

Form No.HCJD/C-121
ORDER SHEET
LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Crl. Misc. No. 52233/B/2022

Kabeer Akbar Vs **The State etc.**

S.No. of Order/ Proceeding	Date of order/ proceeding	Order with the signature of the Judge and that of parties or counsel where necessary
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08.12.2022 Mian Tabassum Ali, Advocate, with the Petitioner.
Mr. Muhammad Mustafa Ch., Deputy Prosecutor General
with Tauqeer/ASI.
M/s Hafeez Saeed Akhtar and Haider Rasool Mirza,
Advocates, *amici curiae*.
Mr. Moeen Ahmad Siddiqui, Advocate, with the
Complainant.

Tariq Saleem Sheikh, J. – Through this application the
Petitioner, Kabeer Akbar, seeks pre-arrest bail in case FIR No.73/2019
dated 09.05.2019 registered at Police Station Sarwar Road, Lahore
Cantt., for an offence under section 489-F of the Pakistan Penal Code,
1860 (“PPC”).

2. Briefly, the prosecution case is that the Petitioner issued
Cheque No. CA-0098015901 for Rs.3,000,000/- to Dost Steel Mills
Limited (“DSML”) which was dishonoured when presented.

3. Mian Tabassum Ali, Advocate, submitted that the Petitioner
was the Chief Executive Officer (“CEO”) of NORD (Private) Limited
(“NORD”). In 2018, DSML signed a Master Agreement to supply steel
bars worth Rs. 146,276,000/- to NORD over time. On 24.12.2018,
NORD issued Cheque No. CA-0098015901 to DSML with the
understanding that it would be payable upon the delivery of a
consignment of 60 tonnes in accordance with Purchase Order No.41.
NORD also made an endorsement to that effect on the back of the
instrument. The counsel contended that DSML breached its contractual
obligations and illegally presented the cheque to the bank. He
maintained that NORD was not liable to pay anything.

4. The Deputy Prosecutor General, assisted by the counsel for DSML, strongly opposed this application. He contended that the Petitioner's plea was false. There was documentary evidence that DSML delivered the goods as per contract. However, when it presented Cheque No. CA-0098015901, the bank returned it for lack of funds. He argued that the Petitioner had committed an offence under section 489-F PPC and was thus ineligible for the extraordinary relief of pre-arrest bail.

5. Admittedly, NORD is a private company limited by shares. It is duly incorporated under the law and the Petitioner is its CEO. NORD issued Cheque No. CA-0098015901 to DSML which the Petitioner signed on its behalf. He did not execute it in his personal capacity. Under the law, corporations have a separate legal identity so they are treated as having a legal personality distinct from the natural persons who comprise them, such as members, directors, and employees. Therefore, before delving into other issues involved in this case, it is necessary to determine the following questions:

- i) Is criminal liability under section 489-F PPC attributable to a company?
- ii) Does the person who signs the cheque on behalf of the company have any criminal liability under section 489-F PPC?

6. This Court appointed M/s Hafeez Saeed Akhtar and Haider Rasool Mirza, Advocates, as *amici curiae* for assistance.

7. Mr. Akhtar submitted that a corporation is a legal person who can be held criminally liable even though it has no physical existence and can only act or think through its directors or staff. A corporation is vicariously liable for the strict liability offences to the same extent as a natural person. It will also face criminal charges if it violates any statutory duty imposed on it in a specific capacity, such as occupier or keeper. Its criminal culpability extends beyond this to include direct liability for the actions of natural persons associated with it though there are two exceptions to this rule. First, corporations cannot commit crimes such as murder, bigamy, rape, incest, and perjury. Second, a corporation will not be convicted of an offence if the law

prescribes only corporal punishment. Mr. Akhtar argued that under section 489-F PPC corporations could be prosecuted for issuing a fraudulent cheque. The liability of the person who signs the cheque on a corporation's behalf would depend upon his role and position.

