**JUDGMENT SHEET**

**IN THE ISLAMABAD HIGH COURT, ISLAMABAD.**
**(JUDICIAL DEPARTMENT)**

**Criminal Appeal No. 298 of 2019**

Malik Muhammad Arif
*Versus*
Mian Zia Ur Rehman and another

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| **Appellant by:** | Ch. Musawwar Iqbal, Advocate. |
| **Respondent by:** | Mr. M. Umer Khan Verdag, Advocate |
| **State by** | Mr. Hammad Saeed Dar, State counsel along with Murtaza- A.S.I. Police Station Margalla, Islamabad. |
| **Date of Hearing:** | 12.08.2020. |

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**Ghulam Azam Qambrani, J.:-** Appellant/complainant (*Malik Muhammad Arif)* seeks setting aside of impugned order dated 10.07.2019, passed by the learned Judicial Magistrate Section-30, Islamabad-West, whereby respondent No.1 (hereafter be called as "***respondent*** ") was acquitted in case F.I.R No.167/2015 dated 11.03.2015 under Section 489-F P.P.C register at Police Station Margalla, Islamabad.

2. Briefly stated facts of the appeal are that, on the application of appellant/ complainant above F.I.R was registered, with the averments that complainant was dealing in vehicles and property and on account of intimation relations with the accused/respondent, appellant accepted the offer of respondent, whereby he agreed to transfer a plot in the name of the appellant against total sale consideration of Rs.12,00,000/-. Finally, the appellant paid an amount of Rs.12,00,000/- to the respondent and in order to secure his payment, the respondent issued two cheques i.e. Ex PA & PB worth of Rs.6,00,000/- each in favour of the appellant. However, when the said cheques were presented in the concerned bank for encashment, those were dishonored vide dishonor slips Ex.PC & Ex.PD, due to insufficiency of balance in the account of the respondent. The accused issued the cheques dishonestly and upon complaint Ex-PF

this case was registered under Section 489-F P.P.C vide F.I.R (Ex-PG).

3. After registration of F.I.R, the investigation was completed and report under Section 173 Cr.P.C was submitted. After fulfilling the codal formalities by the learned trial Court, charge was framed against the respondent to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined the following witnesses:-

i. *PW-1,Malik Muhammad Arif (complainant);*
ii. *PW-2, Niaz Hussain Jaffri, Inspector;*
iii. *PW-3, Muhammad Ashfaq- S.I (R),*
iv. *PW-4, Muhammad Naseer Haider, Operational Manager ABL, Islamabad,*
v. *PW-5, Muhammad Sadiq- ASI,*

After closure of the prosecution evidence, the accused/respondent was examined under Section 342 Cr.P.C wherein he denied the allegations leveled against him. The accused did not opt to record statement on oath as envisaged under Section 340 (2) Cr.P.C. The learned trial Court, after hearing the arguments of the learned counsel for the parties, passed the judgment dated 10.07.2019, whereby the appellant was acquitted from the charge, hence, the instant appeal against acquittal.

5. Learned counsel for the appellant contended that the impugned judgment is against the law and facts of the case; that the accused has failed to prove his defense; that the learned trial Court has miserably failed to consider the true and material facts of the case; that the respondent has narrated an unbelievable story with regard to stealing of his cheques. Next contended that the impugned judgment is result of grave miscarriage of justice, whereas the prosecution has failed to prove the case beyond any shadow of doubt. Lastly, prayed for the setting aside of the impugned judgment and that the accused be convicted according to law.

6. Conversely, learned counsel for the accused/ respondent submitted that the prosecution miserably failed to prove the case

beyond reasonable shadow of doubt against the respondent; that the Ex.PE was abruptly produced, whereas the said document was not supplied to the respondent under Section 265-C Cr.P.C; that the stamp vendor was also not produced by the appellant/complainant; that the Civil suit filed by the appellant was also decreed Ex-parte and upon the application submitted by the respondent the same was set-aside; that a false story has been narrated by the appellant and the appellant has failed to prove any financial liability against the respondent, therefore, the offence under Section 489-F P.P.C is not attracted against the respondent. The learned State counsel supported the impugned judgment.

