

**JUDGMENT SHEET**  
**ISLAMABAD HIGH COURT, ISLAMABAD,**  
**JUDICIAL DEPARTMENT**

**Criminal Appeal No.126/2014**

Muhammad Umar Gul

*versus*

Zubair Farooq Khan & another

Appellant by: Mirza Irfan Ghazanfar, Advocate proxy counsel for appellant.

Respondent by: Mr. Ishtiaq Ahmed Raja, Advocate for Respondent No.1.

Date of Hearing: 14.10.2019.

**MOHSIN AKHTAR KAYANI, J:** The appellant through the captioned criminal appeal has assailed judgment dated 14.11.2014, passed by the learned Judicial Magistrate, 1<sup>st</sup> Class (West), Islamabad, whereby Zubair Farooq Khan/respondent No.1 has been acquitted from case FIR No.145, dated 20.06.2005, under Section 489-F PPC, P.S. Kohsar, Islamabad.

2. Brief facts of the instant case are that the aforesaid FIR has been lodged on the complaint filed by Muhammad Umar Gul/appellant against Zubair Farooq Khan (Respondent No.1) and two others namely Rana Qamar Abbas Khan (died during the trial) and Ashiq Rehmani (P.O.) with the allegations that he on behalf of his company namely AARP International (Pvt.) Ltd. entered into an agreement with the said accused persons' company i.e. M/s Marva Beverages as its distributors and made advance payment of Rs.56,00,000/-. However, later on when the Company failed to fulfill the agreement, the accused persons issued two cheques i.e. bearing No.0212259 and No.0212261 in the sum of Rs.20,00,000/- and Rs.24,00,000/-, respectively, in favour of the appellant's Company. The said cheques dishonoured on their presentation before the bank concerned, whereupon above referred FIR No.145, dated 20.06.2005, U/S 489-F PPC, P.S.

Kohsar, Islamabad was got registered. After investigation, challan was submitted against the said 03 accused persons and the learned trial Court after recording of prosecution evidence as well as statement of Respondent No.1 under Section 342 Cr.P.C., acquitted Respondent No.1 by extending him benefit of doubt vide impugned judgment dated 14.11.2014. Hence, the instant appeal.

3. Learned counsel for appellant contended that the impugned judgment is the result of misreading and non-reading of evidence; that the learned trial Court has failed to appreciate that mandatory ingredients of Section 489-F PPC are proved against Respondent No.1, but even then Respondent No.1 has been acquitted from the charge; that the learned trial Court erred in holding that the prosecution failed to connect the accused with the agreement executed between AARP International and Marketing Vision (parent company of M/s Marva Beverages); that the signatures of Respondent No.1 and his directorship of M/s Marva Beverages are admitted; that the business relationship between appellant's company and accused's company is also manifested from the civil suits filed by co-accused persons together with the factum of payment of Rs.56,00,000/-, but the learned trial Court has failed to appreciate such indication, therefore, the instant appeal may be accepted and the impugned judgment of acquittal of Respondent No.1 may be set-aside.

4. Conversely, learned counsel for respondent No.1 opposed the instant appeal on the grounds that the case established by the prosecution is highly doubtful, which the prosecution, even otherwise, has failed to prove against Respondent No.1; that the prosecution has also failed to prove the essential ingredients of Section 489-F PPC and as a result whereof the learned trial Court has rightly acquitted Respondent No.1 vide the impugned judgment, therefore, the instant appeal may be dismissed.

5. Arguments heard, record perused.

6. From the perusal of record it reveals that case FIR No.145, dated 20.06.2005, U/S 489-F/109 PPC, P.S. Kohsar, Islamabad was registered on the complaint of Muhammad Umer Gul, Director AARP International based upon complaint Exh.PA, dated 16.06.2005, whereby it was alleged that his company AARP International entered into agreement with M/s Marva Beverages brand name Mecca Cola for supply of beverages as its distributor and an advance payment of Rs.56,00,000/- was made to M/s Marva Beverages through their account . The respondent defaulted and not fulfilled the terms of agreement, even amount received by him was not returned. Even two cheques of Bank Al-falah Redco Plaza branch Blue area, Islamabad bearing No.0212259 and 0212261 amounting to Rs.20,00,000/- and Rs.24,00,000/- respectively were given to the complainant/appellant, however, the said cheques were presented and the same were dishonoured due to insufficient funds.

