

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

Criminal Appeal No. 13 of 2017

Masood Ahmed
Versus
Muhammad Paris Khan and another

Appellant by: Syed Ashfaq Hussain Naqvi, Advocate.
State by Mr. Zohaib Hassan Gondal, State counsel alongwith
Muhammad Manzoor, Sub-Inspector, Police
Station Koral, Islamabad.

Date of Hearing: 07.09.2020.

Ghulam Azam Qambrani, J. :- Appellant (*Masood Ahmed*) seeks setting aside of impugned judgment dated 02.12.2016, passed by the learned Judicial Magistrate, 1st Class, Islamabad-East, whereby respondent was acquitted in case F.I.R No.80 dated 10.03.2016, under Section 489-F P.P.C register at Police Station Koral, Islamabad.

2. Briefly stated facts of the appeal are that on 10.03.2016, on the application of appellant/complainant above F.I.R was registered, with the averments that respondent No.1/accused was running a business in the name and style of "MPK Construction Company". Respondent No.1 to clear his debts, borrowed Rs.85,00,000/- from the appellant and in lieu thereof, issued a cheque No.09879252 dated 29.10.2015 of equal amount. The said cheque when presented in Bank for encashment, it was dishonored due to insufficient fund.

3. After registration of F.I.R, 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 on 22.04.2016 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, Masood Ahmed (complainant),
- ii. PW-2, Faisal Qayoum,
- iii. PW-3, Syeda Saleha Batool,
- iv. PW-4, Aurangzeb- A.S.I,

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 02.12.2016, whereby respondent No.1 was acquitted of the charge under Section 489-F P.P.C, hence, the instant appeal against acquittal.

5. Learned counsel for the appellant contended that the respondent/ accused was running a business in the name and style of MPK Construction Company and to clear his debts, he borrowed an amount of Rs.85,00,000/- from the appellant for his business and in lieu, thereof, he issued a cheque No.09879252 dated 29.10.2015 of equal amount, which was dishonored due to insufficient funds in the account of the respondent. Further submitted that the learned trial Court has failed to appreciate that the accused dishonestly issued the cheque in-question toward repayment of a loan of Rs.85,00,000/- with the knowledge that sufficient amount was not available in his account, therefore, the impugned judgment is liable to be set aside.

6. Conversely, learned counsel for the accused/respondent submitted that he has neither issued any cheque to the appellant nor is there any liability upon the respondent, whereas he is totally innocent and has falsely been involved in the instant case with malafide intention in connivance with the local police. The appellant failed to establish on record any liability of the respondent; that the appellant forcibly obtained the disputed cheque from the respondent; that the respondent did not sign the disputed cheque and the same

was dishonored due to mismatch of signature. Lastly, prayed for the dismissal of the instant appeal.

7. The learned State counsel supported the impugned judgment and submitted that the judgment passed by the learned trial Court may be upheld.

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

9. As per contents of the F.I.R, the appellant entered into a business deal with the respondent and in this regard, he paid an amount of Rs.85,00,000/- to the respondent, for which he issued disputed cheque in favor of the appellant, whereas while appearing as PW-1 the appellant stated that he has been doing business with the accused for the last five years; that on 29.10.2015, the accused issued a cheque of Rs.85,00,000/- whereas in his cross-examination, he admitted that he had business partnership with the accused. He further admitted that he had no documentary proof of the said partnership. He further admitted that he had no proof with regard to the payment of said amount to the accused. He further admitted that except the disputed cheque, he had two others cheques of the accused amounting to Rs.5,00,000/- and Rs.3,00,000/- each.

10. Faisal Qayoum, Manager of Allied Bank Limited, Tarlai Kalan Branch, Islamabad, while appearing as PW-2 deposed that they received the cheque of accused Paris Khan in the month of February, 2016 for encashment but due to mismatch of the signature of the accused and insufficient funds in the said account it was dishonored. During his cross-examination, said PW-2 admitted that his signatures are not available on the dishonor slip. He further admitted that his signatures are also not available on the report Ex.PA and it is correct that it is mentioned on the dishonor slip Ex.DA that signatures are different.

11. Perusal of the record reveals that the appellant and the accused were partner in MPK Construction Company and the

version of the appellant is that on 29.10.2015, the accused issued a cheque of Rs.85,00,000/- to him which was dishonored. In order to establish the offence under Section 489-F P.P.C the prosecution has to prove that the said cheque was issued dishonestly by the accused for fulfillment of an obligation or repayment of loan.