7. Heard arguments of the learned counsel for the parties and perused the available record.

8. From perusal of F.I.R and agreement Ex.PE, it transpires that in the F.I.R the appellant narrated that he paid an amount of Rs.12,00,000/- to the accused/ respondent in the presence of witnesses as a consideration amount of a plot and in lieu thereof the accused issued two cheques (Ex.PA & PB) in favour of the appellant, which were dishonored on presentation due to insufficient funds whereas, in the agreement (Ex.PE) it is stated that the appellant gave an amount of Rs.12,00,000/- to the respondent as "Amanat" and there is no mention of any plot or that the said amount was consideration of that plot. Further the alleged agreement (Ex.PE) was allegedly executed by the accused on 07.11.2013, whereas; the F.I.R was lodged on 04.03.2015, after delay of one and a half year after execution of the alleged agreement Ex.PE, but there is no mention of the agreement Ex.PE, in the complaint filed by the appellant Ex.PF. Record further reveals that during the course of investigation, the appellant only produce the disputed cheques and dishonor slips before the investigating officer, but the essential document i.e. agreement Ex.PE was not produced before the investigating officer. It was incumbent upon the prosecution to prove the execution and contents of the agreement Ex.PE when the accused had refused its execution. It is also evident from the record that the prosecution failed

to produce the marginal witnesses of the agreement Ex.PE, either before the investigating officer or before the learned trial Court to prove its execution. Further the prosecution also failed to get compared/ examined the thumb impression and signatures of the accused on the agreement as well as on the disputed cheques, from any handwriting expert or from any concerned laboratory, which has made the prosecution case highly doubtful.

9. The appellant while appearing as PW-1 stated that he had paid an amount of Rs.12,00,000/- as a consideration of a plot. He further stated that there was an oral agreement between the parties with regard to the transfer of the plot whereas, in his cross-examination, he has admitted that no description of the plot is mentioned in the agreement Ex.PE. He further admitted that in the agreement Ex.PE there is no mention of any plot. Muhammad Sadiq- A.S.I while appearing as PW.5 stated that in his investigation, he found that the version of the complainant contained in the F.I.R as well as in Ex.PE is contradictory. In his cross-examination, he admitted that real brother of the complainant namely Malik Babar Awan is a witness of Ex.DA, which is another agreement executed between the accused and one Hamid Rasool and real brother of the appellant namely Babar Awan was also present there at the time of execution of the agreement Ex.DA. PW-5 further admitted in cross-examination that it is correct that inspite of his persistence, no witness was produced by the complainant regarding the disputed cheques and agreement in this case. Further the contents of agreement EX.PE totally negates the story narrated by the complainant in the F.I.R regarding purchase of plot because the appellant/ complainant mentioned in the agreement Ex.PE that the amount of Rs.12,00,000/- was given to the accused/ respondent as "Amanat". On the other hand, the respondent/ accused denied execution of any agreement Ex.PE. He further stated that the said agreement Ex.PE does not contain his signature and thumb impression and that the alleged agreement Ex.PE is a forged document and that he had never issued the disputed cheques Ex.PA & PB to the complainant; that they have

been forged by super-imposing his signature and other writing on the cheques in-question and on the alleged agreement Ex.PE.

