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JUDGMENT SHEET

LAHORE HIGH COURT, LAHORE

JUDICIAL DEPARTMENT

Writ Petition No. 72703/2022

Abdul Hameed

Vs.

Station House Officer etc.

JUDGMENT

Date of hearing:	14.12.2022
For the Petitioner:	Rai Naeem Iqbal Kharal, Advocate.
For the State:	Mr. Mukhtar Ahmad Ranjha, Additional Advocate General, with Saleem/ASI.
Respondent No.2:	In person.
Research assistance:	Mr. Kashif Iftikhar, Research Officer, LHCRC.

“Corruption is a cancer, a cancer that eats away at the citizen’s faith in democracy, diminishes the instinct for innovation and creativity.”¹ Therefore, integrity, transparency, and the fight against corruption must be part of the culture and taught as fundamental values.²

Tariq Saleem Sheikh, J.— The Petitioner serves as Girdawar in Mauza Shahdara, Lahore. Respondent No.2 claims that he paid him Rs.3,500,000/- through cheques in instalments of Rs.500,000/- each as a bribe for the mutation of 182 kanals of land situated in that Mauza. According to him, the Petitioner did not get the job done, and when he asked him to return his money, he issued him Cheque No.D-15380129 dated 22.5.2021 for Rs.2,000,000/- towards partial reimbursement. The cheque was dishonoured on presentation after which Respondent No.2 lodged FIR No. 2477/2022 dated 13.5.2022 against the Petitioner at Police Station Shahdara, Lahore, for an offence under section 489-F PPC. The Petitioner

¹ Joe Biden.

² Angel Gurria, OECD Secretary General.

seeks the quashing of that FIR through this petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (the “Constitution”).

2. The Petitioner denies having received any bribe from Respondent No.2 and also that he gave him Cheque No. D-15380129 to partially return that sum. He claims it was a different transaction regarding which civil litigation is pending. In this petition, his plea is that Respondent No.2 could not, on the stated facts, lodge the FIR against him. The alleged agreement between the parties being void, the consideration for Cheque No. D-15380129 is unlawful and against public policy.

3. The Additional Advocate General has opposed this petition. He contends that the transaction between the Petitioner and Respondent No.2 has two severable parts. The first is illegal, but the second is not. Hence, the Petitioner can be prosecuted under section 489-F PPC for dishonestly giving a bad cheque.

The law and jurisprudence

4. Illegality as a defence stems from two Latin maxims *ex turpi causa non oritur octio* (“no action arises from a disgraceful cause”) and *in pari delicto potior est conditio defendantis* (“where both parties are equally in the wrong the position of the defendant is the stronger”). There is also the principle of *locus poenitentiae* (“an opportunity to repent”) and the “reliance rule”. According to the latter, illegality is a defence where the claimant has to rely on the illegality to establish or to plead the cause of action.³ In ***Holman v. Johnson***, (1755) 1 Cowp 342 at 343, Lord Mansfield CJ stated:

“No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff’s own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendantis*.”

³ Lord Burrows on *The Illegality Defence after Patel v. Mirza*. The Professor Jill Poole Memorial Lecture 2022, Aston University, 24 October 2022. Available at: file:///C:/Users/IST/Downloads/illegality-defence-after-patel-v-mirza-lord-burrows%20(2).pdf

5. Lord Mansfield did not elucidate what an “immoral” or an “illegal” act was. This resulted in an “incoherent mass of inconsistent authorities”⁴ and produced “arbitrary, unjust, and disproportionately harsh”⁵ outcomes. Finally, in *Patel v. Mirza*, [2016] UKSC 42, [2016] 1 W.L.R. 399], a case heard by a panel of nine Justices, the U.K. Supreme Court abandoned the conventional rules and adopted “a policy-based” or “range of factors approach.”⁶ In his leading judgment, Lord Toulson, with whom Lady Hale, Lord Kerr, Lord Wilson, and Lord Hodge agreed (as did Lord Neuberger albeit with some differences) explained:

“[O]ne cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without (a) considering the underlying purpose of the prohibition which has been transgressed, (b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and (c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality ... That trio of necessary considerations can be found in the case law.”

6. On the other hand, Lords Sumption, Mance, and Clarke favoured preserving the existing norms. They apprehended that the new approach would create unacceptable uncertainty.

7. The courts in India and Pakistan decide the restitution claims on the basis of the Contract Act of 1872 which they have commonly inherited from the British. The statutory provisions in both countries are the same except for a few amendments they have made to meet their domestic requirements. Section 23 of the Act describes what considerations and objects are lawful. Section 24 provides that the agreement is void if any part of a single one or any part of several considerations for a single object is unlawful. Section 65 states, “when an agreement is discovered to be void or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.”

