

JUDGMENT SHEET
PESHAWAR HIGH COURT, D.I.KHAN BENCH
(Judicial Department)

Cr.A No.78-D/2019.

Haji Khan Zaman
 Versus
 Zabee Ullah etc.

JUDGMENT

For Appellant: Muhammad Waheed Anjum. Advocate.
 For Respondent: Mr. Rizwan Ullah Arayn. Advocate.
 For State: Mr. Aamir Farid Saddozai. Asstt: A.G.
 Date of hearing: 18.7.2023.

MUHAMMAD FAHEEM WALI, J.- This judgment shall also dispose of the connected Criminal Appeal No.10-D of 2021 titled "Haji Khan Zaman Vs. Naeem Ullah etc" as both the matters are the outcome of one and same FIR No.262 dated 28.6.2014, under Sections 489-F, 419, 468, 506 PPC of Police Station Cantt: D.I.Khan. Criminal Appeal No.78-D of 2019 has been filed against the judgment dated 27.11.2019, rendered by learned Judge Judicial Magistrate-II, D.I.Khan, whereby the accused/respondents have been acquitted, while the connected criminal appeal has been filed against the judgment dated 02.02.2021, rendered by learned Additional Sessions Judge-I, D.I.Khan, whereby appeal against conviction, filed by accused Naeem Ullah was accepted by the appellate Court below and pursuant thereto, he was acquitted from the charges levelled against him in the ibid FIR.

2. Brief facts of the case as narrated in the FIR, are that the appellant submitted an application (Ex. PW 2/1) to the District Police Officer, D.I.Khan for registration of criminal case under sections 406, 489-F, 419, 420, 467, 506, 148, 149 PPC against the respondents. The application was marked for inquiry to Anees-ul-Hassan ASI. As per contents of the application, the appellant had entered into a sale agreement of a market situated at Bazar Ahmad Khan, Bannu through execution of an *Iqrar Nama* dated 17.12.2013, vide which the accused/respondents were required to pay sale consideration in accordance with the said agreement. In view thereof, accused Naeem Ullah issued cheque bearing No.0052409114 dated 16.12.2013, amounting to Rs.35,00,000/- and cheque No.7251349 dated 25.12.2013, amounting to Rs.50,00,000/-, while accused Zabeeh Ullah issued cheque No.0052409115 dated 25.12.2013, amounting to Rs.15,00,000/-. However, only cheque No.0052409114, amounting to Rs.35,00,000/- could be encashed, while rest of the two cheques were dishonoured when presented to the bank concerned; that the accused also deposited Rs.9,80,000/- in the account of complainant, while Rs.20,000/- were paid to him through his brother Hafiz Ghazi Marjan. On demand of the complainant for payment of sale consideration, the accused threatened him of dire consequences and ultimately on 08.6.2014 at about 10:00 a.m, the accused entered into the *Baithak* of complainant with Kalashnikovs and criminally intimidated him for transfer of the market. In view of findings of the concerned inquiry officer and as per order of the concerned Judicial

Magistrate, criminal case vide the captioned FIR was registered against the accused/respondents.

3. On completion of the investigation, complete challan against the accused was submitted before the trial Court, where on conclusion of trial accused/respondents No.1 to 4 were acquitted by the trial Court vide judgment dated 27.11.2019, whereas co-accused Naeem Ullah was convicted under Section 489-F PPC and sentenced to undergo two years rigorous imprisonment with fine of Rs.40,000/- or in default thereof to further undergo one month simple imprisonment. Appeal against conviction and criminal revision there-against were filed before learned Sessions Judge, D.I.Khan, which were entrusted for disposal to learned Additional Sessions Judge-I, D.I.Khan, who accepted the appeal and thereby acquitted accused Naeem Ullah, while criminal revision was dismissed for having become infructuous. Hence, this and the connected criminal appeal.

4. Arguments heard and record scanned.

5. To resolve the controversy, it would not be out of place to reproduce Section 489-F, P.P.C., which is as under:-

"489-F, P.P.C. Dishonestly issuing a cheque.--Whoever dishonestly issues a cheque towards re-payment of a loan or fulfillment of an obligation which is dishonoured on presentation, shall be punishable with imprisonment which may extend to three years, or with fine, or with both, unless can establish, for which the burden of proof shall rest on him, that he had made arrangements with his bank to ensure that the cheque would be honoured and that

the bank was at fault in not honouring the cheque."

For proving the offence under Section 489-F of the Pakistan Penal Code, 1860, the prosecution is duty bound to prove its essential ingredients, which are reproduced below:-

- i. *Issuance of cheque with dishonest intention;*
- ii. *The purpose of issuing the cheque should be*
 - (a) *Re-payment of loan;*
 - (b) *To fulfill an obligation;*
- iii. *On presentation, the cheque is dishonoured.*

