Form No.HCJD/C-121

ORDER SHEET
IN THE LAHORE HIGH COURT
LAHORE.
JUDICIAL DEPARTMENT

Criminal Appeal No.1611/2014.

The State
Vs
Karam Dad Bhatti

S. No. of order/ proceedings	Date of order/ proceeding	Order with signature of Judge, and that of parties or counsel, where necessary
	02.10.2018.	Mr. Muhammad Amjad Rafiq, Additional Prosecutor General for the state. Mr. Muhammad Akram Pasha, Advocate for Bank of Punjab.

This appeal has been directed against the judgment dated 28.02.2014 passed by learned Additional Sessions Judge, Hafizabad, whereby, on acceptance of appeal filed by the accused/ respondent, against the judgment of his conviction, he has been acquitted in case FIR No.924/2009 dated 21.09.2009 registered under section 489-F PPC at police station City Hafizabad.

2. Briefly the facts of the case are that above FIR was registered on the complaint of Rana Saleem Zaeem ur Rehman, Manager of the Bank of Punjab, Hafizabad, to the effect that one Qadir Bakhsh, Proprietor of M/s. Mian Qaiser Bakhsh & Co., Hafizabad Road, Jalalpur Bhattian, obtained a loan amounting to Rs.4,35,00,000/-, but did not return the same. On repeated demands of the Bank, he issue a Cheque No.88945 dated 15.02.2009 to be drawn on MCB, Jalalpur Bhattian for payment of the land. The said cheque was deposited for encashment but was dishonoured and returned with the Memo slip. Ultimately the FIR was got lodged under section 489-F PPC, after investigation report under section173 Cr.P.C. was submitted before the learned Judicial Magistrate Section 30, Hafizabad and after trial, the accused/respondent was convicted under section 489-F PPC and sentenced to rigorous imprisonment for three years with a fine of Rs.5,00,000/-, in case of non-payment of fine, to undergo simple imprisonment for one year. The said

judgment was appealed against and as detailed in para No.1 of this order, the same was allowed, resulting in setting-aside the conviction and sentence of the accused/respondent.

3. With reference to findings recorded by the learned appellate court in para-9 of the impugned judgment, when a question as posed to the learned Additional Prosecutor General whether the original cheque was produced before the court or not, the learned law officer came out with the plea that in his statement under section 342 Cr.P.C. the accused/respondent had not denied the issuance of cheque and further that the original cheque was in possession of the Manager, who appeared before the court and submitted photo copy of the same cheque, therefore, there was no need to produce the original cheque and thus the findings of the learned Additional Sessions Judge, are erroneous. I am afraid the primary and foremost duty and obligation always lies with the prosecution to put and prove its case against the accused beyond any shadow of doubt. If any lacuna is left in the prosecution case, the same cannot be covered by placing reliance on statement of the accused recorded under section 342 Cr.P.C. It is now a well settled proposition of law that when prosecution evidence is rejected in entirety (*as the case in the instant appeal, as held by the learned trial court*), the statement of the accused under section 342 Cr.P.C. has to be accepted in toto and without scrutiny. Reliance is placed on the case "*The State versus Muhammad Hanif, etc*" (1992 SCMR 2047).

4. As regards explanation about non-production of original cheque, Section 76 of the Qanoon-e-Shahadat Order, 1984 is the provision which permits secondary evidence, but while invoking said provision certain conditions, as provided in the said section itself must exist. For ready reference Section 76 above, is reproduced hereunder:-

> *"76. Cases in which secondary evidence relating to document may be given.*
> *Secondary evidence may be given of the existence, condition or contents of a document in the following cases:—*

(a) when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court; or of any person legally bound to produce it; and when, after the notice mentioned in Article 77 such person does not produce it;
(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative-in-interest;
(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;
(d) when, due to the volume or bulk of the original, copies thereof have been made by means of microfilming or other modern devices;
(e) when the original is of such a nature as not to be easily movable;
(f) when the original is a public document within the meaning of Article 85;
(g) when the original is a document of which a certified copy is permitted by this Order, or by any other law in force in Pakistan, to be given in evidence;
(h) when the originals consists of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection;
(i) when an original document forming part of a judicial record is not available and only a certified copy thereof is available, certified copy of that certified copy shall also be admissible as a secondary evidence."

On the face of it, firstly the instant case was not covered by any of the above conditions, secondly, if for the sake of argument it is admitted to be a case where secondary evidence could be permitted, even then permission of the court must have been specifically obtained to bring on record secondary evidence, but here in this case the record does not reflect that even an attempt was made to get permission of the court to bring on record secondary evidence of the disputed cheque. Furthermore as shall be seen from the findings recorded by the learned Additional Sessions Judge, what to talk of getting formal permission of secondary evidence, only a photo copy of the disputed cheque was produced, which practice is least permissible in law. Therefore, in the absence of specific permission of the court to produce secondary evidence, the photo copy could not be said to be an evidence to be read against the

accused. Furthermore, as held by the learned trial court even the photo copy of the cheque Ex.PE showed that it was a crossed cheque in the name of M/s. Qadir Bakhsh & Co. and about 1 ½ inch above the relevant column bearing the name M/s. Qadir Bakhsh & Co. the word "Manager BOP-Hfd A/C" were mentioned in the blank space of the said cheque from which it is evidence that the said words were added subsequently which were not even in the relevant column. There can be no other opinion that a crossed cheque could only be issued in the name of one person and not in the name of two or more different persons having differing account number. Therefore, the findings recorded by the learned trial court even on factual aspects are correct and no exception can be taken to such findings.