10. Perusal of the signatures of the accused on the cheques and alleged agreement Ex.PE with a naked eye, it is *prima facie* seems that the signatures of the accused on Ex.PE, Ex.PA and Ex.PB are totally different on each document. It is further the stance of the accused that a case F.I.R No.490/13 under Section 489-F Police Station Texila was got registered by Hamid Rasool against one Adnan and on 07.11.2013, a compromise was effected between them vide Ex.DA & Ex.DD-1-22 and at that time the complainant in collusion with his real brother Babar Awan and partner Hamid Rasool slipped away cheques and agreement. It is also the stance of the accused that he did not issue the said cheques to the complainant, rather on 07.11.2013, he issued cheques of the same series to Hamid Rasool at Taxila and also entered into an agreement Ex.DA with Hamid Rasool and at the time of execution of agreement Ex.DA, the complainant was also present there and he dishonestly took the cheques either from his custody or from Hamid Rasool to whom he had given the cheque book to write his cheques. To this defence version, the appellant/ complainant has responded in following words:-

میرے بھائی کا نام بابر اعوان ہے حامد رسول میرا بزنس پارٹنر ہے ازخود کہا کہ بطور انوسٹر میرے پاس آتا تھا ۔ میں نے اپنی درخواست میں یہ بات نہ لکھی ہے کہ میں انویسٹمنٹ کا کاروبار بھی کرتا ہوں۔ میں راجہ محمد عدنان کو نہ جانتا ہوں۔ میرے علم میں نہ ہے کہ حامد رسول نے تھانہ ٹیکسلا میں ایک ایف ۔ آئی۔ آر درج کر دی تھی یا نہیں ----- مجھے اس بابت علم نہ ہے مورخہ 07-11-2013 کو ٹیکسیلہ میں ایک راضی نامہ ہوا تھا ہی نہیں۔ میں مورخہ 07-11-2013 کو ٹیکسلا میں موجود تھا۔ میں اس دن ٹیکسلہ تحصیل میں موجود تھا۔ میرے بھائی بابر اعوان میرے ساتھ نہ تھا۔ میں نہ بتا سکتا ہوں کہ وہ وہاں موجود تھا یا نہیں اور یہ میرے علم میں نہ ہے کہ وہ وہاں موجود تھا یا نہیں ۔ یہ غلط ہے کہ مورخہ 07-11-2013 کو میں نے دو چیک (Ex. PA/PB) ملزم کی چیک بک سے حامد رسول اور بابر اعوان ولد خان بہادر کے ساتھ ملی بھگت سے غائب کیے۔

11. When the evidence of the prosecution is read as a whole, except the statement of the appellant, no other tangible evidence with regard to existence of financial liability of the accused has been adduced by the prosecution. Further the prosecution also failed to produce any other witness before whom the said amount of Rs.12,00,000/- was given by the appellant to the accused. All these facts and circumstances makes the prosecution case highly doubtful, therefore, the learned trial Court, after appraisal of evidence, has rightly acquitted the appellant, while given benefit of doubt.

12. In the instant case, provisions of Section 489-F PPC will only be attracted if the following essential ingredients are fulfilled and proved by the prosecution:-

*i. Issuance of cheque;*
*ii. Such issuance was with dishonest intention;*
*iii. The purpose of issuance of cheque should be:*
  *a) To re-pay a loan; or*
  *b) To fulfill an obligation (which is wide term, inter-alia, applicable to lawful agreements, contracts, services, promises by which one is bound or an ct which binds a persons to some performance).*
*iv. On presentation, the cheque is dishonored.*

All the essential ingredients to attract Section 489-F P.P.C, are missing in the instant case as the issuance of the cheques is denied by the accused whereas the appellant has also failed to establish on record with cogent evidence that the said cheques were dishonestly issued by the accused for repayment of loan or fulfillment of an obligation rather as per the appellant, he had given the said amount to the accused as "Amanat" but the appellant has failed to produce any marginal witness of the alleged agreement to prove its authenticity either before the Investigation Officer or before the learned trial Court.