7. In view of above contention of the appellant FIR was got lodged in which three persons were referred as accused namely M. A. Rehmani, Malik Zubair Khan and Rana Qamar Abbas, however, at initial stage Rana Qamar Abbas died, before the trial and FIR was lodged. The I.O after conclusion of the investigation submitted the challan U/S 173 Cr.P.C., whereby charge was framed against Zubair Farooq Khan U/S 489-F PPC, where-after prosecution produced Muhammad Umer Gul/appellant as PW-1, Inam Ullah constable as PW-2, Qasim Khan Niazi Inspector as PW-3, Syed Hasnain Ali Gillani, Manager Operations Bank Al-falah as PW-4, where-after statement U/S 342 Cr.P.C. of respondent/accused was recorded. Learned trial Court after recording of said evidence has passed the impugned judgment dated 14.11.2014 and acquitted the respondent/accused from the charges of Section 489-F PPC. Hence, this appeal.

8. It is trite law that evidence has to be appreciated in appeal with care and caution especially when the respondent has already earned the acquittal. I have

gone through the evidence recorded by the complainant in the trial Court in which it has been stated with specific terms that amount of Rs.56,00,000/- has been transacted into the account of accused persons whereas products of Rs.12,00,000/- were handed over to the complainant/appellant and rest of the agreement was not complied with. PW-1 further stated that respondent/accused has handed over two cheques amounting to Rs.20,00,000/- and Rs.24,00,000/- respectively of Bank Al-falah, which were dishonoured for three times when presented. However during the course of evidence it has been observed that original cheques were not presented before the learned trial Court rather the photocopies of the cheques and dishonoured slips were presented. During the course of cross-examination, it has been acknowledged that original cheques were presented before the Court of District & Sessions Judge in the proceedings U/O XXXVII CPC which have been compared and returned where-after cheques were referred as Exh.PF. It is admitted by the PW-1 /complainant that AARP International is a registered company and he is one of the Directors of the company but he is not in position to disclose the number of shares of each of the Directors of the company. During the course of cross-examination complainant/appellant acknowledged that distribution agreement has been referred as Exh.PC, which was executed by Marketing Vision and AARP International. PW-1 also acknowledged that his agreement was executed with M/s Marva Beverages which was neither produced before the criminal Court, nor before the civil Court. However, he stated that agreement Exh.PC was executed by Director and the complainant is the witness of said agreement as well as Director. At last he stated that M/s Marva Beverages is the company of Marketing Vision.

9. PW-1 also acknowledged that Rs.56,00,000/- was deposited into bank account of M/s Marva Beverages; that his agreement was executed with

Marketing Vision and Exh.PC was signed by Rana Qamar Abbas as witness in the said document, however, the same does not contain the amount of Rs.56,00,000/-; that a compromise was effected between the parties Exh.DA, which was signed by Rana Qamar Abbas. He also acknowledged Exh.DC & Exh.DD.

10. Similarly I.O Qasim Khan Niazi Inspector appeared as PW-3, who has reiterated the stance before the Court and acknowledged that dishonoured cheques contained signature of Zubair Khan and company manager Fareed Khan, whereas company had three Directors Rana Qamar Abbas, Zubair Khan and M. A. Rehmani. It has further been contended that M. A. Rehmani was CEO of the company. The prosecution has also produced Syed Hasnain Ali Gillani, Manager Operations Bank Al-falah as PW-4, who stated that both the cheques were dishonoured due to insufficient funds and dishonoured slips were issued by the bank. During the course of cross-examination he acknowledged that both the cheques were not presented before him.

