

## **JUDGMENT SHEET**

### **ISLAMABAD HIGH COURT, ISLAMABAD,** **JUDICIAL DEPARTMENT**

#### **Criminal Appeal No.40/2018**

Muhammad Saad Naseem

*versus*

Learned Judicial Magistrate (West), Islamabad & 2 others

Appellant by: Malik Qamar Afzal, Advocate.

Respondents by: Mr. Omer Farooq Malik, Advocate for Respondent No.2  
Mr. Zohaib Hassan Gondal, State Counsel.  
Tanveer, ASI/I.O., P.S. Shalimar, Islamabad.

Date of Hearing: 26.06.2020.

**MOHSIN AKHTAR KAYANI, J:** Through this criminal appeal, the appellant has assailed the judgment dated 01.03.2018, passed by learned Judicial Magistrate (West), Islamabad, whereby Ehsan ul Haq/accused (Respondent No.2) has been acquitted from criminal case FIR No.33, dated 25.01.2016, under Section 489-F PPC, P.S. Shalimar, Islamabad.

2. Brief facts referred in the instant case are that on the complaint filed by appellant the abovementioned FIR has been lodged against Respondent No.2 having allegations that the latter being a good friend of appellant induced him to purchase a plot in Blue Area, Islamabad, regarding which he introduced one Naeem Akhtar in this business concern and got executed a partnership deed for the purpose of purchase of commercial plot in Blue Area, Islamabad, vide partnership deed dated 11.09.2016. Accordingly, the appellant invested an amount of Rs.30,000,000/- of his share and in addition to above Respondent No.2 has allegedly received an amount of Rs.25,000,000/- as loan for his personal requirements, however when the Respondent No.2 and his partner failed to arrange the plot, the appellant claimed his amount of Rs.44,000,000/-, whereupon Respondent No.2 issued two post dated cheques bearing No.9452752, amounting to Rs.29,000,000/-, dated 09.07.2015, and No.9452753,

amounting to Rs.15,000,000/-, dated 04.08.2015, whereas Respondent No.2 has also got executed two stamp papers on 25.06.2012 and 15.05.2014. Both the cheques dishonored on 17/18.09.2015, which compelled the appellant to file complaint (Exh.PO), the same was converted into case FIR No.33/2016 (Exh.PZ), whereafter the matter was investigated, even the handwriting expert report Exh.PH was obtained from FIA Headquarters, Islamabad regarding status of signatures on the cheques and affidavits, referred as Exh.P1 to Exh.P9 and Exh.PE-1 to Exh.PJ-1. Respondent No.2 has been challaned by the Investigating Officer i.e. PW-10 Alamgir/S.I., whereafter the learned Trial Court after recording the evidence of 12 prosecution witnesses along with statement of Respondent No.2 under Section 342 Cr.P.C. acquitted Respondent No.2 vide impugned judgment dated 01.03.2018. Hence, this criminal appeal.

3. Learned counsel for appellant contends that the learned Trial Court has committed serious error while acquitting respondent No.2 of the charge under Section 489-F PPC, whereby the cheques and signatures together with relationship of the parties were proved in accordance with law and Respondent No.2 has taken a flawed defence that his cheques were stolen, but despite this defence he has not produced any evidence in his favour to justify his stance; that the report of FIA being an independent corroborative evidence of the prosecution case regarding comparison of signatures and thumb impression has to be read in its totality against Respondent No.2, but same was not considered in its true perspective; that the learned Trial Court is in agreement regarding dishonoring of cheques but the issuance of cheques with dishonesty was taken otherwise in favour of the accused contrary to settled principles of law; learned counsel for the appellant has relied upon cases reported as 2010 SCMR 1791 (Anwar Shamim vs. The State), PLD 2005 Lahore 607 (Major Anwar-ul-Haq vs. The State), 2011 P.Cr.LJ 428 Karachi (Muhammad Saleem vs. The State), 2012 YLR 2780 Lahore (Muhammad Afzal vs. The State), 2010 MLD 1638 Lahore (Mst.

