IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Criminal Miscellaneous Application No.S-604 of 2022
[Muhammad Arif Vs. Riaz Ali & others]

Applicant:	Mr. Muhammad Sohail Jamali, advocate.
Respondent-1:	Miss Hina Iqbal Khanza, advocate.
Respondents-2&3;	Mr. Shewak Rathore Deputy Prosecutor General, Sindh.
Date of hearing & order:	31.10.2022.

O R D E R

ADNAN-UL-KARIM MEMON, J; Applicant Muhammad Arif has filed instant Criminal Miscellaneous Application under Section 561-A Cr.P.C challenging the impugned the order dated 03.09.2022 whereby an application filed by respondent No.1 for registration of F.I.R against him was allowed by learned Sessions Judge / Ex-Officio Justice of Peace Shaheed Benazirabad.

2. Applicant is stated to have obtained loan of Rs.2,50,000/- from respondent No.1 and in lieu thereof issued him postdated cheque which on presentation was returned with memo of insufficient funds, then respondent No.1 contacted to applicant who refused to pay back money, compelling respondent No.1 to approach SHO concerned but he also declined to lodge F.I.R; therefore, he by way of application approached to learned Ex-Officio Justice of Peace who granted his prayer for registration of F.I.R through impugned order, hence this Criminal Miscellaneous Application, inter-alia on the ground that the conditions enumerated in Section 489-F PPC are not attracted; thus no cognizable offence could be made out; that the case of applicant if any could be taken care of under Section 200 Cr.P.C and not under section 154 Cr. P.C.

3. Learned counsel for applicant submits that learned Ex-Officio Justice of Peace did not appreciate the record on its true perspective as there was civil dispute in between the parties which fact also confirmed through the report of SP Complaint Cell, hence there was no need for issuing directions for registration of F.I.R against the applicant; therefore, he prays for allowing this Criminal Miscellaneous Application by setting-aside the impugned order.

4. Learned Deputy Prosecutor General, Sindh assisted by counsel for respondent No.1 supported the impugned order by contending that learned

Ex-Officio Justice of Peace has not erred while passing the impugned order which is well speaking and reasonable as cheque issued by applicant on its presentation by respondent No.1 was dishonored due to insufficient funds, hence cognizable offence is / was made out and no offence has gone unchecked which is to be incorporated in book under Section 154 Cr.P.C;, therefore, they prayed for dismissal of instant Criminal Miscellaneous Application.

5. I have heard learned counsel for the respective parties, having also gone through the record as well as impugned order.

6. Primarily if the following ingredients of Section 489-F PPC are made out from the plain reading of statement, case could be registered.

> "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 cheque should be
>
> (a) to repay a loan; or
>
> (b) To fulfill 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 person to some performance).**
>
> (iv) **on presentation the cheque is dishonored."**

7. Section 489-F PPC is relevant and attracted only to cases where the dishonored cheque had been issued for repayment of loan or towards discharge of an obligation. The obligation to be discharged had to be an existing obligation and not a futuristic obligation arising out of a possible default in future. This is why a cheque issued by way of surety or guarantee to cater for a possible default in future cannot be accepted as a cheque issued towards discharge of an obligation. The obligation in the context of Section 489-F PPC has to be an existing obligation, existing at the time of issuance of cheque and not a futuristic obligation. A provision constituting a criminal offense and entailing punitive consequences has to be strictly and narrowly construed and interpreted, it may be added with advantage. Section 489-F of Pakistan Penal Code of 1860 criminalizes and resultantly penalizes the act of dishonestly issuing a cheque towards repayment of a loan or fulfillment of an

obligation, which is dishonored on presentation by punishment with imprisonment which may extend to three years or with fine, or with both unless the drawer 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 honored and that the bank was at fault in not honoring the cheque. The term dishonestly has been defined by Pakistan Penal Code, 1860 in Section 24 to mean doing anything to cause wrongful gain to one person or wrongful loss to another person. For the act of issuance of a cheque to constitute a cognizable offense under Section 489-F of PPC, 1860 not only must the cheque be issued to cause wrongful gain to one person or wrongful loss to another but the cheque must also be issued towards repayment of loan or fulfillment of an obligation.

