ORDER SHEET.
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

W.P.No.4624 of 2016
Ayaz Builders Private Limited and another
Versus
Malik Khawar Nawaz and others

S. No. of order / proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel wh necessary.
	11.05.2017	**Mr. Waqar Ahmad, Advocate for the petitioners, Raja Anjum Hafeez, Advocate for respondent No.1, Mr. Sadaqat Ali Jahangiri, learned Standing Counsel with Khalid Mehmood A.S.I.**

Through the instant petition, the petitioners impugn the Order dated 10.12.2016, passed by the Court of the learned Judicial Magistrate 1st Class, Islamabad (West), whereby respondent No.1 (Khawar Nawaz) has been discharged under Section 67 of the Code of Criminal Procedure, 1898, (hereinafter referred to as "Cr.P.C.") in case F.I.R.No.372, dated 28.06.2011, registered under Section 489-F Pakistan Penal Code (hereinafter referred to as "P.P.C") at Police Station Margalla, Islamabad.

2. The facts essential for the disposal of this petition are that respondent No.1 entered into agreement to sell dated 13.08.2007 with the petitioner No.1 for the purchase of land measuring 356 *kanals* in *Mouza Sher Dhamial* and *Mouza Khatreel*, Islamabad, at the rate of Rs.4,50,000/- per *kanal*. It was agreed between the said parties that petitioner No.1 would transfer his land in the name of respondent No.1 or of his nominee whenever respondent No.1 feels convenient. It was recorded in the said agreement to sell that respondent No.1 handed over post dated cheque No.838736, dated 01.01.2011 amounting to Rs.1,60,200,000/- drawn on Muslim Commercial Bank Limited, Murree Road Branch, Rawalpindi,

as sale consideration. In the said agreement to sell, it was also mentioned that in case of non-encashment of above-said cheque on presentation, respondent No.1 would pay an extra amount of Rs.2,00,000,00/- as a penalty in addition to the amount mentioned in the cheque. Respondent No.1 got all the land measuring 356 *kanals* transferred in the name of his nominees. However, when petitioner No.1 presented the said cheque for encashment before the concerned bank, it was dishonoured due to insufficient funds. The petitioners informed respondent No.1 about the said cheque getting dishonoured. Furthermore, the petitioners called upon respondent No.1 to pay the entire sale consideration in addition to the extra amount agreed between the parties through agreement to sell dated 13.08.2017. However, respondent No.1 flatly refused to pay the required amount, which resulted in registration of FIR No.372, dated 28.06.2011, under Section 489-F PPC. After a lapse of almost four years, the local police arrested respondent No.1 on 07.12.2016, and after keeping him in custody for two days, produced him before the Court on 10.12.2016. The I.O. requested the Judicial Magistrate concerned to send respondent No.1 to the judicial lock-up. In response to the request made by the I.O., the learned Judicial Magistrate, vide impugned order dated 10.12.2016, discharged respondent No.1 by invoking the powers conferred under Section 63 of Cr.P.C. The said order has been assailed by the petitioners in the instant writ petition.

3. Learned counsel for the petitioners submitted that the discussion on merit of the case at the stage of granting judicial remand by the learned Judicial Magistrate amounts to a judgment

before trial; that the impugned order is the result of misreading and non-reading of evidence; that respondent No.1 remained on physical remand for two days only; that the local police after keeping respondent No.1 on two-days' physical remand requested the learned Magisterial Court to send him to the judicial lock-up; that the learned Court instead of sending respondent No.1 to the judicial lock-up, discharged him without taking into consideration that a huge amount was to be recovered from respondent No.1 on account of dishonestly issuing the cheque in question; that the cheque in question was issued by respondent No.1 in purported discharge of his liability created under the agreement to sell dated 13.08.2007; that in the presence of sufficient incriminating material, the discharge of respondent No.1 from the alleged offence under Section 489-F PPC, was not tenable. Learned counsel prayed for the writ petition to be allowed, and for the impugned order dated 10.12.2016, to be set-aside. In order to strengthen his arguments, the learned counsel relied upon the case law reported as *2005 MLD 1883, PCLD 2009 Lahore 401, and 2002 SCMR 239*.

