

**IN THE SUPREME APPELLATE COURT GILGIT-BALTISTAN
CR. PLA. NO. 06/2010**

**Before: Mr. Justice Muhammad Nawaz Abbasi, Chief Judge
Mr. Justice Syed Jaffar Shah, Judge.
Mr. Justice Muhammad Yaqoob, Judge.**

Sher Ali son of Ghulam Hussain R/O Satellite Town Rawalpindi.

Petitioner/Accused

Versus

The State..... Respondent

**OFFENCE UNDER SECTIONS 417,420,409/34 UNDER FIR NO. 48/09
AND UNDER SECTIONS 420, 489 (F) PPC UNDER FIR NO. 62/09 OF
POLICE STATION SKARDU.**

**PETITION FOR LEAVE TO APPEAL AGAINST THE ORDER DATED
17-09-2010 PASSED BY CHIEF COURT GILGIT-BALTISTAN.**

Mr. Muhammad Issa Sr. Advocate for the petitioner.

Date of hearing 28-09-2010.

JUDGMENT

Mr. Justice Muhammad Nawaz Abbasi, C.J. This petition for leave to appeal has been preferred against the Judgment dated 17-09-2010 passed by the Chief Court Gilgit-Baltistan in a petition under Section 561-A, Cr.P.C. for quashment of two connected FIRs No. 48/2009 and No. 62/2009 dated 19-08-2009 pertaining to the same transaction under Section 409,417,420/34 PPC and 289-F read with 420 PPC respectively. The Chief Court dismissed the petition with observation that prima facie petitioner is found involved in the transaction.

2. The facts in the background leading to this petition are that Muhammad Ibrahim co-accused of the petitioner entered into a transaction of sale of a vehicle with the first informant (Syed Mubarak Ali Shah) for a consideration of Rs. 14,50000/- and after receipt of full consideration did not deliver the custody of vehicle. Sher Ali present petitioner for settlement of dispute stood surety for appearance of Muhammad Ibrahim before Syed Muhammad Sohail a cousin of Syed Mubarak Ali with execution of Surety Bond and issue of a Cheque as guarantee equal to the amount of sale consideration of vehicle. The petitioner failed to produce Muhammad Ibrahim before Syed Muhammad Faisal as per his commitment whereupon Syed Muhammad Faisal as per his commitment whereupon Syed Muhammad Faisal presented the Cheque for encashment but the Bank returned it to him with remarks that there were instructions not to encash the Cheque. In consequence thereto, first case was got registered by Syed Mubarak Ali Shah against the petitioner and others whereas, the second case was registered on the complaint of Syed Muhammad Faisal.

3. The petitioner sought quashment of FIRs in both the cases on the ground that the criminal cases were malafide, as the prosecution under Section 489-F PPC on the Cheque

in question was entirely against law and was abuse of the process of law and Court. Precisely the case of the petitioner before the Chief Court was that he had no liability in the transaction and mere undertaking of producing main accused before Syed Muhammad Faisal, a Civil Judge at Skardu as surety was not an obligation in terms of Section 489-F PPC and in any case he was not beneficiary of the transaction to be proceeded against for the criminal liability.

4. The Chief Court dismissed the petition with observation that the conditional encashment of Cheque was withheld under the instruction of petitioner, therefore, interference in the matter at this stage would not be proper.

5. The learned counsel for the petitioner contended that no offence under Section 489-F PPC on mere issue of Cheque is made out and charge against the petitioner is groundless as he has no Civil or Criminal liability in the transaction and there being no possibility of his ultimate connection, the Criminal prosecution in the matter against him was abuse of process of law and Courts. The learned counsel for the petitioner when confronted that the quashment of FIR under Section 561-A Cr.P.C. may not be possible and petitioner may at the first instance avail the alternate remedy under Section 249-A Cr.P.C. before the Court of Magistrate in which the case is pending in trial, he while conceding the legal position submitted that since Syed Muhammad Faisal a Civil Judge at Skardu is directly involved in the matter therefore, petitioner having no expectation of fair treatment before, the trial Court at Skardu, filed a direct petition under Section 561-A Cr.P.C. before the Chief Court. Learned counsel added that Syed Mubarak Ali Shah complainant in the first case cousin of Syed Muhammad Faisal, Civil Judge and vehicle was also being purchased for the Civil Judge and that on his intervention the petitioner who is a cancer patient was put under pressure for payment of the sale consideration of vehicle by withholding his bail for a considerable period. In the alternative, learned counsel submitted that presently, petitioner is under treatment at Karachi and he is not in a position to travel to Skardu on every date to appear before the Trial Court in a case in which there is no chance of ultimate conviction, therefore in the interest of Justice the case may be transferred from Court of Magistrate at Skardu to a court of competent jurisdiction at Gilgit with exemption of personal appearance of petitioner before the trial court.

