JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

CRIMINAL APPEAL NO. 161 OF 2021

YASIR MEHMOOD

Vs

JAMSHED AHMED SUBHANI & ANOTHER.

Appellant by : Mr. Naveed Malik, Advocate.

Respondents by : Syed Faizan Ali Gardezi, Advocate along with Respondent No. 1 in person.
Rana Hassan Abbas, learned ADPP.
Mumtaz Haseeb, SI, P.S Aabpara along with record.

Date of hearing : 25.02.2025

MUHAMMAD AZAM KHAN, J.

1. By this judgment, I intend to dispose of Criminal Appeal No.161/2021 arising out of the Judgment dated 30.09.2021 **("Impugned Judgment")** passed by the learned Judicial Magistrate Section 30-West, Islamabad **("Trial Court")** whereby the Respondent No.1/Accused Jamshed Ahmed Subhani was acquitted in the case FIR No.222/2014 dated 19.05.2014 u/s 489-F, Pakistan Penal Code, 1860 **("PPC")**, registered at Police Station Aabpara, Islamabad **("Subject FIR")**.

2. The brief facts of the case in hand as per the contents of FIR are that the Respondent No. 1 issued Proclamation in newspaper "Daily Ausaf" and he was bound to deposit amount of proceeds of such Proclamation in the office, however, he did not deposit the amount of Rs. 1,771,785/- and misappropriated the same. In this regard, the office time and again requested the Respondent No.1/Accused to pay back the above mentioned amount, however, he delayed the matter on one pretext or another. Lastly, he admitted misappropriation of the said amount and stated that he has spent all such amount, however, he will pay the same in installments. It is further alleged in the FIR that the Respondent No.1 in order to pay 1st installment, issued a cheque bearing No. 1061225 dated 30.06.2013 amounting Rs. 5,93,600/-, however, when above said cheque was

presented for encashment in Allied Bank Branch, Islamabad, the same was dishonored. Hence, Subject FIR was registered.

3. After the Registration of the Subject FIR, Challan under Section 173, Code of Criminal Procedure, 1898 **("Cr.P.C.")** was submitted before the learned Trial Court and thereafter, photocopies under Section 241-A, Cr.P.C were supplied to the Respondent No. 1/Accused, and on 22.03.2016, charge was framed against the Respondent No. 1/Accused to which he pleaded not guilty and claimed trial. Thereafter, in support of its version, the prosecution produced five witnesses namely Nadeem Ashraf, Operation Manager Allied Bank Limited, Aabpara Branch as PW-1; Yasir Mehmood, General Manager (Recovery) Roznama Ausaf, as PW-2; Zafar Iqbal, ASI as PW-3; Fakhar Abbas, ASI/I.O, as PW-4; and Waheed Ahmad SI, as PW-5. On 28.01.2021, Inspector Legal for State closed the prosecution evidence. Statement of the Respondent No. 1/Accused under Section 342, Cr.P.C was recorded wherein he opted not to produce defense evidence or to appear under Section 340(2), Cr.P.C to record his statement under oath. After hearing arguments of both the sides, the learned Trial Court vide the Impugned Judgment acquitted the Respondent No. 1/Accused of the charge leveled against him. Being aggrieved of the Impugned Judgment, the Appellant/Complainant has filed the instant Appeal.

4. The learned counsel for the Appellant/Complainant argued that the Impugned Judgment is against the law and facts, hence, is not sustainable in the eyes of the law and liable to be set-aside; that the learned Trial Court failed to consider that the cheque in question is a negotiable instrument and the same was issued for fulfilment of obligation, but the same was dishonored on presentation and it was the duty of the Respondent No. 1/Accused to prove that the same was not issued for either repayment of loan or fulfilment of any obligation; that the Impugned Judgment is result of mis-reading and non-reading of the facts of the case and material available on record; that the Respondent No. 1/Accused has deprived the Appellant/Complainant from huge amount through misrepresentation, cheating and fraud; that while passing the Impugned Judgment, the learned Trial Court did not apply its judicious mind and acquitted the Respondent No. 1/Accused of the case, which resulted into grave miscarriage of justice to the Appellant/Complainant; that while passing the Impugned

Judgment, the learned Trial Court failed to appreciate the fact that the Respondent No.1/Accused committed a heinous offence; that the learned Trial Court has given its wrong findings and extended extra ordinary relief to the Respondent No. 1/Accused which is against the principles of natural justice; and that the learned Trial Court did not appreciate the material available on record and acquitted the Respondent No. 1/Accused of the charge in arbitrary manner; that the Impugned Judgment is based on conjectures and surmises as well as assumptions and presumptions. Lastly, the learned counsel requested that instant appeal may kindly be accepted, Impugned Judgment may be set-aside and the Respondent No.1/Accused be awarded sentence/conviction as per law.

5. The learned counsel for the Respondent No. 1/Accused argued that the learned Trial Court has rightly passed the Impugned Judgment which needs no interference by this Court; that the learned Trial Court has rightly held that the Appellant/Complainant has failed to form the first two essentials of the offence under Section 489-F, PPC and that mere dishonor of the cheque does not automatically create any criminal liability for Respondent No. 1/Accused in favor of the Appellant/Complainant; that the learned Trial Court has also rightly concluded that the prosecution failed to prove its case beyond any reasonable shadow of doubt and acquitted the Respondent No. 1/Accused of the charge; that the Impugned Judgment is well reasoned and has been passed keeping in view the evidence available on record; and that there is no illegality or irregularity in the Impugned Judgment. Lastly, the learned counsel prayed dismissal of instant Appeal.

6. The learned Assistant District Public Prosecutor **("ADPP")** adopted the arguments of the learned counsel for the Respondent No. 1/Accused and prayed dismissal of instant Appeal.