8. Mr. Mirza argued that the common perception was that corporations had rights and duties under private law but lacked the moral faculties essential for attributing guilt and imposing criminal penalties. However, the general rule was that a corporation was liable under criminal law like a natural person and could be convicted of common law and statutory offences, including those requiring *mens rea*. Criminal liability arises for a corporation when a crime is committed during the course of its business by a person in control of its affairs to the point where it is reasonable to say that the corporation thinks and acts through him. His actions and intent are those of the corporation. Mr. Mirza also maintained that a corporation could be liable under section 489-F PPC for dishonestly issuing a bad cheque. However, the guilt of the individual writing the cheque on the corporation's behalf would depend on his position and authority in the business.

9. Heard. Record perused.

10. Generally, liability under criminal law is subject to proof of fault (*mens rea*) on the part of the accused person coinciding with his act or omission (*actus reus*). The Latin maxim "*actus non facit reum nisi mens sit rea*" (an act itself does not constitute guilt unless done with a guilty mind) encapsulates this principle.

11. Corporations have a unique legal character. The law considers them as having a legal personality distinct from the natural persons who make them up, such as members, directors, workers, etc. In theory, this makes it possible to prosecute the corporation separately from the individual members for wrongdoing.¹

¹ *Smith, Hogan, and Ormerod's Criminal Law*, 15th Edition, p.245

12. Corporations include public limited companies, private limited companies, and organizations such as local authorities.² Historically, corporate liability has evolved in response to their changing role. Various hypotheses explain this concept. The Fiction (or “Nominalist”) Theory of Corporate Personality postulates that the corporation is merely a legal construct, a term used to describe a group of people at any given time. According to this view, the corporation can only function through its human representatives, with the operational personnel serving as its “limbs”, and officers and senior executives its “brain” or “nerve centre”. Nominalists argue that a corporation is liable because it can be identified with a human being who serves as its “directing mind and will”.³ (This is the identification or “alter ego” model of corporate criminal liability). On the other hand, the Reality Theory posits that the corporation has a distinct personality in its own right and is thus a person under the law. This early understanding of corporate personality allowed legal entities to be held vicariously liable for civil wrongs committed by their employees. In some jurisdictions, it was expanded to permit the imputation of criminal wrongdoing and states of mind to the corporation. It also spawned holistic (or “objective”) and aggregative liability models.⁴ The holistic models do not call for attributing human thoughts, acts, and omissions to the corporation like the identification and vicarious liability models. Instead, they believe the corporation can commit crimes by following established internal decision-making patterns (corporate culture or corporate (dis)organization). However, the aggregative approaches treat the corporation as the principal offender by adding up individual stakeholders' different acts, omissions, and mental states, particularly corporate officers and senior managers. They are a kind of middle ground between the vicarious and holistic approaches.⁵

² *ibid.*

³ Mark Pieth and Radha Ivory, *Emergence and Convergence : Corporate Criminal Liability Principles in Overview*. Comparative Perspectives on Law and Justice, Vol. 9 (2010), Chapter 1.

⁴ *ibid.*

⁵ *ibid.*

13. A corporation or its directors can be prosecuted in the following ways: First, individuals within a corporation have specific roles or duties and are accountable for their actions. They can be prosecuted for their wrongdoing just like other human beings. Thus, if a corporation is found criminally liable, its directors and other employees may face criminal charges. Sometimes Parliament excludes personal liability when introducing corporate offences. Second, the instances in which a corporation commits an offence of strict or absolute liability. Third, the corporation, as opposed to its employees or managers, can be held criminally liable for any offences designated by Parliament as applicable to corporations engaged in a specific activity. As a legal entity, a corporation may be obligated by Parliament to conduct itself in a particular way under penalty of criminal prosecution for failure to comply with a statutory duty. Fourth, a corporation can be held vicariously liable for the acts of its employees and agents. Fifth, where the corporation's controlling officers have engaged in the prohibited activity with the relevant fault element. (This is known as the "identification doctrine"). The sixth is the statutory liability of a corporate officer as a secondary party to the corporation's primary offence.⁶