Allah Wasai vs. Manzoor Hussain) and 2015 SCMR 284 (Qazi Abdul Ali vs. Khawaja Aftab Ahmad).

4. Conversely, learned counsel for respondent No.2 contends that the very terms of the partnership deed, dated 11.10.2011 (Exh.DC), refer the allotment of commercial plot in Blue Area, Islamabad, whereby the appellant has already invested the amount, but no such proof has been placed on record nor any banking instrument has been proved on record, whereafter Respondent No.2 had invested his amount in the said partnership concern; that the initial onus is upon the appellant to prove that he has invested an amount of Rs.30 Million in the said business failing which it could not be read against respondent No.2 and the learned Trial Court has rightly acquitted Respondent No.2 in this case. Respondent side further argued that the prosecution has to prove its own case independently whether any defence has been raised or otherwise by the accused side, even the cheques in question contain different handwritings, which justify the contention of Respondent No.2 that his cheques were stolen and when he filed a complaint, the appellant got registered the FIR after two days of the said complaint; that the third partner Naeem Akhtar also claims his amount from the appellant and he got lodged FIR No.476, dated 01.10.2015, under Section 406 PPC, P.S. Kohsar, Islamabad and the appellant in order to save his skin applied the bail before arrest through Crl. Misc. No.825/2015 before this Court and annexed the agreement Exh.DK, affidavit Exh.PL, and copies of dishonored cheques Exh.PI and Exh.PJ, which were dishonored on 17/18.09.2015, but no application for registration of case was moved till 11.01.2016, which shows the malafide of the appellant and simultaneously the factum of using cheques of Respondent No.2 came into limelight in those proceedings; that Respondent No.2 has produced number of banking transaction receipts regarding their business relationship other than the concerned investment regarding commercial plot in Blue Area, Islamabad and as such, all the receipts Exh.P1 to Exh.P79

demonstrate that a huge sum of amount was transferred to the appellant through banking channel. Respondent No.2 in support of his arguments has relied upon cases reported as 2013 P.Cr.LJ 400 (Qazi Faisal Wajid vs. Munir Ullah Khan) and 2019 SCMR 1045 (Muhammad Shafi alias Kuddoo vs. The State).

5. Similarly, learned State Counsel has also highlighted the principles of Qanun-e-Shahadat Order, 1984 and contends that the prosecution has successfully proved the case against Respondent No.2, but the learned Trial Court has not appreciated the evidence in its true perspective and passed a perverse judgment in violation of settled principles of law.

6. Arguments heard, record perused.

7. Perusal of record reveals that the appellant being the complainant of case FIR No.33, dated 25.01.2016, under Section 489-F PPC, P.S. Shalimar, Islamabad (Exh.PZ), lodged on the basis of complaint (Exh.PO) filed by the appellant, containing the allegations that two post dated cheques bearing No.9452752, amounting to Rs.29,000,000/-, dated 09.07.2015, and No.9452753, amounting to Rs.15,000,000/-, dated 04.08.2015 were dishonored on presentation, which were issued by Ehsan Ul Haq/Respondent No.2 against the amount he had received as loan consideration through a partnership deed.

8. The complainant/appellant appeared as PW-9 to substantiate his case and stated in his evidence that Respondent No.2 and Naeem Akhtar entered into a partnership vide agreement dated 11.10.2011 regarding purchase of a commercial plot situated in Blue Area, Islamabad, upon which he has paid his share to the tune of Rs.30,000,000/-, whereas Respondent No.2 has received further amount of Rs.15,000,000/- in addition to agreed amount as loan, however when Respondent No.2 and the other partner failed to arrange the agreed commercial plot, the appellant claimed for return of his amount, whereupon Respondent No.2 issued two post dated cheques, which were dishonored on presentation vide dishonor slips Exh.PM and Exh.PN. He further stated that Respondent No.2

got executed two stamp papers Exh.PK and Exh.PL on 25.06.2012 and 15.05.2014 to prove his contention. However, during the course of cross-examination, the appellant acknowledged that he is chartered accountant for professionals and he worked in the chartered accountant firm in different companies and he has business relationship with Respondent No.2. He has taken the stance that he has paid the amount through banking channel and some in cash, but he is not aware about the amount paid in cash. The investment of amount and its mode has been acknowledged in the following manner:

یہ درست ہے کہ ایگمنٹ کی بنیاد پر پارٹنر کے درمیان ایک کمپنی Ciel انٹرنیشنل رجسٹر ہوئی تھی۔ اس میں تینوں پارٹنر تھے اور اس میں تینوں برابر کے شیئر ہولڈر تھے۔ مجھے کمپنی کے بارے میں علم نہ ہے کہ وہ ختم ہو گئی ہے کہ نہیں۔ یہ درست ہے کہ پارٹنر A اور B نے تین کروڑ اور پانچ کروڑ CDA میں بطور بینک ڈرافٹ جمع کروانا تھے جو کہ معاہدہ میں تحریر ہے۔ جو کہ دونوں کبھی جمع نہ کروائے ہیں۔ میرے ذمے تین کروڑ تھے جو میں نے ان کو دیئے میرے ذمہ CDA میں جمع کروانے نہ تھے۔ یہ تین کروڑ نقد رقم کی صورت میں دیئے۔ از خود کہا میں نے ایک restoration لیٹر پیش کر سکتا ہوں۔ عدالت میں جو کہ 2011-8-6 کا جاری کردہ ہے۔ یہ درست ہے کہ پارٹنر شپ ایگمنٹ پر میرے دستخط موجود ہیں۔ یہ درست ہے کہ ایگمنٹ پڑھ کر دستخط کیے تھے۔ تین کروڑ ایگمنٹ کی تاریخ والے دن گاڑی میں احسان الحق کو گولہان کے سامنے دیئے تھے یہ تین کروڑ والدین کے پلاٹ اور مکان فروخت کر کے رقم دی تھی اور والدین سے نقد بھی لیے تھے ان کے بینک کا اونٹ ہے۔

9. In order to justify the case, the appellant has produced bank Record Keeper and different documents including the affidavits. The prosecution has also produced PW-1 Malik Babar Ali Awan/Stamp Vendor, who confirmed that the stamp papers were issued in his absence by another person hired by him.

10. The prosecution has also produced PW-7 Niaz Akbar/S.I. who verified the disputed signatures available on the cheques, affidavits as well as on the SS Card and contended that disputed signatures have been matched with proved signatures of Respondent No.2.

11. The criminal case has initially been investigated by PW-10 Alamgir Khan/S.I. who submitted the final report under Section 173 Cr.P.C. and acknowledged that:

دونوں کے درمیان لین دین ہوا تھا۔ یہ درست ہے کہ میں نے اپنی رپورٹ 173 میں تحریر کیا تھا کہ مدعی مقدمہ نے کوئی ٹھوس ثبوت پیش نہ کیا ہے۔ مدعی مقدمہ نے ملزم کو ایک کروڑ سولہ لاکھ کے علاوہ بقایا رقم کا کوئی ثبوت پیش نہ کیا ہے۔

12. Similarly, the other Investigating Officer i.e. PW-11 Malik Muhammad Mumtaz/S.I., who has produced the cheques together with the dishonor slips and got verified the signatures. He acknowledged that he has not placed copy of agreement dated 11.09.2011 on record nor recorded the statement of the witnesses of agreement under Section 161 Cr.P.C. neither investigated Naeem Akhtar (partner) in this case. He also acknowledged that he has not asked the FIA for verification of handwriting available on the disputed agreements and only verified the signatures.