11. Besides the above referred stance recorded in statement of different witnesses, I have to only considered the case of Zubair Farooq Khan at this stage who earned his acquittal on the basis of impugned judgment. The statement U/S 342 Cr.P.C. was recorded by the respondent/accused before the Court alongwith his statement in writing in terms of Section 342 Cr.P.C., whereby respondent has been confronted with question Nos.2 & 3, both the questions & answers are as under:-

*Q. It is in the prosecution evidence that you along with your co-accused in abetment of each other. Being the directors of Marwa Beverages (Pvt) Ltd. dis-honestly issued two cheques bearing Nos. 0212259 & 0212261 amounting to Rs.20,00,000/- and Rs.24,00,000/- respectively in the name of the complainant and the said cheques were presented before the concerned bank, but the same were dis-honored vide dishonor slip due to insufficient balance. What do you say about it?*

*Ans. It is incorrect. In my personal capacity I have nothing to do with the cheques concerned. The cheques, being the property of a private limited company known as M/s Marwa Beverages can only be operated under the instructions of its chief executive or under the authority of a resolution passed by the board of directors. The cheques were issued on the instructions of Chief Executive and duly verified by the Director (Rana Qamar Abbas), who was actually dealing with the complainant Company regarding business affairs. The prosecution failed to prove any sort of dishonesty.*

*Q. It is in the evidence that you accused dis-honestly has issued cheques Ex.PE and Ex.PF through the complainant for fulfillment of your obligation regarding return of his amount. What do you say about it?*

*Ans. The allegation is totally incorrect and false. There was no obligation towards the complainant as far as I am concerned. No personal liability or obligation has ever been assigned against me by the prosecution. The complainant in connivance with the police lodged a frivolous FIR on the basis of the photostate copies of the cheques. At the record, it is proved that the complainant moved an application before the ASP City Islamabad on 22-12-2004, which was registered as Diary No.3055 and was marked to SHO Kohsar. During the course of inquiry, the complainant failed to prove his claim and the matter was settled by the complainant with the company. The said application is available on the record as Ex.DB and the final report of the investigating officer as Ex.DC. Subsequently an application on the same subject was mala fide on the part of complainant and registration of FIR is an excess of authority on the part of police.*

12. While taking into account the above referred evidence as well as stance taken by the respondent in his statement U/S 342 Cr.P.C., the trial Court has passed the impugned verdict, whereby respondent was acquitted on the basis of following observations:-

*Admittedly the transaction in between the companies, no loss whatsoever has been proved by the prosecution to have been caused complainant in person. Moreover, although the prosecution has not proved any link of accused whatsoever with the alleged agreement Ex.PC. Even otherwise, if its presumed that the agreement executed in between the parties pertains*

37

*to the company of the complainant and that of the accused which would not result in any personal gain to the accused in the capacity being its director.*

*Prosecution to prove that cheque on presentation dishonoured, must produced the concerned bank official to whom cheque presented and dishonoured. Perusal of record shows that prosecution produced PW-4 to prove this aspect of the case. PW-4 during his cross examination replied that he is serving in the present branch for the last two and half months. That the cheques were not produced before him.*

13. While considering the entire background as narrated above, the primary question is that as to whether the agreement was executed between appellant/complainant company with M/s Marva Beverages as its distributor against the payment of Rs.56,00,000/- and whether company defaulted in performance of their terms of contract, although PW-1 has acknowledged that products were supplied to the respondent to the extent of Rs.12,00,000/- and the cheques were issued by the respondent's side for the remaining liability.

14. In order to resolve the controversy, it is necessary to go through the ingredients of Section 489-F PPC, whereby Apex Court has settled the ingredients in case reported as 2010 SCMR 806 (Muhammad Sultan vs. The State), in the following manner:-

*"A perusal of Section 489-F PPC 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 cheque is dishonoured.*

15. Besides the above referred ingredients of Section 489-F PPC, it is necessary to dilate upon the legal issue as to whether cheques have been issued by the company and the Directors are liable for their personal actions or otherwise. However, these questions have been discussed in case reported as PLD 2013 Sindh 487 (Shaikh Muhammad Aamir and another Vs. Government of Sindh through Home Secretary and 4 others) wherein following issues have been highlighted:-