14. The concept of vicarious liability and identification doctrine requires some discussion. Generally, vicarious liability applies to regulatory offences.⁷ In *Mousell Brothers Limited v. London and North-Western Railway Company*, [1917] 2 KB 836 (at p. 845), Atkin J. stated that the courts' approach to statutory interpretation should be as follows when determining whether a provision imposed vicarious liability:

“[W]hile *prima facie* a principal is not to be made criminally responsible for the acts of his servants, yet the legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is in fact liable if the act is in fact done by his servants. To ascertain whether a particular Act of Parliament has that effect or not, regard must be had

⁶ *Smith, Hogan, and Ormerod's Criminal Law*, 15th Edition, pp. 247 – 258.

⁷ Michael Allen, *Textbook on Criminal Law*, 7th Edition, p. 234.

to the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed.”

15. Now, the identification doctrine. The mere fact that the corporation has a legal identity does not change the reality that it lacks a body and a mind and is thus incapable of reasoning or acting independently. “The criminal law’s solution to the lack of a corporate body to perform the *actus reus* and a corporate mind capable of forming *mens rea* has been to treat the minds and bodies of the officers and servants of the corporation as supplying its mental and physical faculties.”⁸ In other words, the law creates a fiction in which the acts and thoughts of a human person are reckoned as those of the corporation, granting it personhood. In his celebrated speech in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705, Viscount Haldane L.C. said:

“... a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. It must be upon the true construction of that section in such a case as the present one that the fault or privity is the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing *respondeat superior*, but somebody for whom the company is liable because his action is the very action of the company itself. It is not enough that the fault should be the fault of a servant in order to exonerate the owner, the fault must also be one which is not the fault of the owner, or a fault to which the owner is privy; and I take the view that when anybody sets up that section to excuse himself from the normal consequences of the maxim *respondeat superior*, the burden lies upon him to do so.”

16. Denning LJ explained the fiction mentioned above in *H.L. Bolton (Engineering) Co. Ltd. v. T.J. Graham and Sons Ltd.* [1957] 1 QB 159, as follows:

“A company may in many ways be likened to a human body. It has a brain and a nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind or will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.”

⁸ *Smith, Hogan, and Ormerod's Criminal Law*, 15th Edition, p. 249.

17. In *Tesco Supermarkets Ltd. v Nattrass*, [1972] AC 153, Lord Reid said:

“A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these; it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is all embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is guilty mind then that guilt is the guilt of the company.”

18. It is a question of law whether a person is to be regarded as a corporation or just its employee or agent. The corporation would be held liable only when the individual associated with it acted within the scope of his office, not for acts performed in his personal capacity. A person does not qualify as a “controlling officer” simply because his job involves “brain work” (rather than physical labour) and he has managerial authority. This is because all such people are not the corporation's directing mind and will and govern it. Similarly, someone with the title “manager” is not always a controlling mind. In *Tesco Supermarkets Ltd.*, Lord Reid said that the company could be held criminally liable only for the actions of “the board of directors, the managing director and perhaps other superior officers of a company [who] carry out the functions of management and speak and act as the company ...” According to Viscount Dilhorne, the acts of that person are attributable to the company “who is in actual control of the operations of a company or part of them and who is not responsible to another person in the company for the manner in which he discharges his duties in the sense of being under his orders ...” Lord Diplock held that the issue must be resolved by “identifying those natural persons who by the memorandum and articles of association [of the company] or as a result of action taken by the directors or by the company in a general meeting pursuant to the articles are entrusted with the exercise of the powers of the company.”