6. The learned Advocate General on Court call has submitted that the factual controversy involved in this matter cannot be gone alternate remedy provided under Section 249-A or 265-K Cr.P.C. as the case may be, before the trial Court. However in view of the position explained by the Learned Counsel for the petitioner, learned Advocate General has conceded the request of transfer of case from Skardu to Gilgit and proposed that case may be entrusted to the learned Sessions Judge Gilgit as the offence under Section 420 PPC is triable by the Sessions Court.

7. Section 489-F PPC was inserted in PPC by Criminal Law (Amendment) ordinance 2002 which provides as under:-

489F. “Dishonestly issuing la Cheque.....:-

whoever dishonestly issues a Cheque towards re-payment of a loan or fulfillment of an obligation which is dishonored 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 arrangements with his bank to ensure that the Cheque would be honoured and that the bank was at fault in not honouring the Cheque.

8. The plain reading of this provision of law would show that offence under this Section is only made out if a Cheque issued for payment of a loan or fulfillment of an obligation is dishonoured and in that the essential element to constitute an offence under this Section is that the dishonoured Cheque was dishonestly issued. The purpose of insertion of this provision in PPC was to curb the fraudulent and dishonest issuance of Cheques for return of loan or discharge of financial obligation on Cheque. The necessary requirement of law is to establish prima facie that Cheque was dishonestly issued with the intention to fraud and to ascertain the intention of case under Section 489-F PPC may not be registered against a person without the proper proof of the loan or a financial obligation for which, the dishonoured Cheque was issued and Police on recording oral information of commission of an offence under Section 489-F PPC, mere on the basis of dishonoured Cheque is not obliged to straight away proceed in the matter rather at the first instance this is legal duty of Police to require the informer to bring on record some proof of loan or any other obligation required to be discharged by a person failing which the criminal prosecution may not be legal. Therefore, notwithstanding the fact that the offence is non bailable, the straight away arrest of a person for alleged commission of offence under Section 489-F PPC without permission of the concerned court would amount to curtail his liberty in violation of Article 1 of Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 read with Article 9 of the constitution of Pakistan.

9. The sentence under Section 489-F PPC is three years and offence does not fall within the prohibitory clauses of Section 497 Cr. P.C. therefore withholding of bail in such cases would amount pretrial punishment. The law laid down by the Supreme Court of Pakistan in PLD 1972 SC 81 is that bail cannot be withheld as punishment and observation was as under:-

“The High Court did not follow correct principles in refusing bail. It is obviously not correct to depend on the ipse dixit of the Police regarding the guilt or innocence of an accused person even in the matter of deciding the question of his bail. Bail in non bailable cases is a matter within the discretion of the courts, which has to be exercised with due care and the caution on the facts and the circumstances of each case. For an offence punishable with death or transportation for life, an accused charged with the same is not to be released on bail if

there are reasonable grounds for believing that he has committed such an offence. The onus is on the prosecution to disclose those reasonable grounds and the court has to examine the date available in the case to find out whether such reasonable grounds exist, to connect the accused person with the crime alleged against him. The Court's belief on the point has to arrest on the accusations made in the report to the Police, the nature the credentials of the evidence, which the prosecution proposes to lead occurrence. It is important to remember that bail is not to be withheld as a punishment. There is no legal or moral compulsion to keep people in jail merely on the allegation that they have committed offences punishable with death or transportation, unless reasonable grounds appear to exist to disclose their complicity. The ultimate conviction and incarceration of a guilty person can repair the wrong caused by a mistaken relief of interim bail granted to him, but no satisfactory reparation can be offered to an innocent man for his unjustified incarceration at any stage of the case albeit his acquittal in the long run”.

10. The substance of the matter is “dishonest intention of fraud” and without determination of the question whether Cheque was actually dishonestly issued in discharge of an obligation or it was issued in good faith by a surety to fulfill an obligation other than the financial liability, the provision of Section 489-F PPC is invokeable on a Cheque which was not issued for repayment of loan or discharge of an obligation in the transaction. The sole ground urged in support of this petition for quashment of FIR is that the transaction of sale was between Syed Mubarak Ali and Muhammad Ibrahim whereas Sher Ali petitioner issued Cheque with undertaking to produce Muhammad Ibrahim before Syed Muhammad Faisal, which was not an obligation for discharge of any financial liability under the sale agreement to constitute an offence under Section 489-F PPC. Precisely the contention of learned counsel was that the Police at the instance of first informant a judicial officer set at motion criminal law in pure civil transaction without involving any element of cheating or dishonest, misappropriation or the issue of Cheque with intention to fraud.

