IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Criminal Miscellaneous Application No.S- 537 of 2022
[Mushahid Ali Talpur Vs. The State and others]

Criminal Miscellaneous Application No.S-565 of 2022
[Riaz Hussain Vs. Province of Sindh & others]

Applicant/Respondent-5	:	Mushahid Ali Talpur through Mr. Riazat Ali Saahar, advocate.
Respondents: 1-3	:	Mr. Shewak Rathore Deputy Prosecutor General, Sindh, .
Applicant/Respondent-4	:	Mr. Abdul Shakoor Keerio, advocate.
Date of hearing& order	:	31.10.2022.

O R D E R

ADNAN-UL-KARIM MEMON, J; Both applicants Mushahid Ali Talpur and Riaz Hussain approached learned Ex-Officio Justice of Peace Hyderabad for registration of their respective F.I.Rs against each other which their pleas were allowed by him through impugned orders dated 10.08.2022 and 31.08.2022.

2. The dispute between the parties is about sale and purchase of vehicles. It is claimed by applicant Mushahid Ali Talpur that Riaz Ahmed Magsi had purchased a Land Cruiser Toyota Japan, Model 2011 bearing Registration No.AFR Chassis No.URJ202-4005247 from him and paid token money of Rs.40,00,000/- in cash and for remaining amount Rs.1,50,00,000 a cheque of Bank Al-Habib Qasimabad Branch, was issued which on presentation before the Bank was returned due to difference in signature hence said Riaz Ahmed committed fraud and cheating to usurp his amount while the assertion of applicant Riaz Ahmed is that he in good faith kept his cheque kbook with Mushahid Ali Talpur but when relation became strained between them he used the said cheque to show him, defaulter, in payment of certain amount.

3. I have heard learned counsel for the respective parties, and have also gone through the record available before me.

4. Both parties intend to lodge F.I.R against each other in terms of the ratio of judgment passed by Hon'ble Supreme Court in the case of *Muhammad Bashir Vs. Station House Officer Okara Cant. and others* (**PLD**

2007 SC 539); however, their intention to invoke the provision of 489-F PPC including Section 420, 468 & 506/II PPC.

5. Firstly to see whether Section 489-F PPC is attracted from the assertion of the parties and other Sections could be considered secondary. In this regard Honorable Supreme Court of Pakistan in the case of Muhammad Sultan Versus The State **(2010 SCMR 806)** has provided the following ingredients of Section 489-F PPC.

> "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."**

6. According to Hon'ble Supreme Court of Pakistan in **Mian Muhammad Akram v. The State and others** (2014 SCMR 1369) and **Mian Allah Ditta v. The State and others** (2013 SCMR 51), 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. It has been clarified by Hon"ble Supreme Court of Pakistan that 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. According to Hon'ble Supreme Court of Pakistan, 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.

7. Section 489-F PPC criminalizes and resultantly penalizes the act of dishonestly issuing a cheque towards repayment of 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.

8. 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.

9. For the act of issuance of a cheque to constitute a cognizable offense under Section 489-F of the 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.

10. 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 cheque with dishonest intent, the cheque should be towards repayment of loan or fulfillment of an obligation, and lastly that the cheque is dishonored.'

11. Section 154 of Cr.P.C. mandates the registration or recording of information relating to the commission of a cognizable offense, and the information provided by the informant must allege the commission of a cognizable offense. In case a cheque is issued which differs from the signature of the bearer, and there is no supporting evidence that the bearer was a holder in due course of such cheque, prima-facie, the commission of a cognizable offense could not be said to have been established.

12. The above clearly means that none of the tests alluded to by the Hon'ble Supreme Court of Pakistan in Mian Muhammad Akram v. The State and others (2014 SCMR 1369) and "Mian Allah Ditta v. The State and others (2013 SCMR 51) are met.

13. 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.

14. 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 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 the FIR. At the stage of registration of FIR, what is to be seen is merely whether the information given ex-facie discloses 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.

15. During arguments, parties agitated that the registration of FIR is mandatory under Section 154 of the Code if the information discloses commission of a cognizable offense and no preliminary inquiry is permissible in such situation; If the information received does not disclose a cognizable offense but indicates 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.

16. So far as the scope of preliminary inquiry is concerned, the same is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offense. As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The categories of cases in which

prima-facie, the preliminary inquiry could be ordered are (a) Matrimonial disputes/family disputes (b) Commercial offenses (c) Medical negligence cases (d) Corruption cases (e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for the delay.

17. The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry, and it is required in such circumstances, to ensure and protect the rights of the accused and the complainant at the same time.

18. On the issue of filing direct complaint as suggested by the counsel for applicants, it is well-settled proposition of law that the concerned Magistrate is empowered to deal with the situation on institution of written complaint regarding 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 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 conclusions 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.

19. Based on the above discussions, these criminal miscellaneous applications are disposed of in the terms that the parties may take resort to direct complaint if they feel their 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 orders shall not be acted upon in terms of the observations made hereinabove.

JUDGE

Karar_Hussain/PS*