8. Section 84 of the Trust Act 1882 is also relevant to the discourse. It provides that if the owner of a property transfers it to another

⁴ *Bilta (UK) Ltd. (in liquidation) and others v. Nazir and others (No.2)*, [2015] UKSC 23, per Lord Sumption.

⁵ Calab O’fee, *Patel v. Mirza and the Future of the Illegality Doctrine in New Zealand* (2018). Available at: file:///C:/Users/IST/Downloads/paper_access%20(2).pdf

⁶ See note 1.

for an illegal purpose but that purpose is not carried out, the transferee must hold the property for the benefit of the transferor. The same rule will apply where the transferor is not as guilty as the transferee, or allowing the transferee to retain the property would defeat the provisions of any law.

9. The defence of illegality is sometimes also pleaded in criminal cases. In India, jurisprudence in this regard has mostly developed on section 138 of the Indian Negotiable Instruments Act, 1881 (the “NIA”), which allows criminal prosecution for the dishonour of cheques.⁷ In the context of bribery, there are two streams of decisions. Some courts have accepted the plea while others have not.

10. In *Virender Singh v. Laxmi Narain and another* [1 (2007) BC 530, 2007 Cri LJ 2262]⁸, the petitioner received illegal gratification from the respondent-complainant for arranging a job for his nephew in Haryana Police through high-profile political leaders. He failed to fulfil his promise and issued a cheque to return the money which was dishonoured for want of sufficient funds. The complainant filed a complaint under section 138 of the NIA in which the petitioner was convicted. The Delhi High Court acquitted him holding as under:

⁷ Section 138 of India’s Negotiable Instruments Act, 1861, reads as under:

S.138. Dishonour of cheque for insufficiency, etc., of funds in the account.— Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless—

- (a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;
- (b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing to the drawer of the cheque within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and
- (c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice.

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

⁸ <https://indiankanoon.org/doc/300293/>

"[T]he explanation in section 138 of the [NIA] makes it clear that the expression ‘debt or other liability’ has reference only to a legally enforceable debt or liability. Conversely, if a cheque is issued in respect of a debt or liability which is not legally enforceable, then section 138 of the said Act would not apply. Section 23 of the Indian Contract Act, 1872, *inter alia*, stipulates that every agreement of which the object or consideration is unlawful is void."

11. In *Virender Singh*, the Delhi High Court noticed Illustration (f) to section 23 of the Contract Act, which is as follows: "A promises to obtain for B an employment in the public service, and B promises to pay 1000 rupees to A. The agreement is void, as the consideration for it is unlawful." Taking Illustration (f) further, the Court considered the following questions: If B pays the promised sum of 1000 rupees to A, but the latter does not fulfil his promise of obtaining employment for B in public service, does B have a remedy in law to seek restitution and return of his money? And next, what is the obligation of a person who has received advantage under a void agreement? Is A bound to return 1,000 rupees to B? To answer these questions, the Court considered section 65 of the Contract Act and ruled that this provision does not apply where the parties are aware of the illegality at the time of execution of the agreement, and it is void *ab initio*. Resultantly, the money in the example given above is not recoverable. The High Court stated:

"[Section 65 of the Contract Act] applies to (1) an agreement which is “discovered to be void” or (2) a contract which “becomes void”. The expressions “agreement” and “contract” have distinct meanings under the Contract Act. As mentioned earlier, an “agreement” becomes a “contract” only if it is enforceable in law. Thus, the phrase “a contract becomes void” appearing in the said Section 65 would not have any application in the case where an agreement is void *ab initio*. It has already been indicated above that the agreement in the present case was void from the very beginning. Therefore, the agreement in question, as also the agreement of the type mentioned in Illustration (f) to the said Section 23, cannot fall within the phrase “a contract becomes void.” This leaves us with agreements which are “discovered to be void.” This has reference to those agreements which, the contracting parties or one of them did not know, at the time of entering into the agreement, that the same was not enforceable in law, but it was later “discovered” by them or one of them as being void. Where the parties are aware and have knowledge that the agreement is unlawful and despite this knowledge they go ahead with the agreement, they would not be able to take recourse to the provisions of the said Section 65 because there would be no “discovery” of the invalidity of the agreement. That the agreement was unlawful and, therefore, void, was known to them all along."

12. In *R. Parimala Bai v. Bhaskar Narasimhaiah*,⁹ the accused assured the complainant that he could secure a job for his son in a particular factory and received Rs.10,00,000/- for that purpose. However, he failed and gave the complainant a cheque to return the money which was dishonoured. The Karnataka High Court quashed the complaint under section 138 of the NIA holding as under:

“Section 138 of the Negotiable Instruments Act mandates that [a legally recoverable debt should exist]. To attract section 138 of the Negotiable Instruments Act, the party has to plead with regard to the existence of a legally recoverable debt. If he pleads with regard to the existence of the legally recoverable debt under section 138 of the Act, then only presumption under section 139 of the Act can be raised in favour of the complainant. If the complainant himself does not plead the existence of a legally recoverable debt, then there is no question of raising any initial presumption in favour of the complainant.”