**(a) Penal Code (XLV of 1860)---**

---S. 489-F---Criminal Procedure Code (V of 1898), Ss. 561-A & 154---  
 Constitution of Pakistan, Art. 199---Dishonestly issuing a cheque---  
 Constitutional petition---Quashing of proceedings---"Dishonest issuance"  
 of a cheque---Scope---Undated cheque issued with the mutual agreement  
 that it would not be presented to any bank without written consent of  
 drawer (i.e. issuer of cheque)---Effect---Accused had issued ten undated  
 cheques to complainant-company, and each cheque contained an  
 endorsement on its back stating that it was mutually agreed that the  
 company would not present it to any bank without written consent of  
 accused---Complainant-company, without written consent of accused,  
 presented two of the cheques before a bank and got them dishonoured---  
 F.I.R. under S.489-F, P.P.C was lodged against accused---Plea of accused  
 that cheques were issued with a clear understanding that they would not  
 be presented unless consent in writing was obtained from him, therefore,  
 neither there was any dishonesty on his part nor ingredients of S.489-F,  
 P.P.C were attracted, thus, F.I.R. was a result of mala fide of complainant-  
 company---Validity---Undated cheques were admittedly issued by accused  
 on different dates with the condition that they should not be presented  
 without his written consent, which condition was accepted by  
 complainant-company without any objection, therefore, presentation of  
 cheques without obtaining written consent of accused was totally  
 unauthorized and would not bring such presentation within the mischief  
 of "dishonest issuance" as the cheques were not issued by accused for  
 payment---No successful prosecution of accused was possible even if the  
 allegations in the F.I.R. were not rebutted, therefore, present criminal  
 proceedings were nothing but an abuse of process of the court---



*Proceeding emanating from F.I.R. under S.489-F, P.P.C were quashed in circumstances---Constitutional petition was allowed accordingly.*

*In our opinion, the basic ingredients of Section 489-F, is the "dishonest issuance of a cheque" towards repayment of a loan or fulfillment of an obligation, which is dishonoured on presentation as has been held by the Supreme Court in the case of Mian Allah Ditta v. The State (2013 SCMR 51). The question consequently arises as to whether an undated cheque handed over even towards repayment of loan or fulfillment of an obligation with the condition that it should not be presented without written consent of the drawer can be termed as dishonest issuance" and its dishonour could give rise to initiation of criminal proceedings under the provisions of section 489-F, P.P.C. In our opinion words "dishonest issuance" in section 489-F are of significance and reflects the state where the drawer has issued cheque directing payment of the amount mentioned therein knowingly that he has no funds and on presentation the cheque would be dishonoured. Whereas in the instant case, the drawer has placed an embargo on presentation of cheque without his written consent meaning thereby that issuance of cheque would take place only when such written consent is obtained from the drawer, failing in our opinion it would remain at the most an acknowledgment of liability.*

*In the circumstances without dilating upon the negotiability of the cheques as it might effect the rights of the parties pending before the Court of Original Jurisdiction, we are of the clear view that since undated cheques were admittedly issued by petitioner on different dates as it appears from the serial numbers of the cheques with the condition that it should not be presented without written consent of the drawer which condition was accepted by the respondent No.4 holder without any objection therefore, presentation of such cheque without obtaining written consent was totally unauthorized and would not bring such presentation within the mischief of "dishonest issuance", as the cheques presented for the payment by the respondents were not issued by the petitioner for payment.*

*Coming to the various judgments cited by the learned counsel to contend that since more than one alternate remedies are available to the petitioner, therefore, the proceedings may not be quashed. We are fully conscious of the fact that powers to quash the proceedings in criminal cases is to be*

