SCMR 51**), Section 489-F PPC is relevant and attracted only to cases where the dishonored cheque had been issued for repayment of the loan or towards discharge of an obligation. It has been clarified by the Supreme Court of Pakistan that the obligation to be discharged had to be an existing obligation and not a futuristic obligation arising out of a possible default in the future. This is why a cheque issued by way of surety or guarantee to cater for a possible default in the future cannot be accepted as a cheque issued towards the discharge of an obligation. According to the Supreme Court of Pakistan, the obligation in the context of Section 489-F PPC has to be an existing obligation, existing at the time of issuance of the cheque, and not a futuristic obligation.

13. A provision constituting a criminal offense and entailing punitive consequences has to be strictly and narrowly construed and interpreted, it may be added with advantage. Section 489-F PPC criminalizes and resultantly penalizes the act of dishonestly issuing a cheque towards repayment of loan or fulfillment of an obligation, which is dishonored on presentation by punishment with imprisonment which may extend to three years or with fine, or with both unless the drawer can establish, for which the burden of proof shall rest on him, that he had made arrangements with his bank to ensure that the cheque would be honored and that the bank was at fault in not honoring the cheque.

14. The term 'dishonestly' has been defined by the Pakistan Penal Code, 1860 in Section 24 to mean doing anything to cause wrongful gain to one person or wrongful loss to another person. For the act of issuance of a cheque to constitute a cognizable offense under Section 489-F of the PPC, 1860 not only must the cheque be issued to cause wrongful gain to one person or wrongful loss to another but the cheque must also be issued towards repayment of loan or fulfillment of an obligation. In the present case the applicant has not gained rather he has lost his amount and property papers which are lying with the complainant and it was not proved that the subject plots were physically handed over to the applicant as per agreement as discussed supra and the question of issuance of the cheque for securing the deal between the parties remained in as mystory, merely issuance of cheque without fulfilling the contents of agreement on both the parties how a conviction could be made based just dishonoring of cheque without meeting the conditions as enumerated in section 489-F PPC as discussed supra, which is apathy on the part of the trial and appellate court for the reason that the Supreme Court of Pakistan in case of *Mian Allah Ditta v. The State and others* (**2013 SCMR 51**) in Paragraph 6 held that 'every transaction where a cheque is dishonored may not constitute an offense. The primary and foremost duty and obligation always lies with the prosecution to put and prove its case against the accused beyond any shadow of a doubt. If any lacuna is left in the prosecution case, the same cannot be covered by placing reliance on the statement of the accused recorded under section 342 Cr.P.C. It is now a well-settled proposition of law that when prosecution evidence is rejected in its entirety (as the case in the instant appeal, as held by the learned trial court), the statement of the accused under section 342 Cr.P.C. has to be accepted in toto

and without scrutiny. Reliance is placed on the case of *The State versus Muhammad Hanif, etc* (**1992 SCMR 2047**).

15. The foundational elements to constitute an offense under this provision are the issuance of the cheque with dishonest intent, the cheque should be towards repayment of a loan or fulfillment of an obligation, and lastly the cheque is dishonored. The above ingredients are missing and were not proved in the trial as the complainant has admitted in his evidence that in the contents of the FIR, the agreement was not mentioned. He further admitted that there was a difference in the issuance of the date of the cheque in the FIR as well as in the agreement. He also admitted that the date mentioned in the cheque is 05.06.2020 as per agreement. He admitted that he purchased that property from an investor but does not remember the name of the owner of the file. He admitted that he did not give possession of the plot because the deal was settled from file to file. He admitted that he received the cheque from the applicant and assured him to purchase the plot from the investor.

16. It is a cardinal principle of criminal jurisprudence that the burden to prove the commission of an offense with all its ingredients lies on the prosecution and even a slight doubt would be resolved in favor of the accused. Article 117. Qanun-e-Shahadat Order. 1984 provides that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he/ she asserts, must prove that those facts exist. It further provides that when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person, and in concluding that the offense stands proved against the accused beyond a reasonable doubt, the trial Court should first see whether the prosecution has successfully discharged its burden and it should not be swayed by the failure of the accused to prove his defense. On the aforesaid proposition, I may refer here to the case of *ABDUL HAQUE vs. THE STATE and another* (**PLD 1996 S.C. 1**).

17. There is a major contradiction in the statements of the complainant and his eyewitnesses, regarding the mode and manner of giving cheque and business transaction about the sale and purchase of plots and agreement executed between the parties which cannot be ruled out here. For giving him benefit of doubt, there doesn't need to be many circumstances creating doubts. If there is a circumstance that creates reasonable doubt in a prudent mind about the guilt

of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right.

18. In view of the above discussion this appeal is allowed and the conviction and sentence awarded to the applicant by both courts below in the subject crime are set aside. The Applicant Muzaffar Ali Soomro is acquitted of the charge, he is on bail his bail bond stands discharged.

JUDGE

Nasim/P.A