19. *Tesco's* elucidation of the identification doctrine generated a lot of criticism. One argument was that it does not reflect the internal structure of a modern-day large corporate entity. It makes it much easier to prosecute smaller corporations with easily identifiable controllers, while large corporate entities can avoid liability due to their intricate and complex organizational structures.⁹ In *Meridian Global Funds Management Asia Ltd. v. The Securities Commission*, [1995] 2 AC 500, the Privy Council held that the company's constitution, which is usually the articles of association, contains its primary rules of attribution. Company law implies a few additional rules, but they are insufficient to allow a company to operate in the real world. Since every activity on its behalf is unlikely to be covered by a board resolution or a decision of the shareholders in a general meeting, the company expands on the aforementioned primary rules. It employs the principles of agency, which apply equally to natural persons, and integrates them with the company's primary attribution rules. Consequently, the acts of the company's servants and agents are counted as its own. It becomes subject to the standard principles applicable to natural persons when liability for conduct is assigned to them, such as estoppel or ostensible authority in contract and vicarious liability in tort. The Privy Council further held that when criminal liability is alleged under a statutory offence, the question of whether a particular action should be attributed to a company is one of interpretation of the specific statute under which the proceedings are instituted. A statute may impose corporate liability on an agent who does not represent the "directing mind and will" of the company under the primary rules of attribution. Arguably, the *Meridian* approach was more flexible in imposing corporate liability and focused on statutory interpretation rather than determining the corporation's 'directing mind' and 'will'. However, in *A-G's Reference (No. 2 of 1999)*, [2000] QB 796, Rose LJ interpreted the *Meridian* case as merely an extension of the previous rulings and a restatement of the law rather than a departure from

⁹ C. Wells, *Corporate Criminal Liability in England and Wales: Past, Present and Future*. Comparative Perspectives on Law and Justice, Vol.9 (2010), Chapter 3.

existing principles. Lately, *St. Regis Paper Co Ltd.*, [2011] EWCA Crim 2527, interpreted the *Meridian* as simply emphasizing the importance of construing a statute that creates the offence.

20. After identifying the controlling individual, it is necessary to establish that he performed the relevant *actus reus* with the associated *mens rea*. Under the attribution principle, where the offence is one of strict liability, the corporation may be held liable for the acts of any of its employees or agents if those acts are, in law, the corporation's acts. If the offence requires *mens rea*, it must be proved that the controlling officer had the *mens rea*.¹⁰

21. To sum up, in the U.K., the view that a corporation, as a creature of the law, can only do what it is legally authorized to do, and thus any crime must be *ultra vires* (outside its powers) is waning. The *ultra vires* doctrine appears to have been abandoned in both tort and criminal law and is now applied only in contract and property law.¹¹ The public perception of corporations has shifted toward the true legal position that the corporation is a “stand-alone entity” distinct from the people who manage or control it.¹² As a result, it will be held jointly and severally liable with its directors for criminal offences, subject to the following exceptions: a corporation cannot be indicted for crimes that carry a death or prison sentence (such as treason or murder) or for offences that cannot be committed vicariously (such as perjury or bigamy). However, Parliament has passed the Corporate Manslaughter and Corporate Homicide Act of 2007, which allows the prosecution of corporations for manslaughter.

22. The jurisprudence of other countries has developed along similar lines. In *New York Central & Hudson River Railroad Co. v. United States*, 212 U.S. 481 (1909), the company and its assistant traffic manager were convicted for illegal rebate payments and sentenced to pay a fine. The U.S. Supreme Court maintained the conviction and, so far as the company was concerned, held as follows:

¹⁰ *Smith, Hogan, and Ormerod's Criminal Law*, 15th Edition, p. 254.

¹¹ *ibid.*, p.247.

¹² *Ibid.*

“It is true that there are some crimes, which in their nature cannot be committed by corporations. But there is a large class of offenses, of which rebating under the Federal statutes is one, wherein the crime consists in purposely doing things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them. *Morawetz on Corporations*, § 733; Green’s Brice on Ultra Vires, 366. If it were not so, many offenses might go unpunished and acts be committed in violation of law, where, as in the present case, the statute requires all persons, corporate or private, to refrain from certain practices forbidden in the interest of public policy.”

The Court further said:

“We see no valid objection in law, and every reason in public policy, why the corporation which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has entrusted authority to act in the subject-matter of making and fixing rates of transportation, and whose knowledge and purposes may well be attributed to the corporation for which the agents act. While the law should have regard to the rights of all, and to those of corporations no less than to those of individuals, it cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands, and to give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at.”