13. To constitute an offence under Section 489-F PPC, dishonesty on the part of the payer is a condition precedent in issuance of a cheque towards re-payment of loan or fulfillment of an obligation. Thus, it is for the Court to consider that under what circumstances, the cheque was issued and what was the intention of the person,

issuing it. The words "*whoever dishonestly issues a cheque*" used in this section shows the intention of the legislature that to constitute an offence, it must be proved that the cheque has been issued dishonestly. Dishonesty means a fraudulent act or intent to defraud others, especially creditors and lien holders. Similarly, the word "*dishonor*" used in this section means failure to honour a cheque with an intent to defraud and befool a payee towards re-payment of a loan or fulfillment of an obligation just to disgrace or put him in a state of shame. Hence, mere issuance of a cheque and it being dishonored by itself is not an offence, unless and until dishonesty on the part of a payer is proved. Reliance is placed on the judgment of the Hon'ble Supreme Court of Pakistan reported as "*Mian Allah Ditta Vs The State and others*" **[2013 SCMR 51],** wherein it has been held as under;-

> *"Every transaction where a cheque is dishonoured may not constitute an offence. The foundational elements to constitute an offence under this provision are issuance of a cheque with dishonest intent, the cheque should be towards repayment of a loan or fulfillment of an obligation and lastly that the cheque in question is dishonoured.*

14. The complainant has failed to produce a single evidence to prove dishonest intention of the accused/respondent nor did he utter a single word to show his disgrace or feeling of shame due to dishonoring of the cheques. The evidence and the material available on record, do not constitute an offence under section 489-F P.P.C against the respondent.

15. It is pertinent to mention here that considerations for interference in an appeal against acquittal and an appeal against conviction are altogether different because presumption of double innocence is attached with the former case. The well settled principles for appreciation of appeal against acquittal, as have been held by the Hon'ble Supreme Court of Pakistan in the judgment reported as *Muhammad Iqbal Vs. Abid Hussain alias Mithu and six others* (**1994 SCMR 1928**), are as under:-

> *i. That with the acquittal, the presumption of innocence of accused becomes double; one initial, that till found guilty*

*he is innocent, and two, that after his Trial a Court below has confirmed the assumption of innocence;*

ii. *That unless all the grounds on which the High Court had purported to acquit the accused were not supportable from the evidence on record, Supreme Court would be reluctant to interference, even though, upon the same evidence it may be tempted to come to a different conclusion;*

iii. *That unless the conclusion recorded by a Court below was such that no reasonable person would conceivably reach the same, the Supreme Court would not interfere;*

iv. *That unless the Judgment of acquittal is perverse and the reasons therefore are artificial and ridiculous, the Supreme Court would not interfere; and*

v. *That the Supreme Court, however, would interfere in exceptional cases on overwhelming proof resulting in conclusive and irresistible conclusion, and that too, with a view only to avoid grave miscarriage of justice and for no other purpose.*

16. Keeping in view the above principles, it transpires from the record that the important witness of the prosecution case, i.e. the complainant/ appellant himself, who while appearing as PW-1 stated that the accused Zia-ur-Rehman offered him to purchase a plot from him and in lieu of that plot, the appellant paid an amount of Rs.12,00,000/- to the accused, but perusal of the agreement Ex.PE reveals that there is no mention of any plot in the said agreement rather it is mentioned that the appellant had given the said amount to the accused as "Amanat" but to prove the payment of said amount, the appellant failed to produce any witness either before the learned trial Court or before the Investigation Officer. Therefore, the element of *mensrea,* and dishonestly issuance of cheque, fulfillment of obligation or repayment of loan are missing in the instant case. As such, the learned trial Court has rightly acquitted the accused person/ respondent of the charge by giving him the benefit of doubt holding that the prosecution has miserably failed to prove the offence under Section 489-F P.P.C.

17. I have found no illegality or irregularity in the impugned judgment dated 10.07.2019 passed by the learned Judicial Magistrate Section-30, Islamabad-West, nor the same is suffering from any misreading or non-reading or miss-appreciation of evidence, warranting interference by this Court.

18. Resultantly, the instant appeal having no force is **dismissed.**

(GHULAM AZAM QAMBRANI)
JUDGE

Announced in open Court on this day 20th of August, 2020.

JUDGE

"Rana.M.Ifz."