4. Conversely, learned counsel for respondent No.1 vehemently opposed the petition by submitting that the impugned order had been passed after scrutinizing the material available on record; that the learned Magisterial Court discharged respondent No.1 due to non-production of any material against him especially with reference to the allegation of transferring 356 *kanals* in the name of respondent No.1 or his nominees; that there is no question of any illegality in the impugned order passed by the learned Judicial Magistrate, because the same has been

passed in accordance with material available on record. Learned counsel prayed for the writ petition to be dismissed.

5. I have heard the contentions of the learned counsel for the petitioners, and perused the record with his able assistance.

6. Before going into the validity or legality of the impugned order dated 10.12.2016, passed by the learned Judicial Magistrate, it will be appropriate to reproduce the same for ready reference:-

> *"Present Accused produced in police custody.*
> *Learned counsel for the accused.*
> *I.O. with record.*
> *I.O. requested for judicial remand of the accused person. Whereas the counsel for accused strongly opposed the request on the ground that matter is of discharge. Whereas the I.O. also elaborated in case diary No.25 that the complainant did not produce any material against the accused person especially with reference to allegation of transferring 356 Kanals in name of accused. Therefore mere issuance of cheque is not an offence without intention of dishonestly and obligation. Therefore in light of contentions of accused counsel and investigation of police the accused person Khawar Nawaz son of Muhammad Nawaz is discharged under Section 63 Cr.P.C. on submitting personal surety bond to appear before the I.O. / Court if needed and be released immediately if not required in any other case. Case property be dealt in accordance with law."*

7. The question that needs to be answered in this petition is whether or not the learned Magisterial Court is empowered to discharge an accused under Section 63 Cr.P.C. without any application for discharge of the accused made by the I.O., or even a request in that regard.

8. For ease of reference, Section 63 Cr.P.C. is reproduced hereunder:-

> *"Discharge of person apprehended.--- No person who has been arrested by a police officer shall be discharged except on his own bond or on bail or und the special order of a Magistrate."*

9. Undoubtedly, the learned Magisterial Court is empowered (either to make an order for sending the accused to judicial lock-up or) to discharge the accused under Section 63 Cr.P.C. from the offences/charges levelled against him by the prosecution only when accused is found innocent, and there is nothing incriminating available on the record to connect him/her with the commission of alleged crime. In the case at hand, the Investigating Officer after keeping respondent No.1 on two days' physical remand, requested the Court to send him to judicial lock-up. Upon such request, learned Magisterial Court vide impugned order discharged respondent No.1 by invoking the powers conferred under Section 63 Cr.P.C.

10. After going through the impugned order as well as record appended with this petition, it is evident that at no material stage, was it either the issuance of cheque denied by respondent No.1 or was it disclosed as to why respondent No.1 issued a cheque for an amount as huge as Rs.1,60,200,000/- to the petitioner. Furthermore, the execution of the agreement to sell dated 13.08.2007 was also not denied by respondent No.1. In the said agreement to sell, the handing over of a post dated cheque to the petitioner was admitted. Even if, it is assumed that the complainant had failed to produce any material against respondent No.1/accused with respect to allegation of transferring 356 *kanals* of land in the name of respondent No.1 (and as a result respondent No.1 denied execution of agreement to sell), the question remains that why did respondent No.1 not move for the cancellation of cheque before the appropriate forum. There is nothing on record to show that respondent No.1 moved for the cancellation of cheque in question.

Therefore, in my view, in presence of a dishonoured cheque, which had not been cancelled, the discharge of respondent No.1 by the Judicial Magistrate by observing that "*the complainant did not produce any material against the accused person especially with reference to allegation of transferring 356 kanals in name of accused*", was not tenable. Moreover, in the presence of sufficient material to connect respondent No.1 with the commission of alleged crime, the observation of the learned Magistrate that *"mere issuance of cheque is not an offence without intention of dishonesty and obligation"* amounts to a pre-trial judgment, which is not the intention of the law. In my view, such observations at the stage of granting judicial remand are not warranted. The learned Magisterial Court is only competent to discharge any of the accused from any offence when he is satisfied from the material available on the record that no offence at all, is made out, whereas in the case at hand the situation is otherwise as discussed herein above.

11. In view of the above, the instant writ petition is allowed, and as a result impugned discharge order dated 10.12.2016, is set-aside. The police request for judicial remand of respondent No.1/accused would be deemed as pending before the Magistrate concerned for disposal in accordance with law. The observations made herein above are tentative in nature, and shall not impact upon the merits of the case during the course of trial.

(MIANGUL HASSAN AURANGZEB)
JUDGE

Qamar Khan*
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