*exercised sparingly and that too in extraordinary cases where the Court is convinced that the prosecution is mala fide and/or motivated or that the trial of a person is nothing but a farce and abuse of the process. The criteria laid down by the Supreme Court for exercising such power could be derived from the case of Rana Shahid Ahmed Khan v. Tanveer Ahmed (2011 SCMR 1937) which appears to be that "in case allegations levelled in the F.I.R. or complaint are un-rebutted despite no criminal case could be made out then the High Court while exercising its inherent jurisdiction could quash the proceedings emanating from a crime". In this case, since we have already come to the conclusion that the complainant/respondent in breach of a condition on the basis of which the cheques were handed over to him i.e. without obtaining written authority from the petitioner presented the cheques which without such authority were never meant for payment, therefore, the basic ingredients of section 489-F, P.P.C. i.e. "dishonest issuance" is missing and there could be no successful prosecution even the allegation in the F.I.R. are un-rebutted and, therefore, the proceedings would be nothing but an abuse of the process of the Court.*

16. Similarly, the other important element as to whether the Directors are personally liable in such type of cases, whereby Directors signed the cheques on behalf of juridical person and in this regard the concept of lifting veil has been highlighted in 2006 CLD 191 Karachi (M/s Sakhi Dattar Cotton Industries & Oil Mills through authorized partner Vs. M/s Mahmood Pvt. Ltd. and 4 others) and eventuality has been explained in which Court can lift veil:-

13. This brings this Court to examine another question i.e. can on any principle of law a shareholder be made personally liable for the obligation of a limited company. The law is not static but is ever changing process. The task of judicial interpretation is not always to reiterate but also to create with rigorous discipline in harmony with the statute law and its previous growth. The doctrine of piercing the veil of incorporation is the product of judicial interpretation necessitated by the exigencies of modern commercial practices. However while resorting to the doctrine of piercing the corporate veil the Courts have always been cautious and circumspect. Through the device of liberal interpretation the very object of providing

*statutory protection to a shareholder of a limited liability cannot be defeated on every occasion when a company defaults. It would then certainly defeat and not advance the very object of statutory protection.*

*14. I have examined the situations in which the Courts have rent the veil woven by the famous case of Salomon v. Salomon & Co. 1897 AC 22 by cracking open the corporate shell. These situations are as follows:--*

*(i) Where the companies are in relationship of holding and subsidiary companies or where there is a group of companies working under a common control.*

*(ii) Where the company continued to carry on business by its members well after it ceased to exist and thereafter its members attempted to use their sheltered position of limited liability.*

*(iii) Prohibition of trading with the enemy is circumvented by using corporate cover of a Company.*

*(iv) Matters pertaining to taxation laws, where the question of controlling interest is in issue.*

*(v) Merging of companies with each other.*

*(vi) Formation of new company by members holding absolute majority in an existing company solely for the purpose of expropriating the shares of the minority ' shareholders in the existing company.*

*(vii) Transfer of company's assets to another company or entity to avoid liabilities of transferor company.*

*(viii) Members using corporate structure for hiding their crimes in order to avoid criminal punishment to them.*

*15. Above are situations in which Courts have lifted the corporate veil.*

*16. There is also another aspect of the case. The house personally owned by defendant No.2 was attached so that in case any decree is passed against defendant No.1 the same could be satisfied from its sale. It is not the case of the plaintiff that such property was purchased by defendant No.2 from the funds of defendant No.1, which would have also called for the invocation of doctrine of lifting the corporate veil. The doctrine of lifting of*

*the corporate veil does not mean that shareholders are also to be made equally liable with the company. It only means that any undue benefit drawn by a shareholder or any other entity to the detriment of a company is to be returned back to company so that its creditors could successfully settle their account with the company, which they otherwise would not have.*

17. Keeping in view the above legal interpretation it is necessary to consider the other factual aspects as to whether the cheques in question i.e. Rs.20,00,000/- Exh.PF and Rs.24,00,000/- Exh.PE were signed with conscious knowledge by the respondent/accused as to whether the company has insufficient balance and cheques were issued dishonestly, although there is no denial that cheques were not dishonoured but respondent has taken specific stance in statement U/S 342 Cr.P.C. while answering the question No.3 "No personal liability or obligation has ever been assigned against me by the prosecution." As such the plea advanced by the respondent is based upon legal justification in the matter of corporate entity. The respondent/accused if at all signed the cheques Exh.PE & PF which were dishonoured can be considered the liability of M/s Marva Beverages and it is correctly highlighted that it is not the personal liability of the Directors; however, the question of intention has to be gathered from the circumstances in which cheques were issued. It has not been denied that agreement was executed between the parties for distribution and as per complainant's version the products of Rs.12,00,000/- were delivered to the respondent and rest of the products have not been delivered, as such no other document has been produced through which it could be ascertained that certain products have been delivered which could be equalized in terms of money and cheques were issued.