13. In *Nagaraj alias Nagappa Karennavar v. Basalingayya Hiremath* (2022 Latest Case Law 2529 Kant)¹⁰, on similar facts, the Karnataka High Court quashed the proceedings on a complaint under section 138 of the NIA. It held that the provisions of section 23 of the Contract Act are “crystal clear.” If a contract is void, particularly where the consideration is immoral, illegal or contrary to public policy, the entire transaction is rendered void. The consideration paid in such a contract becomes an unlawful consideration. As a result, the money for which the cheque is drawn cannot be called a legally recoverable debt.

14. Let’s now look at the other set of cases. In *E.K. Saseendra Varma Raj v. State of Kerala and another* [2009 (5) R.C.R (criminal) 267]¹¹, the petitioner issued two cheques to refund the money he received for arranging a job for the complainant’s son which bounced. In a private complaint, he was convicted for an offence under section 138 of the NIA. The Kerala High Court upheld his conviction while exercising revisional jurisdiction. The learned Judge nixed the contention that the accused and the complainant were in *pari delicto*. He reasoned:

“This is not a case where the original agreement entered into between the complainant and the accused is sought to be enforced ... But here the accused after taking a sum of Rs. 75,000/- was unable to secure the employment to the complainant as promised by him in an aided high

⁹ <https://indiankanoon.org/doc/126365146/>

¹⁰ <https://indiankanoon.org/doc/179605958/>

¹¹ <https://indiankanoon.org/doc/1204314/>

school where the teachers are not government servants and where the service is not public service. Thereupon the complainant demanded the money back, and the accused agreed to return the money. This agreement to return the money was not in any way tainted by any illegality. The accused was really agreeing to disgorge his ill-gotten gains. It is only an act of undoing an illegality by another agreement, the consideration for which was not illegal or opposed to public policy. The cheques executed by the revision petitioner/accused in pursuance of the agreement to return the money received by him, were thus drawn for the discharge of a legally enforceable debt or liability.”

15. In ***R.L. Sahu v. Moh Tahir Shekh*** [2012 (3) MPHT (C.G.) 69; 2012 ACD 981; 2012 (118) AIC 882], the respondent received money from the petitioner to get a job for him but failed. The petitioner demanded his money back upon which the respondent gave him two cheques which were dishonoured. The petitioner filed a complaint under section 138 of the NIA. The trial court dismissed it on the ground that the cheques in question were not for the payment of a legally enforceable debt or liability. The Chattisgarh High Court set aside that order stating:

“In the present case, first part of the agreement was not illegal, but when the respondent, with a view to correct himself, has agreed to return the money which he had received from the petitioner for an illegal purpose and issued cheques in favour of the petitioner, who is victim of the first agreement, then it cannot be said that second part of the agreement is illegal and the petitioner is not entitled to take recourse available under the law for the wrong committed by the respondent. Therefore, petitioner cannot be denied access to justice. His position was not of *pari delicto*.”

16. In ***Awadesh Tahkur and others v. State of Bihar and another***,¹² the complainant, an unemployed person, approached the petitioners who promised him a job abroad in exchange for Rs.150,000/- Subsequently, the petitioners provided him a visa and an air ticket which was found forged. The Patna High Court refused to apply the *pari delicto* rule for two reasons: first, the petitioners had a higher level of bargaining power, and second, there was an allegation against them that they had forged the visa and air ticket.

17. Analysis of the above case law shows that in India there is a preponderance of opinion that a complaint under section 138 of the NIA is not competent because the consideration therefor is unlawful, against public policy and dehors section 23 of the Contract Act. However, recently in

¹² <https://indiankanoon.org/doc/175687127/>

Prakash N. v. The State of Karnataka,¹³ the Karnataka High Court took a more pragmatic approach to the issue. In that case, the accused and the complainant struck a deal to secure employment for the latter's son. The money exchanged was thus a bribe. The civil court had dismissed the suit for recovery of money on the ground that the agreement was against public policy and violated section 23 of the Contract Act. The High Court refused to quash the criminal proceedings and ruled that both the bribe-taker and the bribe-giver must be prosecuted. The following excerpt is quite instructive:

“The petitioner [accused], by relying on the decision of the Delhi High Court, would contend that the agreement is contrary to section 23 of the Indian Contract Act, 1872 is not enforceable, and therefore the criminal proceedings cannot be initiated. Thereby, there is an admission on the part of the petitioner-accused that there is an agreement which is contrary to law and a violation of section 23 of the Indian Contract Act, 1872. Therefore, leading to the inevitable conclusion that there is an illegal bargain which was entered into between the petitioner and respondent. If that is so, I am of the considered opinion that extraordinary powers under section 482 of Cr.P.C. cannot be exercised to quash the proceedings at this stage. The matter would require investigation as to who are involved in job scam and their respective roles etc. since *prima facie* there is an admission of an offence by both parties ... In view of the said admission, it is clear that not only the bribe-taker but the bribe-giver would also have to be prosecuted.”

