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JUDGMENT SHEET

LAHORE HIGH COURT, LAHORE

JUDICIAL DEPARTMENT

Writ Petition No. 3103/2023

Hayat Kimya Pakistan (Private) Limited

Vs.

Humair Yusuf and others

JUDGMENT

Date of hearing:	**27.3.2023**
For the Petitioner:	Barrister Sharjeel Adnan Sheikh, assisted by Mian Hassan Raza and Khayyam-ul-Hassan Lodhi, Advocates.
For Respondents No.1 & 2:	Kh. Haris Ahmad, Advocate, assisted by Mr Muhammad Zubair Khalid, Advocate.
For Respondents No.3 & 4:	Mr Sittar Sahil, Assistant Advocate General.

Tariq Saleem Sheikh, J. – The Petitioner, Hayat Kimya Pakistan (Private) Limited, had appointed Apex Distribution and Marketing Services (Private) Limited (hereinafter referred to as "Apex") as its non-exclusive distributor for the sale and distribution of its products for certain parts of Karachi in terms of the Distribution Agreement dated 15.5.2019. As per clause 8.8 (read with clause 15.2) thereof, Apex could purchase products from the Petitioner on a deferred payment basis subject to furnishing post-dated/undated cheque(s) of Rs.60.00 million as security. Apex was required to settle all the transactions made on a credit/deferred payment basis within 40 days. Clause 15.3 provided that if the agreement expired or was terminated and/or Apex failed to perform its obligations under the Distribution Agreement, the Petitioner could collect any outstanding amount by encashing the security cheques. Clause 15.5 stipulated that if any such cheque was returned unpaid, the Petitioner could initiate criminal and/or civil proceedings without prejudice to other legal rights.

2. On 8.7.2021, the Petitioner filed an application under section 22-A of the Code of Criminal Procedure, 1898 (hereinafter referred to as "Cr.P.C." or the "Code"), before the Ex-officio Justice of Peace, Lahore, stating that it was in business with Apex and, in due course, Rs.15.00 million became outstanding against it. Thereupon, Apex's directors, Respondents No.1 & 2, gave the Petitioner three cheques (Cheque Nos. 97479699, 1688258316 and CA-0053594927) for Rs.5.00 million each to pay Apex's liabilities, but these were returned on presentation. It is pertinent to point out that Cheque No.97479699 was drawn on the personal account of Respondent No.1 with Summit Bank Limited, while Cheque Nos. CA-0053594927 and 1688258316 were drawn on Apex's two corporate accounts maintained with Faysal Bank Limited and MCB Bank Limited, respectively, and issued under the hand of Respondent No.2.

3. The Petitioner's application under section 22-A Cr.P.C. does not specify the precise date(s) when Respondents No.1 & 2 delivered it the above-mentioned cheques. However, their copies are available on record, which reflects that all of them are dated 4.5.2021.

4. The Ex-officio Justice of Peace dismissed the Petitioner's application under section 22-A Cr.P.C. vide Order dated 21.11.2022, holding that Respondents No.1 & 2 gave it Cheque Nos. 97479699, 1688258316 and CA-0053594927 by way of security under clause 8.8 (read with clause 15.2) of the Distribution Agreement. Section 489-F PPC does not apply to such cheques. The Petitioner has assailed that order in this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (the "Constitution").

The submissions

5. The Petitioner's claim in its application before the Ex-officio Justice of Peace under section 22-A Cr.P.C. that Respondents Nos. 1 & 2 gave it Cheque Nos. 97479699, 1688258316, and CA-0053594927 to cover Apex's current bills. However, it appears that at the time of the final hearing it departed from that position and argued that they constituted security under the Distribution Agreement. The Ex-officio Justice of Peace has also passed the Order dated 21.11.2022 (the "Impugned Order") on that premise. In its pleadings before this Court, particularly paragraphs 1(b), 2 and 3 of this

petition, the Petitioner has admitted that it received the aforementioned cheques as security.

6. The Petitioner's counsel, Barrister Sharjeel Adnan Sheikh, contends that the Ex-officio Justice of Peace has not properly appreciated the facts of the case and the applicable law while passing the Impugned Order. Apex unequivocally assured the Petitioner that it would observe and perform its obligations under the Distribution Agreement on time and in full. The parties agreed that the Petitioner would extend credit to Apex in exchange for security cheques and that it would be entitled to initiate civil and criminal proceedings if any of them bounced. The security cheques were essential to the arrangement, and the Petitioner would not have made it without them. Respondents No.1 & 2 are liable under both civil and criminal law for the dishonour of Cheque Nos. 97479699, 1688258316 and CA-0053594927, and cannot be excused for any reason.