11. The offence under Section 489-F was created in Criminal Law (Amendment) Ordinance 2002 issued on 25-10-2002 in pursuance of the Proclamation of Emergency in the country on 12th October, 1999 which was validated by the Supreme Court of Pakistan in Syed Zafar Ali Shah case (PLD 2000 SC 869) an later was also given protection by 17th Amendment in the Constitution. The question whether the ordinance in question issued by the President under Article 89 of the Constitution on expiry of period of four months would still be considered a valid law without placing the same before the Parliament for approval and further if on its expiry, a fresh Ordinance was also saved under 18th Amendment in the Constitution by virtue of which the Emergency of 12th October, 1999 with all laws made between 12.10.1999 & 31.12.2003 has been declared unconstitutional and illegal.

12. The legal position is that an Ordinance promulgated by President of Pakistan in exercise of his power under Article 89 of the Constitution if is not placed before the Parliament within the prescribed period of 4 months for approval, it stands expired and it no further Ordinance in continuation of the repealed Ordinance is promulgated or enforced by the President, the repealed Ordinance would no more be a law of land.

13. If Section 489 PPC is not a valid law and is no more part of statue in Pakistan, it may have no legal force in Gilgit-Baltistan and thus the question relating to the validity and constitutionality of provision of Section 489-F, PPC essentially requires decision alongwith the question whether on the basis of dishonored Cheque, prosecution under Section 420 PPC is justified. The first question is a pure question of law whereas the second question is a mix question of law whereas the second question is a mix question of law and fact which must be decided by the trial court.

14. The initial burden of proving on the accused under Section 489-F PPC that Cheque was not dishonoured by his fault rather the Bank was at fault is against the basic concept of Criminal law according to which an accused is considered innocent unless he is proved guilty of the charge. The placing of initial burden on accused to prove that Cheque was not dishonoured by his fault in an offence under this Section is open discrimination in terms of Article 25 of the Constitution of Pakistan read with Article 17 of Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 wherein it is provided that all are equal before law and have equal protection of law. The burden of proving dishonest issue of Cheque is on the prosecution and at the same the burden of proving that Cheque was not dishonoured for the fault of accused rather it was fault of Bank is on the accused which is against the basic principle of Criminal law that prosecution beyond all reasonable doubts must prove the accused guilty of charge.

15. Be that as it may, we without commenting on the merits of present case at this stage, are of the view that in the given facts, the apprehension of the petitioner that he will not get fair treatment at Skardu is not unfounded which is a valid reason for transfer of case and we order accordingly.

16. There are serious allegation against Syed Muhammad Faisal Civil Judge/Judicial Magistrate Skardu that he, having direct interest in the matter by misuse of Judicial Office put pressure on the petitioner for obtaining Cheque from him who stood surety for Muhammad Ibrahim and by influence managed withholding bail of petitioner for a considerable period in an offence which is punishable with maximum sentence of three years. The Judicial Office is a sacred trust and a Judicial Officer at the cost of dignity of Judicial Officer in the manner stated above is unbecoming of a gentleman and a Judicial Officer. Therefore, Registrar of the Chief Court will bring the matter to the notice of learned Chief Judge of the Chief Court Gilgit-Baltistan for his consideration in his supervisory jurisdiction.

17. The net result of the above discussion is that Criminal cases registered against the petitioner and others vide FIR Nos 48/2009 and 62/2009 under Sections 409,417,420/34 PPC and 489-F, 420 PPC pending before Magistrate 1st Class at Skardu are transferred to Gilgit for trial by the learned Sessions Judge Gilgit. The petitioner subject to the furnishing of Surety Bond to the satisfaction of learned Trial Judge will be exempted from personal appearance before the court in the trial.

18. The petitioner may if so advised, avail the remedy under Section 265-K Cr. PC before the learned Sessions Judge Gilgit, and if such a remedy is availed, the learned trial Judge will decide the application on its own merits in accordance with law.

19. This Criminal petition for leave to appeal with the above observations stands disposed of.

Chief Judge

Judge

Judge