13. On the contrary, Respondent No.2 being an accused in this case has recorded his statement under Section 342 Cr.P.C. and raised his defence in the following manner:

*"Q. No.3. It is in the prosecution evidence that you accused has issued impugned cheque No.9452752 amounting to Rs.29,000,000/- which was presented as Exh.PI/1, cheque No.9452753 amounting to Rs.15,000,000/- which was presented as Exh.PI/1, to the complainant against your liability/obligation and subsequently dishonored upon presentation before the concerned Bank due to insufficiency of balance. What do you say about it?"*

*Ans. It is incorrect. The impugned cheques Exh.PI/1 & PI/1 never issued by me. Both cheques are fake and fabricated, without consideration, the complainant admitted in his evidence that both cheques were without dated and with reference to partnership agreement and both are under challenge by way of a suit for cancellation etc pending before competent Court of jurisdiction and fate of which will be decided on proper forum after the recording of evidence of the parties."*

14. While considering the above evidence brought by the prosecution and defence, it is necessary to consider the case of prosecution at the first instance, whereby the appellant has taken the stance that some plot in Blue Area, Islamabad was purchased for the purpose of investment through a partnership agreement, which was made basis of the entire transaction referred as Exh.DC,

which is a joint business agreement executed on 11.10.2011. I have gone through the said agreement of partnership executed between Ehsan Ul Haq (Respondent No.2) as "Party A", Naeem Akhtar as "Party B" and Muhammad Saad Naeem (appellant) as "Party C" with the following conditions.

**All the three (03) business partners are agreed as follows:-**

1. The worth of land mentioned above is accorded as 110 Million.
2. Out of 110 Million, every partner will invest according to his share.
3. Following share is agreed with mutual consent subjected to the investment capita ie:-
  - a. Partner A= 27.25%
  - b. Partner B= 45.50%
  - c. Partner C= 27.25%
4. While the investment capital is as follows:-
  - a. Partner A=30 MILLION, investment will be made in CDA/allotting authority with bank draft.
  - b. Partner B=50 MILLION, investment will be made in CDA/allotting authority with bank draft.
  - c. **Partner C=30 MILLION, already invested as expense for seeking land.**
5. All the three partners will establish a (Pvt.) Ltd. Company namely **CIEL International (Pvt.) Ltd.**, in accordance with the shares stated in para 3.
6. The allotment of the lease will be made on **Ciel International (Pvt.) Ltd.** from CDA/any other department deserving the right to allot or sublet the land, where all parties will enjoy ownership according to share basis.
7. It is pertinent to mention here that this partnership in land in conditional and referred to the investment capital, that PARTY A and PARTY B will deposit in allotting authority. In case of failure to deposit this amount as investment capital this partnership deed is no more valid.
8. Any amendment in the company (**Ciel International (Pvt.) Ltd.**) regarding sale of land or change of directorship will be made with mutual consent of all three parties. Anyone or the two parties will have no right to change the directorship or enter into any business deal of above said land.
9. The signatory of company is mutually agreed as **Party B** who will be having powers to deal with all departments concerned and the Capital Development Authority.
10. The **Party C** assures that the piece of land is free from all types of encumbrances and lien and that there is no defect in the property whatsoever. Furthermore no legal proceedings is underway in any court of law or tribunal with regard to the land any problem if arises during the allotment of land shall be resolved amicably by Party C

*except when Party A and B will fail to pay the requisite INVESTMENT mentioned in para 4 above.*

11. *After completion of lease period, all parties will enjoy good will (granted from CDA) according to the shares.*

12. *In case of failure to seek this lease, any of the party will not file any case against any other party/partner, in any court of law.*

13. *All of the three parties are fully agreed that CIEL International Pvt Ltd. will work for the community welfare and in interest of Nation.*