23. So far as India is concerned, the Constitution Bench of the Supreme Court stated the legal position in *Standard Chartered Bank and others v. Directorate of Enforcement and others* [(2005) 4 SCC 530] as follows:

“There is no dispute that a company is liable to be prosecuted and punished for criminal offences. Although there are earlier authorities to the effect that corporations cannot commit a crime, the generally accepted modern rule is that except for such crimes as a corporation is held incapable of committing by reasons of the fact that they involve personal malicious intent, a corporation may be subject to indictment or other criminal process, although the criminal act is committed through its agents.”

24. In the *Standard Chartered Bank’s* case, *supra*, the Indian Supreme Court considered the issue of whether the court has the authority to impose a fine-only sentence when an accused is found guilty of an offence that carries both a fine and an imprisonment sentence. The relevant excerpt is as follows:

“As the company cannot be sentenced to imprisonment, the court cannot impose that punishment, but when imprisonment and fine is the prescribed punishment the court can impose the punishment of

fine which could be enforced against the company. Such a discretion is to be read into the section so far as the juristic person is concerned. Of course, the court cannot exercise the same discretion as regards a natural person. Then the court would not be passing sentence in accordance with law. As regards the company, the court can always impose a sentence of fine and the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a company. This appears to be the intention of the legislature and we find no difficulty in construing the statute in such a way. We do not think that there is a blanket immunity for any company from any prosecution for serious offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment. The corporate bodies, such as a firm or company undertake a series of activities that affect the life, liberty and property of the citizens. Large-scale financial irregularities are done by various corporations. The corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to criminal law is essential to have a peaceful society with a stable economy.”

25. In *Iridium India Telecom Ltd. v. Motorola Incorporated and others* (AIR 2011 SC 20), the Indian Supreme Court ruled that corporations cannot seek immunity from criminal prosecution on the ground that they are incapable of possessing *mens rea*. It further stated that a corporation would be held criminally liable if a crime was committed during its business by a person or group of people in charge of its affairs. In such cases, it is necessary to determine whether the individual or group possesses sufficient power and influence to be said to think and act on behalf of the corporation. *Mens rea* is applied to corporations on the company's "alter ego" principle. The Supreme Court reaffirmed this view in *Sunil Bharti Mittal v. Central Bureau of Investigation* (AIR 2015 SC 923) and held:

“It is abundantly clear from the above that the principle which is laid down is to the effect that the criminal intent of the ‘alter ego’ of the company, that is the personal group of persons that guide the business of the company, would be imputed to the company/corporation. The legal proposition that is laid down in the aforesaid judgment is that if the person or group of persons who control the affairs of the company commit an offence with criminal intent, their criminality can be imputed to the company as well as they are the ‘alter ego’ of the company.”

26. In Pakistan, the legislature may allow prosecution of corporations through a special law. Section 11 of the Pakistan Penal Code, 1860,¹³ embodies the concept of corporate criminal liability under the general law. According to that section, the term "person" "includes any company, association, or body of persons, whether incorporated or

¹³ This is equivalent to section 11 of the Indian Penal Code.

not." In *Muhammad Rashid vs. The State* (PLD 1960 SC 168), it was argued before the Hon'ble Supreme Court of Pakistan that the word "person" in section 415 of the PPC was restricted to a "natural person". The apex Court disagreed, holding as under:

“... [W]e find no such indication in the section itself, which could persuade us to cut down the connotation of ‘person’ in this section to a ‘natural person’ alone. It is significant that the terms ‘man’ and ‘woman’ have also been defined in section 10 of the [Pakistan Penal] Code and if the legislature intended section 415 to be confined to a ‘natural person’ alone, it could have placed the matter beyond all doubt by use of these terms rather than by the term ‘person’.”

27. Subsequently, in *Muhammad Yasin v. The State* (1989 PCr.LJ 131), the Sindh High Court relied on the aforementioned decision and held that a bank fell within the definition of "person" in section 415 of the PPC.