7. The counsel for Respondents No.1 & 2, Kh. Haris Ahmad, Advocate, contends that a person is not criminally liable under section 489-F PPC for the dishonour of a security cheque. He claims that Cheque Nos. 97479699, 1688258316 and CA-0053594927 were undated when Respondents No.1 & 2 delivered them to the Petitioner. According to him, Cheque No. 97479699 was issued on 13.5.2019, Cheque No. CA-0053594927 on 25.1.2020 and Cheque No.1688258316 on 2.7.2020, but the Petitioner put the date 4.5.2021 on all of them and had them dishonoured. Mr Ahmad states that Apex owes no money to the Petitioner. It has a dispute with the Petitioner and a claim of Rs.100,439,515/- against it; hence Respondents No.1 & 2 instructed the banks concerned to stop payment against the said cheques. Apex served the Petitioner with a notice of arbitration before it presented them. Mr Ahmad contends that a directive to register a case cannot be issued in such circumstances, and the Ex-officio Justice of Peace has rightly turned down the Petitioner's request.

Opinion

8. Section 489-F in its present form was inserted in the Pakistan Penal Code, 1860 ("PPC"), by the Criminal Law Amendment Ordinance, 2002. It reads as follows:

> **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.

9. A bare perusal of section 489-F PPC shows that every dishonour of a cheque may not constitute an offence. This provision is attracted when the following conditions are fulfilled: (i) the cheque was issued with a dishonest intention; (ii) the cheque was for the repayment of a loan or fulfilment of a financial obligation; and (iii) the cheque was dishonoured on presentation. In ***Malik Safdar Ali v. Syed Khalid Ali and others*** (PLD 2012 Sindh 464), the Sindh High Court ruled that section 489-F PPC seeks to protect the public from financial fraud committed through dishonest cheques. According to it, section 420 PPC applies to all types of fraud, deceit and deception that cause loss to a person, but section 489-F PPC defines a separate offence when fraud or cheating is perpetrated using a cheque.

10. The first question that requires determination is whether cheques given as security (or as "guarantee", as sometimes described) would attract section 489-F PPC if they are returned unpaid. These cheques may bear the same date as the execution date or be post-dated or inchoate instruments.[1] The general rule is that the cheques, which are not intended to settle any specific transaction but to foster trust between the parties in their usual business operations, are not susceptible to criminal prosecution under section 489-F PPC.[2] This issue was raised before the Supreme Court of Pakistan for the first time in ***Mian Allah Ditta v. The State and others*** (2013 SCMR 51). In that case, the Investigating Officer informed the Court that during the investigation, he found that the parties had a dispute, which they agreed to resolve through arbitration. The arbitrator took the cheque from the accused as security before initiating the proceedings, and the sum written on it was never adjudicated against him. The Supreme Court observed that if the cheque was not issued to repay an outstanding loan or fulfilment of an existing obligation but to meet a prospective future liability

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[1] See section 21 of the Negotiable Instruments Act, 1881.

[2] *Malik Safdar Ali v. Syed Khalid Ali and others* (PLD 2012 Sindh 464).

that may be determined as a result of another exercise, then one of the key elements of section 489-F PPC is lacking. Given the facts of the case, the Supreme Court held that the cheque in question was furnished as security and admitted the accused to pre-arrest bail. However, it avoided detailed deliberation on the issue "lest it may prejudice anyone during investigation or trial."

11. In India, section 138 of the Indian Negotiable Instruments Act, 1881 (the "INI Act") criminalizes dishonour of cheques.[3] The Indian Supreme Court has considered the issue of whether dishonour of post-dated and security cheques entails criminal liability in various cases. In ***Indus Airways Private Limited v Magnum Aviation Private Limited*** [(2014) 12 SCC 539], the purchaser delivered post-dated cheques as advance payment against a purchase order that was subsequently cancelled. The supplier presented those cheques, but they were not cashed. The Supreme Court ruled that section 138 would only apply if a legally enforceable debt existed on the "date of the drawl of the cheque." It further stated that if a cheque is issued as an advance payment for the acquisition of goods and the purchase order is not carried out to its logical end for any reason, whether due to cancellation or otherwise, and the contractor does not supply the contract goods, the cheque cannot be said to have been drawn for an existing

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[3] For facility of reference, section 138 of the Indian Negotiable Instruments Act, 1881, is reproduced below:

> **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:
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> Provided that nothing contained in this section shall apply unless–
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> (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;
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> (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
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> (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.
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> **Explanation.–** For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.