12. In the instant case, provisions of Section 489-F P.P.C 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 act which binds a persons to some performance).*
- iv. On presentation, the cheque is dishonored.*

In the present case, appraisal of the evidence reveals that there was no dishonesty in issuance of cheque which is an essential ingredient to attract Section 489-F P.P.C. The appellant in his cross-examination admitted that he had no written proof with regard to payment of Rs.85,00,000/- allegedly due towards the accused. Further the appellant in his application submitted before the S.H.O Police Station Koral, Islamabad, stated that on 29.10.2015, the accused gave him a cheque of Rs.85,00,000/- and asked the appellant to keep the said cheque with him and later on, he shall pay the cash amount to him, as such, the prosecution has failed to prove dishonesty against the respondent in issuing the cheques to the appellant. Whereas, stance of the accused was that he did not issue the said cheque to the complainant and the disputed cheque is without consideration. The dishonor slip shows that the cheque was dishonored due to mismatch of the signature of the accused on the cheque in-question and the second reason for dishonor of the dispute cheque was insufficiency of the balance in the account of the

accused, as such, mismatch of signature on cheque with the specimen of the accused Muhammad Parish khan strengthened and corroborated the version of the accused/ respondent No.1. Reappraisal of the evidence available on record further shows that the appellant has failed to establish that on what account an amount of Rs.85,00,000/- was outstanding against the accused. Prosecution has failed to prove the liability on the part of the accused in the instant case. PW- 4, the investigating officer deposed that during his investigation, he found that only an amount of Rs.13,00,000/- was outstanding against the accused. As the appellant has admitted that he was a business partner with the accused, therefore, it is not surprising factor that being a partner with the accused the complainant would have easy access with the documents of the accused.

13. To constitute an offence under this section, 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.

14. 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."

15. The complainant has failed to produce a single piece of evidence to prove dishonest intention of the respondent nor did he utter a single word to show his disgrace or feeling of shame due to dishonoring of the cheque rather in cross-examination he has admitted that he has no prove with regard to the amount of Rs.85,00,000/- outstanding against the accused, therefore, the evidence and the material available on record, do not constitute an offence under section 489-F P.P.C against the respondent.

16. The scope of interference in appeal against acquittal is most narrow and limited, because in an acquittal the presumption of innocence is significantly added to the cardinal rule of criminal jurisprudence, that an accused shall be presumed to be innocent until proved guilty; in other words, the presumption of innocence is doubled. The Courts shall be very slow in interfering with such an acquittal judgment, unless it is shown to be perverse, passed in gross violation of law, suffering from the errors of grave misreading or non-reading of the evidence; such judgments should not be lightly interfered and heavy burden lies on the prosecution to rebut the presumption of innocence, which the accused have earned and attained on account of their acquittal. It has been categorically held in a plethora of judgments that interference in a judgment of acquittal is rare and the prosecution must show that there are glaring errors of law and fact, committed by the Court in arriving at the decision, which would result into grave miscarriage of justice; the acquittal judgment is perfunctory or wholly artificial or a shocking conclusion has been drawn. Moreover, in number of dictums of this Court, it has been categorically laid down that such judgment should not be interjected until the findings are perverse, arbitrary, foolish, artificial,

speculative and ridiculous. The Court of appeal should not interfere simply for the reason that on re-appraisal of the evidence a different conclusion could possibly be arrived at, the factual conclusions should not be upset, except when palpably perverse, suffering from serious and material factual infirmities.

17. This Honourable Supreme Court of Pakistan in "Ghulam Sikandar and another v. Mamaraz Khan and others"(PLD 1985 SC 11) has authoritatively ruled that whole examining defects about order of acquittal, substantial weight should be given to the findings of subordinate Courts whereby accused are exonerated from committing the crime. Obviously approach for dealing with appeal against, conviction would be different and distinguishable from appeal against acquittal, because presumption of double innocence is attached in the later case.

18. It is important to note that an appeal against acquittal has distinctive features and the approach to deal with the appeal against conviction is distinguishable from appeal against acquittal, as presumption of double innocence is attached, in the latter case Reliance in this regard is placed upon the case of "Inayatullah Butt v. Muhammad Javed and 2 others" [PLD 2003 SC 562]. Until and unless the judgment of the trial Court is perverse, completely illegal and on perusal of evidence, no other decision can be given except that the accused is guilty or there has been complete misreading of evidence leading to miscarriage of justice, the Court will not exercise jurisdiction under section 417, Cr.P.C.

19. The learned counsel for the appellant has failed to advance any ground to justify the setting aside of the acquittal judgment. There is no misreading or non-reading of evidence nor the findings of the learned trial Court are patently illegal. The findings of acquittal, by no stretch of imagination, can be declared as perverse, shocking, alarming or suffering from errors of jurisdiction and misreading or non-reading of evidence.

20. For what has been discussed above, the instant appeal having no force is hereby **dismissed**.

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(GHULAM AZAM QAMBRANI)
JUDGE~~

Announced in open Court on this 15th day of September, 2020.

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JUDGE~~

"Rana. M. Ift."