7. The learned counsel for the parties as well as the learned ADPP heard and record perused with their able assistance.

8. Nadeem Ashraf, Operation Manager, Allied Bank Aabpara Branch **(PW-1)** deposed that on 04.07.2013, cheque bearing No.1061225 was presented, which was sent for clearance to the Allied Bank Chowk Shah Abbas Branch Multan and it got dishonored on 05.07.2013.

9. Yasir Mehmood, General Manager (Recovery) "Daily Ausaf" **(PW-2)** deposed that the Respondent No. 1/Accused has to deposit the amount which he received regarding advertisement fee of Daily Ausaf, he deposited some of the amount and failed to deposit remaining amount of Rs.1,771,785/-. When the said amount was demanded, he promised to pay the same and delayed the matter on one or the other pretext and told that he has spent the said amount for his personal use. He then agreed to pay the same in installments. The Respondent No. 1/Accused handed over a cheque No.1061225 dated 30.06.2013 amounting to Rs. 593,600/- of Allied Bank, as first installment, which was dishonored due to insufficient balance in his account.

10. Zafar Iqbal, ASI **(PW-3)** deposed on warrant of arrest of Respondent No. 1/Accused, report of unserved service, proclamation of accused and its report.

11. Fakhar Abbas, ASI (PW-4) deposed regarding receipt of cheque and dishonor slip vide recovery memo Ex.PG, preparation of site map Ex.PH and verification report Ex.PI and forwarding the report under Section 512, Cr.P.C.

12. Waheed Ahmed, ASI **(PW-5)** deposed regarding application which was marked to him, whereupon F.I.R Ex.PH was got registered.

13. For the convenience of the Court, Section 489-F PPC is reproduced 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 punishable 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 arrangement with his bank to ensure that the cheque would be honoured and the bank was at fault in not honouring the cheque.**]"*

14. Basic ingredients of Section 489-F, PPC *ibid* are that cheque was issued with dishonest intention; that purpose of issuance of cheque was to repay a loan or to fulfill an obligation; and that cheque was dishonored on presentation. In order to prove the offence of dishonoring of cheque, the Complainant/Prosecution produced five witnesses in support of his claim that a cheque of Rs. 593,600/- was issued against the outstanding claim of the Appellant/Complainant's organization in relation to advertisement charges in the newspaper "Daily Ausaf" but the cheque was dishonored when presented before

the concerned bank due to insufficient funds in the Respondent No. 1/Accused's account.

15. The issuance of cheque Ex.PA is admitted by the Respondent No. 1/Accused, whereas element of dishonesty is to be thrashed out from the appraisal of evidence. Section 489-F, PPC *ibid* requires that cheque must be issued dishonestly as the word "issue" was prefixed with dishonesty. Dishonesty or *mens rea* is always in the mind of an accused, which could only be inferred from the conduct or *actus reus* of an accused before or after committing the offence. As per the prosecution case, the cheque was issued as first installment of outstanding claim, while on the other hand, the Respondent No. 1/Accused pleaded that the said cheque was issued, not for any payment, but as security at the time of getting employment with the Appellant/Complainant's organization. Yasir Mehmood, General Manager (Recovery) "Daily Ausaf" (PW-2/Appellant) admitted during cross-examination that there is no written agreement with the Respondent No. 1/Accused regarding the Publication in the newspaper, rather the Respondent No. 1/Accused was employed on agreed commission basis. He also stated that it is correct that Head of Multan Branch has not been produced before Police or before the Court in evidence.

16. The second ingredient of Section 489-F, PPC *ibid* is that the cheque must be issued for the fulfilment of an obligation or return of loan. Yasir Mehmood, General Manager (Recovery) "Daily Ausaf" **(PW-2)** in cross admitted that a recovery suit was also filed against the Respondent No. 1/Accused which has already been dismissed though on the ground of being time-barred. The Appellant/Complainant has also failed to produce any independent witness before whom the obligation was admitted by the Respondent No. 1/Accused, before the police during investigation. That no written agreement was executed between the Appellant/Complainant and the Respondent No. 1/Accused concerning the Publication transaction and even the Publication was not produced in the Court. Furthermore, no minutes or decisions from the Board of Directors' meeting were presented to the Investigating Officer that could indicate any claim against Respondent No. 1/Accused.

17. The prosecution's case hinges upon the oral testimony of the Appellant/Complainant and documentary evidence, which should not be given

significant weight in absence of details regarding the financial obligations, testimony from relevant witnesses, a breakdown of the claimed obligations, copies of publications, and information about related clients, all of which were not included in the evidence. These shortcomings in the prosecution's evidence shows that the prosecution has failed to prove its claim for the recovery of amount against the Respondent No. 1/Accused.

18. The dishonoring of the cheque is not a disputed, but it cannot be given any weight as the prosecution failed to establish the first two essential elements of Section 489-F, PPC. Mere dishonor of the cheque does not automatically result in criminal liability against the Respondent No. 1/Accused. Therefore, in light of these circumstances, this Court holds that the prosecution has failed to prove the first two fundamental basic ingredient of Section 489-F, PPC, i.e. the issuance of the cheque with dishonest intent and the issuance of the cheque as payment for a liability.

19. The upshot of the above discussion is that the Appellant/Complainant has failed to point out any illegality or irregularity in the Impugned Judgment so as to call for interference by this Court. Resultantly, the instant Criminal Appeal, being devoid of any merits, is hereby **dismissed**.

20. Copy of this judgment be sent to the learned Trial Court and the learned Appellate Court for information.

(MUHAMMAD AZAM KHAN)
JUDGE

Announced in the Open Court on _____ day of March, 2025.

JUDGE

//Mehboob//