18. Similarly, PW-1 acknowledged in his cross-examination that:-

یہ درست ہے کہ میرے بیان کے مطابق ہمارا معاہدہ مرواہیور بیجز کے ساتھ تھا۔ میں نے مرواہیور بیجز کے ساتھ ہونے والا معاہدہ نہ تو دیوانی دعویٰ میں اور نہ ہی اس فوجداری مقدمہ میں پیش کیا ہے۔ از خود کہا کہ مارکیٹنگ ڈیشن مرواہیور بیجز کی patent company ہے۔ چونکہ ہمارا مرواہیور بیجز کے ساتھ کوئی تحریری معاہدہ نہ ہے اس لیے اس کی رجسٹریشن چیک نہ کی تھی۔

The complainant also acknowledged that:-

یہ درست ہے کہ میں نے اپنے عدالتی بیان میں 12 لاکھ کے مال کی وصولی اور بقیہ رقم کے چیک کا ذکر کیا تھا اس 12 لاکھ کے علاوہ بھی فریقین سے لین دین ہوتا رہا تھا جو کہ تقریباً ایک سال تک چلتا رہا تھا جس کی تفصیل مہیا کر سکتا ہوں مگر آج میرے پاس نہ ہے اور نہ ہی یہ تفصیل تفتیشی آفیسر کو دی تھی۔

19. It has further been observed in the evidence of PW-1 that there is no mentioning of Rs.56,00,000/- in the distribution agreement Exh.PC and first ever application for registration of FIR was filed on 01.12.2004, however, matter was compromised through Exh.PA.

20. The above referred admitted position of the evidence justifies the order passed by the trial Court, whereby respondent/accused was acquitted from the charges as such the ingredients of Section 489-F PPC i.e. "dishonestly issuance of cheques" has not been proved from the record. The trial Court has rightly observed that the matter in question relates to company dispute on the basis of agreement which was not produced and as such real intention of the parties could not be ascertained. It is the role of prosecution to prove due payment or financial obligations which have not been fulfilled by the respondent/accused, which is missing in the matter. The prosecution has withheld best available evidence intentionally and as such the case of prosecution is hit by Article 129(g) of the *Qanun-e-Shahadat Order, 1984*.

21. The overall circumstances of the case brought on record by the prosecution placed an important responsibility upon the complainant/appellant i.e. company against the accused its dealer/distributor to brought every record and relationship of business transaction on record failing which the case has not been proved beyond any reasonable doubt as held in PLD 2012 Sindh 464 (Malik Safdar Ali Vs. Syed Khalid Ali and 2 others), whereby it was held that

"complainant is a company and the accused claims to be its dealer. Both sides were admittedly on business terms prior to the date of issuance of the said cheques, therefore, the company would have come forward with all record of such business transactions justifying the existence of the claim claimed to have met with the issuance of the cheque(s) carrying necessary element of mens rea beyond shadow of any reasonable doubt. In the instant case, no such material has been produced by the prosecution."

22. Even otherwise, after the acquittal, respondent No.1 earned double presumption of innocence in his favour, therefore, to disturb such findings, strong and cogent evidence is required, which is lacking in the present case. The learned counsel for the appellant has failed to point out any illegality or irregularity, therefore, I am not inclined to interfere with a well-reasoned order of acquittal passed by the learned Magistrate, thus, in view of what has been stated and discussed hereinabove, the appeal is dismissed.

(MOHSIN AKHTAR KAYANI)  
JUDGE

Announced in open Court on: 07 Nov 2019.

JUDGE

Zahid.