28. In *Rafiq Hussain v. Islamuddin and others* (PLD 1977 Karachi 183), the workers filed complaints under sections 53, 54, and 55 of the Industrial Relations Ordinance, 1969, in the Labour Court. One of the issues was whether they should have filed the complaints first against the corporation, and if it had been found guilty, they could proceed against the managing director, directors, and other officers. The learned Single Judge of the Sindh High Court, citing *Tesco* and the case of *State of Maharashtra v. Messrs Syndicate Transport Co. (Pvt.) Ltd. and others* (AIR 1964 Bombay 195), endorsed the view that several offenses could only be committed by a human being (for instance, murder, treason, bigamy, rape, perjury, etc.). Furthermore, a corporation could not be imprisoned or subjected to corporal punishment. He held that, subject to these exceptions, a corporate body could be indicted for criminal acts or omissions of its directors, authorised agents, or servants, regardless of whether they involved *mens rea*, if they acted or purported to act under the authority of the corporate body or in furtherance of its aims or objects. The question as to whether a corporate body should be held criminally responsible for an individual's actions must depend on the nature of the offence as alleged in the complaint or the charge sheet, the position of the officer or agent in relation to the corporate body and any other relevant facts and

circumstances that could indicate that the corporate body, as a whole, meant or intended to commit that act. The Magistrate or Judge must consider the facts of each case before deciding whether or not to proceed against a corporate body. A learned Single Judge of this Court applied these principles in *Muhammad Ayub and another v. The State* (1980 PCr.LJ 429).

29. The Hon'ble Supreme Court's decision in *Pakistan International Airlines Corporation v. Khalid Waheed and others* (1981 SCMR 573) is also instructive. According to the facts, the company was in the travel agency business. In or around 1965, it acquired PIAC's agency for Nowshera and used to remit the freight and other amounts collected from the sale of airline tickets after deducting its commission. In 1968, the company issued three cheques totaling Rs. 364,707/40, all of which were returned unpaid. Meanwhile, the company decided to petition the Peshawar High Court for winding up. PIAC filed a complaint under sections 409, 420, and 109 PPC against the company's directors, who claimed that they could not be prosecuted for the alleged breach of trust because the company, which was a separate legal entity, had issued the cheques. The apex Court ruled:

“[A]lthough a company is a distinct legal entity which is quite different from its members, including its directors, as held in *Salomon v. Salomon* (1897 A C 22), this does not alter the fact that a company can only act through its directors and officers. Therefore, an allegation of a criminal offence against a company can only mean that the company's directors and/or officers have committed the alleged offence and in order to decide who has committed that offence, the Court has always to pierce the veil of incorporation, as held by Hamoodur Rehman, C.J., in *President v. Shaukat Ali* (P L D 1971 S C 585). We are aware that this decision is an order by the Supreme Judicial Council and not by this Court; therefore, we would clarify that we respectfully approve of the observations of the learned Chief Justice in this case on the necessity of piercing the veil of incorporation. Therefore, merely because a company is a distinct legal entity from its directors, it does not mean, as held by the learned Judge, that the commission of a criminal offence by a company is inconsistent with *mens rea* on the part of its directors.”

30. Having discussed the general law and jurisprudence regarding corporate criminal liability, let's turn to section 489-F PPC which is an issue in the present case. It reads as under:

489-F. Dishonestly issuing a cheque.— Whoever dishonestly issues a cheque towards repayment of a loan or fulfilment of an obligation which is dishonoured on presentation, shall be punished with imprisonment which may extend to three years or with fine, or with both, unless he 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.