5. In addition to the above, earlier the proposition with regard issuance of cheque by a private person in favour of a bank for return of a loan, dishonor of the cheque and registration of criminal case under section 489-F PPC, came under consideration before this Court in "*Muhammad Asif Nawaz versus Additional Sessions Judge and others*" (PLJ 2013 Lahore 606) and after detailed discussion with reference to the relevant statute and the case law, this court made certain observations, the relevant portions thereof, are reproduced hereunder:-

> *"6. Section 20 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 is the provision relating to certain offences and its sub-section (4) deals with dishonest issuance of a cheque towards repayment of a finance or fulfillment of an obligation which is dishonoured on presentation. The punishment of said offence has been provided as one year or with fine or with both. Therefore, it becomes quite obvious that in the matter, like the one in hand, the jurisdiction only lies with the Banking court established under the Financial Institutions (Recovery of Finances) Ordinance, 2001 and not before any other court, until and unless the same is provided by law, by which the financial institution is established.*
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8. Although by amendment in PPC, section 489-F PPC has been inserted after promulgation of Financial Institutions (Recovery of Finances) Ordinance, 2001 but this insertion would also not give it an overriding effect over special law, for the reason that the special law is passed before or after the general act does not change the principle. Where the special law is later, it will be regarded as an exception to, or a qualification of, the prior general act; and where the general act is later, the special statute will be construed as remaining an exception to its terms, unless repealed expressly or by necessary implication.

If the legislators had an intention otherwise, they could at the very beginning formulate or afterwards could amend the Financial Institutions (Recovery of Finances) Ordinance, 2001 in such a manner so as to bring this offence within the definition of "cognizable" offence. In such circumstances, when the amendment was not made in the Ordinance, ibid, the legislators explicitly made their intention clear that with regard to the matters between financial institutions and their customers, this enactment shall hold the field and section 489-F PPC (dishonest issuance of cheque) will be applicable to all other persons in general except those covered by the Financial Institutions (Recovery of Finances) Ordinance, 2001. The purpose by not amending the Financial Institutions (Recovery of Finances) Ordinance, 2001 appears to be that normally in any case of loan from financial institution, the loans are protected by mortgage, warranties and covenants made by or on behalf of the customer to a financial institution, including representations, warranties and covenants with regard to the ownership, mortgage, pledge, hypothecation or assignment of, or other charge on assets or properties, and the financial institution can recover the amount by adopting appropriate process under any of the above mode."

6. In continuation to the above discussion it may be mentioned here that the legal proposition with regard to issuance of cheques by the customers to the financial institutions for return of loans, dishonour thereof and registration of FIRs under the provisions of Section 489-F of the PPC by the banks against their customers, came under judicial scrutiny before this Court through various writ petitions, revision petitions or under section 561-A Cr.P.C., claiming that action could only be taken against them under the Ordinance, 2001 (in particular Section 20 thereof) and no other

law, and exclusive jurisdiction vests with the Banking Courts constituted under the said Ordinance. Through common judgments, the learned High Court dismissed the matters holding that concurrent jurisdiction vests in the Banking Courts constituted under the Ordinance, 2001, the Special Courts constituted under the ORBO, the ordinary criminal courts and the Agency, and the jurisdiction of the latter two courts and the Agency would not be ousted on account of Sections 4 and 20 of the Ordinance, 2001. Thereafter, the customers approached the Hon'ble Supreme Court of Pakistan and vide judgment reported as "*SYED MUSHAHID SHAH and others versus FEDERAL INVESTMENT AGENCY and others*" (2017 SCMR 1218), after exhaustive discussion the apex Court set-aside the judgment of this court by hold that:-

> *"19. In conclusion, we find that the provisions of the Ordinance, 2001 are to have an overriding effect on anything inconsistent contained in any other law for the time being in force, including the ORBO, the Code (read with the PPC) and the Act, 1974 (read with the Ordinance, 2016). In essence, whenever an offence is committed by a customer of a financial institution within the contemplation of the Ordinance, 2001, it could only be tried by the Banking Courts constituted thereunder and no other forum. The Special Courts under the ORBO, the ordinary criminal Courts under the Code and the Agency under the Act, 1974 read with the Ordinance, 1962 would have no jurisdiction in the matter."*

As such, the legal proposition now stands settled on the point that whenever an offence is committed by a customer of a financial institution within the contemplation of the Ordinance, 2001, it could only be tried by the Banking Courts. The Special Courts under the Offences in Respect of Banks (Special Courts) Ordinance, 1984, the ordinary criminal courts under the Cr.P.C. and the Agency under the Federal Investigation Agency Act, 1974, would have no jurisdiction in the matter.

7. For the above reasons, the prosecution case apparently was full of patent illegalities right from its very inception i.e. lodgment of the FIR, which could not have been done in the light of above cited pronouncement of Hon'ble Supreme Court of Pakistan. The

learned Additional Sessions Judge, therefore, was fully justified in setting aside the conviction judgment against the accused/respondent and I do not see any legal or factual flaw therein. This appeal, therefore, is dismissed in limine.

(Muhammad Qasim Khan)
Judge.

APPROVED FOR REPORTING.

Javed*