debt or liability. In ***Sampelly Satyanarayana Rao v. Indian Renewable Energy Development Agency Limited*** [(2016) 10 SCC 458 : AIR 2016 SC 4363], the respondent advanced a loan to the appellant to set up a power project for whose repayment he gave it post-dated cheques, describing them as security. These cheques were dishonoured, prompting a complaint under section 138 of INI Act. The Supreme Court held that whether a post-dated cheque is for "discharge of debt or liability" depends on the nature of the transaction. Section 138 only applies if, on the date of the cheque, the liability or debt exists or the amount has been legally recoverable. The Supreme Court distinguished *Indus Airways, supra,* noting that the said decision cannot be applied to a situation where the cheque was for repayment of a loan instalment which had fallen due, even though such deposit of cheques towards repayment of instalments was also described as "security" in the loan agreement. There is a distinction between a transaction where the purchase order is cancelled, and a loan transaction in which the loan has been advanced and repayment is due on the cheque date. The critical question in determining the applicability of section 138 INI Act is whether the cheque represents the discharge of existing enforceable debt or liability or an advance payment without subsisting debt or liability.

12. In ***Sripati Singh (since deceased) v. State of Jharkhand and another*** (AIR 2021 SC 5732), a Magistrate's order taking cognizance and issuing summons on a complaint under section 420 IPC[4] and section 138 of INI Act was challenged. There was a transaction in which the appellant had advanced funds. Several cheques were given to it but they were all returned unpaid. The Indian Supreme Court ruled that "security" refers to something given, deposited or pledged to ensure that the parties to a transaction fulfil their obligations. If a cheque is furnished as security for a loan, and if the loan is not repaid before the due date, or if the parties do not agree to defer the payment, the cheque will mature for presentation. If it is not honoured, the consequences outlined in section 138 and the other provisions of the INI Act will apply. The Supreme Court pointed out that when a cheque is given as security for repayment of a loan or an instalment of a loan, it cannot be presented before it becomes due. The borrower can repay the loan amount or

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[4] Section 420 of the Indian Penal Code is *pari materia* with section 420 of the Pakistan Penal Code.

the financial liability in any other form. If he settles the liability within the agreed period, the cheque issued as security cannot be presented. Hence, there cannot be a hard and fast rule that a security cheque can never be presented. The Indian Supreme Court further said:

> "When a cheque is issued even though as 'security' the consequence flowing therefrom is also known to the drawer of the cheque and in the circumstance stated above if the cheque is presented and dishonoured, the holder of the cheque/drawee would have the option of initiating the civil proceedings for recovery or the criminal proceedings for punishment … it is not for the drawer of the cheque to dictate terms with regard to the nature of litigation."

13. In ***Sunil Todi v. The State of Gujarat*** (AIR 2022 SC 147), the company issued the respondent a Letter of Intent to provide an uninterrupted power supply for which all payments were to be made within 60 days. Following that, the company sent an e-mail stating that the security for the dues would be a cheque for an amount equal to the quantum of energy scheduled for forty-five days. The company subsequently issued two cheques "only for security deposit" to be deposited "after getting confirmation only". The company terminated the agreement whereafter the respondent presented the cheques for payment. The Supreme Court held that the INI Act's object is to increase the acceptability of cheques and inspire trust in the usefulness of negotiable instruments for business transactions. If the provision is interpreted to exclude situations in which debt is incurred after the cheque is drawn but before it is encashed, the clause's purpose becomes obtuse. The Supreme Court further stated that the true purpose of section 138 would not be fulfilled if "debt or other liability" is interpreted to include only a debt that exists as on the date of drawing of the cheque. Parliament has used the expression "debt or other liability", which consists of two different terms having their own meaning. The expression "or other liability" is broader than "a debt" and the two cannot be equated. A cheque may be issued to facilitate a commercial transaction between the parties. Where, based on the underlying objective, a commercial relationship between the parties has been fructified, as in the present case by the supply of electricity, the drawer would consider the cheque's presentation upon the buyer's failure to pay. In other words, the cheque would mature for presentation and, in substance and effect, would be for a legally enforceable debt or liability.