15. While scanning the above document, the most important fact which came into limelight is that the appellant (Partner C) claimed that he has already invested Rs.30 Million as expense for seeking the land, whereas the other two partners i.e. Respondent No.2 and Naeem Akhtar were bound to invest their shares in the CDA through bank draft. This documentary evidence belied the entire prosecution case for payment of cash amount to accused, which was specifically taken in his examination-in-chief as well as in his complaint submitted for registration of FIR that he has paid cash amount of Rs.30,000,000/- to Respondent No.2, which is not the case. It is trite law that in case of oral evidence *vis-a-vis* documentary evidence the documentary evidence has to be relied upon as a document did not tell a lie. Reliance is placed upon 2016 SCMR 274 (Azeem Khan, etc. v. Mujahid Khan, etc.) and 2010 SCMR 473 (Shamshad v. Arif Ashraf Khan, etc.).

16. In view of above, the initial claim of investment by the appellant is not proved, which could be made basis for corresponding financial obligation as a key requirement in terms of Section 489-F PPC.

17. I have gone through the judgment reported as 2010 SCMR 806 (Muhammad Sultan vs. The State), whereby following ingredients of Section 489-F PPC have been highlighted.

*"A perusal of section 489-F, P.P.C. reveals that the provision will be attracted if the following conditions are fulfilled and proved by the prosecution:-*

- (i) *issuance of cheque;*
- (ii) *such issuance was with dishonest intention;*



- (iii) *the purpose of issuance of cheques should be:-*
  - a) *to repay a loan; or*
  - b) *to fulfill an obligation (which in wide term inter alia applicable to lawful agreements, contracts, services, promises by which one is bound or an act which binds person to some performance).*
- (iv) *on presentation, the cheques is dishonoured.*

*However, a valid defence can be taken by the accused, if he proves that:-*

- (i) *he had made arrangement with his bank to ensure that the cheques would be honoured; and*
- (ii) *that the bank was at fault in dishonoring the cheque.*

*If the accused establishes the above two facts through tangible evidence and that too after the prosecution proves the ingredients of the offence then he would be absolved from the punishment."*

18. If we go through the above referred requirements of Section 489-F PPC as endorsed by the apex Court, it is the obligation of the prosecution or the complainant, as the case may be, to justify that the cheques issued by Respondent No.2 and received by the appellant were against some corresponding financial obligations, which has not been justified from the record, the cheques, if any, received by the appellant are considered to be without consideration having no legal effect qua the rights claimed by the appellant for the purpose of prosecution, hence the concept of dishonestly issuing cheques, which is the key factor for the purpose of conviction of an accused person in terms of Section 489-F PPC, has not been proved. Even otherwise, the dishonesty has to be proved separately by the prosecution as the initial onus is upon the prosecution to prove that the cheques were issued with dishonest intention, however in this case the star witness i.e. the appellant/complainant has failed to justify his payment of Rs.30,000,000/- against whom he intends to claim that he has received the cheques in question from Respondent No.2 against the said amount.

19. The other amount of Rs.14,000,000/- as claimed by the appellant, which was allegedly extended as loan to Respondent No.2, is a verbal assertion and has not been substantiated through any independent source. However, the appellant

has given much emphasis on the binding agreement, dated 25.06.2012, and an affidavit of Respondent No.2, dated 15.05.2014 (Exh.PL), whereby certain acknowledgments were given by Respondent No.2.

