

ORDER SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

CRL. APPEAL NO. 297 /2019

Mushtaq Hussain Vs Abid Hussain, etc.

Serial No. of order/ proceeding	Date of order/ proceedings	Order with signatures of judge, and that of parties or counsel, where necessary.
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01	23.01.2020	Mr. Ehtasham Asalm Khan, Advocate.
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GHULAM AZAM QAMBRANI, J

Appellant (Mushtaq Hussain) seeks setting aside of impugned order dated 29.06.2019 passed by the learned Judicial Magistrate Section 30-West, Islamabad, whereby respondent No.1 was acquitted under Section 249-A, Cr.P.C.

2. Briefly the allegation against the respondent is that he issued a cheque bearing No.63515556, amounting to Rs.50,00,000/- to the appellant/complainant, which was dishonoured.

3. Learned counsel for appellant contends that the application under section 249-A Cr.P.C filed by the respondent was accepted without considering the material and evidence available on the record; that the impugned order is illegal, arbitrary and passed in violation of law. He further contends that the respondent has used sub-standard material in the construction of the house of the appellant.

4. Brief facts of the case are that an agreement was executed between the parties on 08.01.2018 for construction of a house situated at City Housing Society, Jhelum, and as a result of the said agreement the complainant/ appellant deposited an amount of Rs.50,00,000/-in the bank account of the respondent. Thereafter, the respondent started construction of the house. It was settled between the parties that all the building material shall be purchased under the supervision of Shahid Mehmood

(attorney of the appellant). The respondent has completed the superstructure, but the appellant or his representative did not raise any objection at the time of completion of superstructure. The appellant raised an objection that the respondent is using sub-standard material in the construction of the house whereupon the respondent gave a cheque of Rs 50,00,000/- (Fifty lac) as a guarantee for construction of the house as per the above said agreement and completed the superstructure of the house under the supervision of Shahid Mehmood, attorney of the appellant. But the appellant did not return the said cheque to the respondent, got it dishonoured and lodged the instant FIR against him. After registration of FIR, investigation was carried out and thereafter report under section 173 Cr.P.C. was submitted before the learned trial Court. After fulfilling codal formalities, charge was framed against the accused/ respondent, to which the accused pleaded not guilty. During the trial, accused/ respondent moved an application under Section 249-A, Cr.P.C., which was accepted vide order dated 29.06.2019, hence, the instant appeal.

5. A careful perusal of the record reveals that the complainant entered into an agreement with the respondent through his attorney namely Shahid Mehmood, for the construction of a house against a cost of Rs 1,25,000,000/- and the appellant paid in advance 40 % of the total consideration. Admittedly the respondent issued the disputed cheque to the appellant as a guarantee for construction of the house. Record further reveals that after threat of attorney of the appellant/ complainant, the accused/ respondent has filed a civil suit, which is also pending between the parties. The said civil suit has been filed by the respondent prior to the registration of the instant FIR.

6. It is pertinent to mention here that considerations for interference in an appeal against

acquittal and in an appeal against conviction are altogether different. The appeal against acquittal has distinctive features and the approach to deal with the appeal against conviction is distinguishable from the appeal against acquittal because presumption of double innocence is attached with the latter case. The well settled principles for the appreciation of appeals against acquittal as has been held by the Hon'ble Supreme Court of Pakistan in the judgment reported as **Muhammad Iqbal Vs. Abid Hussain alias Mithu and 6 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.

7. Perusal of the statements of the witnesses recorded under section 161 Cr.P.C shows that there is no probability of conviction of the accused in this case even if all the prosecution evidence is summoned and recorded. It also transpires that the prosecution witnesses are not the expert of assessing the cost incurred on the construction of the house of the complainant. There is lack of evidence that how much money has been spent on the construction of the superstructure of the house. All these ingredients can only be determined after recording evidence in the civil suit.

8. The dispute prima facie is of civil nature as the respondent has issued the said cheque to the appellant as a guarantee of the construction work and as per the agreement executed between the appellant and the respondent, the appellant was bound to return the said cheque to the respondent, meaning thereby that there is civil liability of contractual obligation and no cash amount has actually been paid by the appellant to the respondent. The appellant has tried to convert the civil litigation into criminal litigation.

9. It is admitted fact that the cheque was issued as a guarantee and not for re-payment of amount due to the complainant. Reliance in this regard is placed on the Judgment reported as “ Tahir Masood Butt Vs The State & another”, [2019 YLR 2125] and “Amanat Ali Vs The State, etc” [2014 UC 530]. In the instant case, all the construction was to be done under the supervision of attorney of the appellant namely Shahid Mehmood and all the building material was purchased under his supervision.

10. Provisions of Section 489-F PPC will only 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 cheque should be:
 - (a) To re-pay a loan; or
 - (b) To fulfil 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 person to some performance).
- (iv) On presentation, the cheque is dishonoured.

The element of *mense rea* and dishonestly issuance of cheque is missing in the instant case.

11. In view of what has been discussed above, the appellant has failed to establish extra ordinary reasons and circumstances, whereby the acquittal order recorded by the learned trial Court can be interfered with by this Court. It is a case of fulfilment of contractual obligations of construction of a house and not dishonestly issuance of a cheque. Thus, the learned Trial Court after proper appraisal of the record available on the file has rightly acquitted the respondent No.1 under Section 249-A Cr.P.C. I have found no illegality or irregularity in the impugned order nor the same is suffering from any misreading or non-reading or misappropriation of record warranting interference by this Court.

12. Resultantly, the instant appeal having no force, is **dismissed in limine**.

(GHULAM AZAM QAMBRANI)
JUDGE

S.Akhtar