14. In ***Dashrathbhai Trikambhai Patel v. Hitesh Mahendrabhai Patel and others*** (AIR 2022 SC 4961), the appellant lent money to the respondent against the security of two cheques, which were dishonoured. The trial court acquitted the respondent of an offence under section 138 of INI Act because he had partly discharged his liability against those cheques before the appellant presented them for encashment. Consequently, as on the date of presentation, the amount payable to the appellant was less than the amount shown on the cheque. The question arose as to whether section 138 could still be invoked. The Indian Supreme Court held:

> "(i) For the commission of an offence under section 138, the cheque that is dishonoured must represent a legally enforceable debt on the date of maturity or presentation;
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> (ii) If the drawer of the cheque pays a part or whole of the sum between the period when the cheque is drawn and when it is encashed upon maturity, then the legally enforceable debt on the date of maturity would not be the sum represented on the cheque;
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> (iii) When a part or whole of the sum represented on the cheque is paid by the drawer of the cheque, it must be endorsed on the cheque as prescribed in section 56 of the [INI] Act. The cheque endorsed with the payment made may be used to negotiate the balance, if any. If the cheque that is endorsed is dishonoured when it is sought to be encashed upon maturity, then the offence under section 138 will stand attracted;
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> (iv) The first respondent has made part-payments after the debt was incurred and before the cheque was encashed upon maturity. The sum of rupees twenty lakhs represented on the cheque was not the 'legally enforceable debt' on the date of maturity. Thus, the first respondent cannot be deemed to have committed an offence under section 138 of the [INI] Act when the cheque was dishonoured for insufficient funds."

15. The Indian courts have interpreted the phrase "discharge of debt or liability" in section 138 of INI Act in light of the Explanation given in it. The expression "repayment of a loan or fulfilment of an obligation" in section 489-F PPC somewhat carries the same meaning. Nonetheless, there is a subtle difference between the two sections. The INI Act makes dishonour of a cheque a strict liability offence, while *mens rea* is the fundamental component of the offence under section 489-F PPC, which is signified by the word "dishonestly".

16. Dishonesty is "to act without honesty". It is used to describe a lack of integrity, cheating, lying, or deliberately withholding information or being intentionally deceptive, knave, perfidious, corrupt or treacherous.[5]

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[5] https:// en.m.wikipedia.org>wiki>Dishonesty

"Dishonesty" is something which laymen can easily see.[6] In this sense, it is distinguishable from "fraud" which seems to involve technicalities that a lawyer must explain.[7] Dishonesty provides the *mens rea* for a range of offences under statute and the common law. In ***Ivey v. Genting Casinos (UK) Ltd. t/a Crockfords*** [2017] UKSC 67, Lord Hughes stated:

> "Where it applies as an element of a criminal charge, dishonesty is by no means a defined concept. On the contrary, like the elephant, it is characterised more by recognition when encountered than by definition. Dishonesty is not a matter of law but a jury question of fact and standards. Except to the limited extent that section 2 of the Theft Act 1968 requires otherwise, judges do not, and must not, attempt to define it: *R v Feely* [1973] QB 530. In this, it differs strikingly from the expression "fraudulently", which it largely replaced, for the judge did define whether a state of mind, once ascertained as a matter of fact, was or was not fraudulent: *R v Williams* [1953] 1 QB 660 ... When dishonesty is in question, the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

17. Section 24 PPC states that "whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing 'dishonestly'." Thus, issuing a cheque and its subsequent dishonour does not *ipso facto* attract section 489-F PPC. The drawer's dishonesty must also be established,[8] and for that purpose, every transaction must be carefully scrutinized.[9] In ***Ahmed Shakeel Bhatti and others v. The State and others*** (2023 SCMR 1), the complainant sought cancellation of the pre-arrest bail of the accused, alleging a lack of commercial integrity. The Supreme Court of Pakistan dismissed his application *inter alia* with the following observations:

> "… commercial integrity is an ethical standard which would require evidence for establishing its absence in the conduct of an accused to a degree that constitutes dishonesty by him within the meaning of section 489-F PPC. In the facts of the present case, such an assessment can be

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[6] Criminal Law Revision Committee. Eighth Report: Theft and Related Offences, para 39

[7] *ibid*

[8] *Major Anwar-ul-Haq v. The State* (PLD 2005 Lahore 607); *Malik Safdar Ali v. Syed Khalid Ali and others* (PLD 2012 Sindh 464); *Naseeb Gul v. Amir Jan and another* (2013 PCr.LJ 175); and *Kim Seon Bae v. The State and others* (2021 YLR 114).

[9] *Muzaffar Ahmad v. The State and others* (2021 PCr.LJ 1393).

> made at the trial to evaluate whether any improper benefit, if at all, has been derived by the respondent on account of the stoppage of payment of his cheque which was wrongful. This aspect of the matter cannot be determined at the bail stage in the present case. As dishonesty is an ingredient of the offence under section 489-F of the PPC, therefore, the cancellation of pre-arrest bail can be ordered in the instant case if the element of dishonesty is presently indicated from the conduct of the respondent. Evidentiary material to such effect is lacking on record at the present stage. Indeed, if evidence on the point is brought at the trial, the finding thereon will depend on the significance and materiality of the obligation claimed by the respondent to have been breached by the petitioner under the terms of the bargain between the parties."