20. I have gone through those instruments i.e. firstly, the binding agreement, in which Respondent No.2 is "Party A" and the appellant is referred as "Party B", Clause 4 of which being an important clause is reproduced as under:

*4. That it is important to mention here that Party A warrants/acknowledges, beside aforesaid amount Party A along with his relative/Partner/Director (M/S Ciel International (Pvt.) Ltd.) Naeem Akhtar s/o Iqbal Akhtar had received sum of Rs.30 Million from party B, as money entrusted for seeking leasing of land mentioned in the partnership agreement dated 11/10/2011 and performance of this agreement is still pending even though, the party A assures that the party A and his relative partner had already deposited their share in the allotting authority with bank draft and party A assures that this pending deal will be materialized, in next six months time period."*

21. By considering the above referred clause the amount of Rs.30 Million was received by Naeem Akhtar (third partner) from the appellant on the basis of partnership agreement, dated 11.10.2011, which also nullifies the prosecution case at the first stance. Similarly, remaining text of clause also negates the version of prosecution, even the witnesses referred in the said agreement were not produced before the Investigating Officer nor even appeared before this Court to strengthen the prosecution case.

22. The second document i.e. affidavit Exh.PL, dated 15.05.2014, refers the disputed cheques in Clause 4, whereby the said affidavit was denied by Respondent No.2, however Clause 5 of the said affidavit reflects that if amount is not returned the appellant will take over the property situated at Plot 68-C, Charrah Road, Satellite Town, Rawalpindi i.e. Caltex Petrol Pump and Attock Oil Petrol Pump, which should be considered as sold. Hence, sufficient guarantees were entrusted to the appellant in this document, therefore, there is no occasion

left to be considered that the cheques were issued for return of the amount as surety/guarantee has already been given to the appellant.

23. I have also gone through the disputed cheques Exh.PA/1 and Exh.PB/1, whereby Cheque No.9452752, amounting to Rs.29,000,000/-, dated 09.07.2015 contains words "*guarantee cheque/WRT agreement*" on its back. If the instrument has been considered along with its written content on its back, it *prima facie* demonstrates that it is a guarantee cheque. Although, no such reference was given in any of the binding agreement, affidavit or partnership deed and this aspect has not been cleared by the prosecution. The documentary evidence of partnership deed as well as the binding agreement contains the mechanism for settlement of any dispute qua the payment, if any. Therefore, the criminal prosecution initiated by the appellant is an afterthought and same could not be conciled with his plea, although the technical expert report clearly spells out the matching of signatures, however the same is inconclusive qua the thumb impression affixed on the stamp papers, which further casts a shadow of doubt in the case of the prosecution.

24. I have gone through the impugned judgment of the learned Trial Court, whereby a detailed and elaborated findings were given with each and every explanation, especially when the learned Trial Court has agreed to dishonoring of cheques, but has rightly observed that the cheques in question were not proved to be issued with dishonest intention. The relevant part of the impugned judgment qua findings is as under:

*"For what has been discussed above, it can easily be gathered that the testimony of the prosecution witnesses and presented documents are not sufficient to prove the charge leveled against the accused person and surely renders the case against the accused highly doubtful and benefit of doubt is always extended in favour of the accused. Moreover, in the presence of partnership agreement which was executed between the parties, it can safely be concluded that the instant matter is related to a civil nature dispute. I have no manner of doubt to observe here that prosecution has miserably failed to prove the ingredients of Section 489-*

*F PPC against the accused person. In these circumstances by granting benefit of doubt, the accused namely Ahsan-ul-Haq is hereby acquitted of the charge leveled against him."*

25. Keeping in view the above position, this Court is confident to hold that the appellant/complainant has failed to prove the initial payment allegedly made by him in favour of Respondent No.2, against which he received the cheques from Respondent No.2, however the said cheques were dishonored on presentation and as such, the financial obligation at the initial stage has to be proved by the complainant/appellant in terms of Article 117 of the Qanun-e-Shahadat Order, 1984, failing which an adverse inference has to be drawn against the appellant. The ingredients of Section 489-F PPC have not been proved independently and the learned Trial Court has rightly acquitted Respondent No.2 in this case vide the impugned judgment, which is well reasoned and in accordance with law, therefore, the instant criminal appeal is misconceived and same is hereby DISMISSED.

(MOHSIN AKHTAR KAYANI)  
JUDGE

Announced in open Court on: 03 July 2020.

JUDGE

Khalid Z.