6. Section 489-F has been inserted into Pakistan Penal Code, 1860, through Criminal Law (Amendment) Ordinance 2002. Rationale behind the said enactment does not call for a mechanical action immediately when a cheque is returned by a Bank as dishonoured, but is to be used only where, *prima facie*, the purpose of issuing the cheque was dishonesty pure and simple in the matter of payment of loan. Business transaction, genuine disputes and contractual obligations would not be sufficient to constitute an intention for such offence, hence, section 489-F PPC, cannot be used as a tool for recovery of amount in civil liability. The words "*whoever dishonestly issues a cheque*" are of much significance which means that offence is constituted when a cheque is dishonestly issued. The main purpose of section 489-F, P.P.C. is only to penalize an accused person who has knowingly issued a cheque with dishonest intention that it would be dishonoured. As stated

earlier this statute cannot be turned into mechanism for recovery of any amount on the basis of some business transaction. Mere issuance of cheque and its becoming dishonoured, being *actus reas* would not be able to attract the provisions of S.489-F, P.P.C., simply for want of presence of element of dishonesty in the matter. In absence of dishonesty in issuance of such cheque, the prime ingredient of the offence would not stand satisfied and there would be no offence. For deciding whether or not, there appeared a dishonest intention in issuance of cheque, the Court should take notice of the facts culminating in the issuance of such cheque. Cheque which is issued as a security so as to develop trust between the parties as a matter of normal business dealings, and is not the outcome of any transaction of consideration of the time thereof, would not be a subject of criminal accountability of S.489-F, P.P.C. for want of element of relevant *mens rea*. To constitute the offence, dishonesty on the part of payer is a condition precedent.

7. As far as dishonesty is concerned, in order to make out a case under Section 489-F PPC, the prosecution is duty bound to prove the dishonest intention of the accused in issuing the relevant cheque. The term “dishonestly” has itself been defined in Section 24 of the Pakistan Penal Code, 1860, which for ready reference, is reproduced below:-

24. “Dishonestly”. Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing “dishonestly”.

From the aforesaid definition, the term "dishonestly" means and includes the intention to cause wrongful gain to one person and wrongful loss to another person. These terms of wrongful gain and wrongful loss have, in turn, been defined in Section 23 of the P.P.C. itself, whereby wrongful gain and a gain by unlawful means regarding a "property" to which the person so gained is not legally entitled and conversely, "wrongful loss" is a loss caused to a person by unlawful means regarding property from which he is being wrongfully deprived of. For the sake of convenience, Section 23 is reproduced below:-

"23. "Wrongful gain".—Wrongful gain is a gain by unlawful means of property to which the person gaining is not legally entitled.

Gaining wrongfully. Losing wrongfully. A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to loss wrongfully when such person is wrongfully kept out of any property as well as when such person is wrongfully deprived of property.

8. Conjoint effect of the above provisions of law clearly suggests that to make out a case under the term "dishonestly", a wrongful gain or wrongful loss in relation to a property to a person has to be established.

9. As a corollary to the above explanation, it is abundantly clear from the record and admitted position that in pursuance of the agreement to sell, no wrongful gain or wrongful loss has occasioned as the property has not changed hands

because the possession of the property still lies in the hands of the appellant coupled with the fact that no transfer of ownership has also been effected. In view of the above, when the property in question is still in possession of the complainant and no Registry or mutation has been entered or attested in that regard, necessary ingredients as per the provisions of Sections 23 and 24 of Pakistan Penal Code, 1860, have not been fulfilled to constitute offence under Section 489-F PPC.

10. So far as merits of the case are concerned, there is no denial to this fact that the appellant/complainant owned a market consisting of certain shops and he entered into an agreement dated 17.12.2013 (Ex. PW 2/5), with the accused with respect to the said shops. According to the complainant, Rs.55,00,000/- per *marla* was sold to accused Naeem Ullah and Zabeeh Ullah and total sale price was fixed at Rs.15,70,55,000/-. Three cheques amounting to Rs.35,00,000/-, 50,00,000/- and Rs.15,00,000/- were issued by the afore-named accused, however, out of three cheques, two cheques were dishonoured when presented to the bank concerned, while cheque amounting to Rs.35,00,000/- was encashed. Similarly, Rs.9,80,000/- were transferred to his account by accused Zabeeh Ullah, while Rs.20,000/- were paid through his brother Hafiz Ghazi Marjan. Complainant while appearing before the trial Court, during cross-examination admitted in unequivocal term that the market in question is still in his possession and no registry or mutation has been entered or attested in favour of accused Naeem Ullah. He also admitted that the cheques were not signed before him,

rather same were already filled at the time when same were handed over to him. He also admitted that he has not filed any suit for specific performance. He further admitted that accused Naeem Ullah had filed a suit before Civil Court at Bannu, which was dismissed. Needless to mention that Section 489-F of P.P.C. is not a provision which is intended by the Legislature to be used for recovery of an alleged amount. It is only to determine the guilt of a criminal act and award of a sentence, fine or both as provided under section 489-F, P.P.C. On the other hand, for recovery of any amount, civil proceedings provide remedies, inter alia, under Order XXXVII of C.P.C.

11. For the aforesaid reasons, this Court comes to an irresistible conclusion that the prosecution has miserably failed to prove the essential ingredients of the offence under section 489-F PPC. No mis-appreciation or non-appreciation of the material evidence has been noticed by this Court in the impugned judgments so as to warrant interference. Accordingly, this and the connected appeal having no merit and substance are hereby dismissed.

Announced:
Dt: 18.7.2023.
Kifayat/CS*


Naeem
JUDGE

(S.B)
Hon'ble Mr. Justice Muhammad Faheem Wali


21/7