18. The general concept of criminal law is that *actus reus* and *mens rea*, as necessary elements of an offence, must coincide in time. This is known as the contemporaneity rule or the coincidence principle. However, courts frequently take a flexible approach while interpreting this synchronicity requirement, or as some would say, make exceptions to it.[10] As a result, "one-transaction theory" and "the continuing act theory" have emerged. The former postulates that having the *mens rea* for the crime at some point during a series of acts is sufficient.[11] On the other hand, the continuing act theory holds that a person can be guilty of an offence if he forms the *mens rea* at some point while the *actus reus* is still taking place.[12] If the threshold requirement that the cheque was issued towards repayment of a loan or fulfilment of an obligation is met, the "one-transaction theory" or the "continuing act theory" may be used to superimpose the *mens rea* element of dishonesty in determining whether criminal liability is attracted under section 489-F PPC.

19. Post-dated cheques may be classified into three broad categories: (a) cheques issued to discharge a liability that has already accrued or that is determined and would accrue on a specific date; (b) cheques issued to satisfy a future liability which may or may not occur; and (c) cheques provided for the payee's comfort under an express agreement and are not the product of any specific transaction. Criminal liability under section 489-F PPC generally arises only in respect of the cheques falling in category (a) unless the one-transaction or the continuing act theory can be applied.

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[10] Jonathan Herring, *Criminal Law, Text, Cases, and Materials*, 9th Edn., Oxford University Press.

[11] *Thabo Meli and others v. The Queen* [1954] 1 All ER 373 PC.

[12] *Fagan v. Metropolitan Police Commissioner*, [1969] 1 QB 439.

20. In view of what has been discussed above, the proposition that all security cheques fall beyond the purview of section 489-F PPC is too broad to be accepted. Nevertheless, I may highlight two points. First, the plea that the cheque was given as security constitutes an accused's defence. It is a question of fact which is determined by the evidence gathered during an investigation or produced at the trial. Hence, the accused cannot petition under Article 199 of the Constitution for quashing of FIR on this ground unless the factual aspects of the matter are admitted between the parties. Second, civil liability for dishonour of a cheque differs from criminal liability. They each have their own criteria and are not dependent on one another. Civil responsibility is determined by applying the principles of civil law.

21. Let's now turn to the case at hand. In its application under section 22-A Cr.P.C. before the Ex-officio Justice of Peace, the Petitioner stated that it did business with Apex and Rs.15.00 million became outstanding against it over time. Apex's directors, Respondents No.1 & 2, issued Cheque Nos. 97479699, 1688258316 and CA-0053594927 for Rs.5.00 million each to settle the liability, but these were dishonoured on presentation. However, as adumbrated, the Petitioner's pleadings before this Court, particularly paragraphs 1(b), 2 and 3, indicate that it received the said cheques as security under the Distribution Agreement. Respondents No.1 & 2 have submitted documents proving this reality. Most importantly, the Petitioner admits them. Since the Petitioner's plea, which it took in the application under section 22-A Cr.P.C. is negated, this petition is liable to be dismissed on this short ground.

22. Admittedly, the Petitioner and Apex never settled their accounts. There is a dispute between the two, and the latter has a claim against it for Rs.100,439,515/-, which is currently under litigation. As per record, Respondent No.1 issued Cheque No. 97479699 on 13.5.2019, while Respondent No.2 issued Cheque Nos. CA-0053594927 and 1688258316 on 25.1.2020 and 2.7.2020, respectively. There was no final liability of Apex on those dates or when the Petitioner presented them. These cheques are also not the outcome of any specific transaction.

23. True, clause 15.5 of the Distribution Agreement allows the Petitioner to pursue both criminal and civil proceedings for the dishonour of cheques, but that is subject to the law. It must demonstrate that the requirements of section 489-F PPC are met before it can begin proceedings thereunder and prosecute Respondents No.1 & 2. These are conspicuously missing in the present case.

24. The learned counsel for the Petitioner has failed to point out jurisdictional defects or other legal infirmities in the Impugned Order dated 21.11.2022 which may call for interference by this Court. This petition has no merit and is, therefore, **dismissed**.

(Tariq Saleem Sheikh)
Judge

Announced in open Court on _____

Judge

Naeem

Approved for reporting

Judge