18. In Pakistan, the issue under discussion was considered by B.Z. Kaikaus, J. in **Malik Allah Ditta v. Malik Allah Wasaya** (PLD 1956 Lahore 521). The plaintiff claimed that he extended the defendant a loan of Rs.1500/- and he gave him a cheque which was dishonoured. He filed a suit for recovery of money based on that cheque. The defendant, an employee of a Municipal Committee, pleaded that the cheque was not by way of a loan but represented money received by the plaintiff *benami* for the defendant in consequence of an illegal transaction between the defendant and the Committee. The plaintiff argued that the defendant's plea was founded on an illicit transaction and should be rejected outright. His Lordship held that the maxims, such as *ex turpi causa non oritur octio*, “are not rules of law and courts are not bound by them. They represent considerations of justice and public policy that may, in the circumstances of a case, be overridden by other similar considerations. Their applicability is always subject to what appears to the court to be the equities of a case ... The courts need not apply them if, in a particular case, their application would lead to injustice or to a

¹³ <https://indiankanoon.org/doc/122076919/>

situation that public policy does not approve of.” Following an earlier Full Bench judgment in *Qadir Bakhsh v. Hakam* (AIR 1932 Lahore 503), his Lordship ruled that the defendant could plead the real facts before the court.

The case at hand

19. The issue before this Court in the present proceedings is whether FIR No.2477/2022 should be quashed. The question as to whether a suit based on Cheque No.D-15380129 is maintainable or whether Respondent No.2 is otherwise entitled to recover Rs.2,000,000/- from the Petitioner is not before me. Therefore, I must avoid any comment on that aspect.

20. As per contents of FIR No.2477/2022, Respondent No.2 gave Rs.3,500,000/- to the Petitioner as a bribe for the mutation of land. He failed to manage it and gave him Cheque No.D-15380129 for Rs.2,000,000/- to return the aforesaid amount partially. The Petitioner has his own story about the cheque. Therefore, a thorough investigation is required to determine the real facts.

21. In *Mst. Sughran Bibi v. The State* (PLD 2018 SC 595), the Hon’ble Supreme Court of Pakistan held that FIR is essentially an “incident report” because it informs the police for the first time that an occurrence involving commission of a cognizable offence has taken place. Once the FIR is registered, the occurrence is regarded as a “case”, and every step taken in the ensuing investigation under sections 156, 157, and 159 Cr.P.C. is a step taken in that case. The contents of the FIR do not guide or govern the Investigating Officer, and he is not under any obligation to establish that version. Instead, he must find out the truth. He is required to collect information from any number of people who appear to be acquainted with the facts of the occurrence. Every new piece of information he obtains during the process or the discovery of a new circumstance relevant to the commission of the offence does not require the registration of a separate FIR. Such additional information or knowledge is part of the ongoing investigation into the same case, which began when the FIR was registered.

22. I am aware that the courts quash the criminal proceedings when the allegations in the FIR or the complaint, taken at face value and accepted

in entirety, do not *prima facie* constitute an offence or make out a case against the accused. This principle cannot be applied to the present case. The Petitioner seeks quashing of the FIR rather than a private complaint. Even if his contention is accepted that Cheque No.D-15380129 is void because the consideration is unlawful and against public policy, an investigation is required to determine whether the crime of corruption has been committed. The State is interested in fighting corruption and prosecuting those who indulge in it.

23. Pakistan Penal Code expressly recognizes that the bribe-giver is the collaborator of the bribe-taker. The Explanation to section 109 PPC states that “an act or offence is said to be committed in consequence of the abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.” Illustration (a) to section 109 reads as follows:

“(a) A offers a bribe to B, a public servant, as a reward for showing A some favour in the exercise of B’s official functions. B accepts the bribe. A has abetted the offence defined in section 161.”

24. In view of the fact that the bribe-giver is an accomplice of the bribe-taker, both are liable to be prosecuted. Hence, if the police determine following an investigation that the offence of bribery has been committed, proceedings shall also be initiated against Respondent No.2.

25. Subject to the above observations, this petition is **dismissed**.

(Tariq Saleem Sheikh)
Judge

Announced in open Court on _____

Judge

Naeem

Approved for reporting

Judge