31. Section 489-F PPC begins with the word “whoever”. The Pakistan Penal Code does not define this word. According to the Merriam-Webster Online Dictionary, it connotes “whatever person: no matter who”. The Oxford Advanced Learner’s Dictionary (Eighth Edition) explains it as: “(1) the person or group who; any person who; (2) used to say that it does not matter who, since the result would be the same.” *Corpus Juris Secundum* states that “[whoever is a] comprehensive term which refers to a person or persons, and may include artificial persons, such as a municipality, corporations, and public officers as well as private persons.”¹⁴ In *Seena M. Haniff & Co. v. Liptons Limited* (23 Indian Cases 689), the Lower Burma Chief Court while interpreting sections 482 and 486 of the Indian Penal Code, held that the word “whoever” therein does not refer only to a definite individual or definite individuals and can apply to a corporate body. In *Mst. Gulshan Bibi and others v. Muhammad Sadiq and others* (PLD 2016 SC 769), the Hon’ble Supreme Court of Pakistan examined the aforesaid word in the context of sections 3(1) and 3(2) of the Illegal Dispossession Act, 2005. The question before it was whether section 3 applied to land grabbers alone or to anyone who committed the prohibited act. The apex Court held:

“The legislature while enacting a special law for awarding punishment for a crime, in its wisdom, may or may not describe any particular category of persons who could be prosecuted. Where a special law after making a particular act an offence also describes the category of persons who could only be prosecuted then unless such person falls within the described category, he cannot be prosecuted. Where the special law only describes the offence or a set of offences and seeks to punish any person and every person who is found to have committed the described offence then the terms like ‘anyone’, ‘any person’ ‘whoever’ and ‘whosoever’ are used for the offenders in order to include all offenders without any distinction. In such a case, the offender may belong to any class of offenders, he as an accused can be prosecuted under such law.”

¹⁴ *Corpus Juris Secundum*, Vol. XCIV, p. 94.

32. In view of the above, the term “whoever” in section 489-F PPC encompasses all offenders without distinction, whether natural or juristic persons. Resultantly, criminal liability for dishonestly issuing a bad cheque is attributable to a company and it can be prosecuted.

33. The criminal liability under section 489-F PPC of the person signing the cheque on the company’s behalf should depend on his role, position and authority within the company. We have already seen that the *mens rea* of those managing the company’s affairs, and its directing mind and will, may be attributed to it in certain circumstances. However, the prosecution must prove that that particular person was in-charge of the company's operations at the time of the commission of the offence. It is also important to point out that the offence under section 489-F PPC is not one of strict liability. Penal consequences depend on proof of dishonesty.

34. Now, I’ll get back to the case at hand. NORD is a family-owned, limited liability company with two directors: the Petitioner and his wife Anam Kabeer. The Petitioner is also the company's Chief Executive Officer. Admittedly, he has complete control over its affairs, and keeping in view the documents available on record, it is reasonable to conclude that the company thinks and acts through him, and his actions and intent are those of the company. He is its nerve centre. In the circumstances, he cannot invoke the concept of a separate legal identity to avoid criminal liability for any wrongdoing. The Petitioner and NORD can both be prosecuted under section 489-F of the PPC.

35. So far as the present transaction is concerned, DSML’s stance in the FIR is that Cheque No. CA-0098015901, which was for Rs.3,000,000/-, had two components. It included arrears of Rs.1,715,130/- and the balance as an advance for the next consignment. However, the endorsement on the back of the instrument contradicts his version, as it clearly stated that it related to Purchase Order No.41 and was payable upon delivery of a consignment of 60 tonnes in accordance

therewith. A copy of the Purchase Order available on the file evinces that NORD had placed an order for Rs.16,320,000/-. Cheque No. CA-0098015901 was encashable after the delivery of 60 tonnes of steel. NORD was to issue a cheque for the remaining amount upon the execution of the Purchase Order. DSML has failed to perform its part of the contract and civil litigation is pending between the two companies.

36. *Prima facie*, the Petitioner's contention that FIR No. 73/2019 is motivated by malice is not unfounded. Therefore, I **accept** this application and confirm the pre-arrest bail already granted to the Petitioner subject to his furnishing bail bond in the sum of Rs.200,000/- (Rupees two hundred thousand) with one surety in the like amount to the satisfaction of the learned trial court.

(Tariq Saleem Sheikh)
Judge

Naeem

Approved for reporting

Judge