8. Keeping in view the above two provisions it was held by Honorable Supreme Court of Pakistan in "Mian Allah Ditta v. The State and others" (2013 SCMR 51) in Paragraph 6 that "every transaction where a cheque is dishonored may not constitute an offense. The foundational elements to constitute an offense under this provision are the issuance of a cheque with dishonest intent, the cheque should be towards repayment of loan or fulfillment of an obligation, and lastly that the cheque is dishonored."

9. Section 154 of Criminal Procedure Code, 1898 mandates the registration or recording of information relating to commission of a cognizable offense, and the information provided by the informant must allege the commission of a cognizable offense. However since an offense under Section 489-F requires the cheque to have been issued with dishonest intention as well as for payment against a loan or liability, being a mere payee or a bearer would arguably not fulfill the requirements of Section 489-F for which the complainant must show (i) a clear intention of the drawer allowing the complainant to present and encash the cheque (through a specific endorsement) and also (ii) a liability owed by the drawer of the cheque towards the complainant.

10. Coming to the other aspect of the case because of claims and counterclaims regarding registration or non-registration of FI.R, what is necessary is only that the information given to the police must disclose the commission of a cognizable offense. In such a situation, registration of an FIR is mandatory. However, if no cognizable offense is made out in the information given, then the FIR need not be registered immediately and perhaps the police can conduct a sort of preliminary verification or inquiry for the limited purpose of ascertaining whether a cognizable offense has been committed. But, if the information is given, and mentions the commission of a cognizable offense, there is no other option but to register an FIR forthwith. Other considerations are not relevant at the stage of registration of FIR, such as, whether the

information is falsely given, whether the information is genuine, whether the information is credible, etc. These are the issues that have to be verified during investigation of FIR. At the stage of registration of FIR, what is to be seen is merely whether the information given ex-facie discloses the commission of a cognizable offense. If, after investigation, the information given is found to be false, there is always an option to prosecute the complainant for filing a false FIR.

11. learned counsel for respondent agitated that the registration of FIR is mandatory under Section 154 of the Code if the information discloses the commission of a cognizable offense and no preliminary inquiry is permissible in such a situation; If the information received does not disclose a cognizable offense but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether the cognizable offense is disclosed or not; that If the inquiry discloses the commission of a cognizable offense, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further; the police officer cannot avoid his duty of registering the offense if the cognizable offense is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offense.

12. it is the well-settled proposition of law that the concerned Magistrate is empowered to deal with the situation on the institution of written complaint regarding the commission of cognizable offense and has two options (i) At the pre-cognizance stage- he may direct the concerned police station to register F.I.R. based on facts narrated in the complaint if the commission of a cognizable offense disclosed prima facie and Investigating officer would conduct the investigation. Thus the Magistrate exercises a very limited power under section 156(3) Cr.P.C. and so is its discretion. It does not travel into the arena of merit of the case if such a case was fit to proceed further. (ii) At the post cognizance- after taking cognizance, he may adopt the procedure of complaint cases provided under Section 200 and 202 Cr.P.C. If the Magistrate is not satisfied with the conclusion arrived at by the Investigating Officer in the report submitted under section 173 Cr.P.C. then the Magistrate may take cognizance upon the original complaint sent to S.H.O. at the pre-cognizance stage and proceed further to examine the complaint under section 200 Cr.P.C. and his witnesses under Section 202 Cr.P.C.

13. Based on the above discussions, this criminal miscellaneous application is disposed of in the terms that the complainant may take resort to direct

complaint if he feel his cause subsists, and upon receiving the complaint learned trial court shall take pains to deal with the matter for early disposal under law, thus the impugned Order shall not be acted upon in terms of the above observations.

JUDGE

Muhammad Danish