IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Bail Application No.1899 of 2021

Faraz Tasneem, applicant through:	Mr. Aurangzaib Khan, advocate
The State, through:	Mr. Faheem Hussain Panwhar, DPG
Rahim Mirani, complainant through:	Mr. Rizwan Rasheed, advocate
Date of hearing:	**29.12.2021**
Date of order :	**07.01.2022**

O R D E R

Adnan-ul-Karim Memon, J. – Applicant Faraz Tasneem has been granted ad-interim pre-arrest bail by this Court vide order dated 08.10.2021. Applicant / accused has been booked in Crime No.19/2020, PS Tipu Sultan, Karachi registered under Sections 489-F/420/506 PPC.

2. In a nutshell, the prosecution story as per FIR is that the complainant Rahim Mirani is doing his own business and entered into an agreement with the applicant / accused in respect of one plot situated in PECHS Block-6, Karachi, who issued him a cheque of Rs.2,12,50,000/- dated 15.5.2018, which the complainant then deposited in his account on 12.6.2018. As per the complainant, the said cheque was bounced due to insufficient funds, he contacted the applicant / accused and informed him that the cheque has been dishonored, but thereafter continuously the applicant put the complainant on false pretexts, although he obtained possession of the said plot. Per the complainant, when he demanded his amount from the applicant, he extended threats of dire consequences, hence the FIR.

3. Mr. Aurangzaib Khan learned counsel for the applicant contended that the applicant is quite innocent and has been falsely implicated in the present case with malafide intention and ulterior motives; that the complainant lodged a false FIR; he contended that the learned trial Court through impugned order allowed the applicant one hour to submit fresh surety and the applicant arranged the same, but the trial Court recalled the order dated 26.10.2020, by which bail was granted; that the applicant since the date of registration of FIR regularly attending the Court; that the story as set out by the complainant in the FIR is concocted and based on mala fide grounds. It is further contended that the cheque was issued on 15.5.2018, while the FIR was lodged on 14.1.2020 i.e. after the delay of two years, for which no reasonable explanation has been furnished. Learned counsel has raised his voice of concern about the apathy of the learned trial Court to non-suit the applicant and left him in the lurch on the premise that the surety applied for withdrawal of surety,

which was allowed by the learned trial Court vide order dated 26.7.2021 without providing an opportunity of hearing and issued non-bailable warrant against the applicant. He further pointed out that the applicant approached this Court by filing Bail Application No.1444/2021, which was converted into Criminal Miscellaneous Application No.457/2021 vide order dated 02.8.2021 and in the meanwhile, the NBW issued by the learned trial Court was suspended, thereafter the applicant approached the learned trial Court in compliance of the order passed by this Court, however, nothing could be done as the learned trial Court just passed the order dated 05.8.2021 to the effect whether bail recalling order dated 26.7.2021 has been set aside or otherwise. Learned counsel further stated that the story did not end here, the applicant again approach the learned Additional Sessions, Judge Karachi South, by filing Bail Application No.3177/2021 and interim pre-arrest bail was granted to the applicant vide order dated 06.9.2021 and subsequently ad-interim pre-arrest bail order dated 06.9.2021 was recalled by the learned II-Additional Sessions Judge Karachi South vide order dated 25.9.2021 on the point of maintainability. Thereafter he approached this Court and this Court was pleased to grant ad-interim pre-arrest bail to the applicant vide order dated 08.10.2021. Learned counsel further added that both the parties have filed their respective Civil Suits No.1197/2018 and 127/2021 for specific performance of contract and settlement of accounts. The complainant also filed Suit No.1965/2018 and the same are pending adjudication before the competent Court of law. Learned counsel agreed to deposit the security to this Court if the ad-interim pre-arrest bail earlier granted to the applicant is confirmed.

4. Mr. Rizwan Rasheed learned counsel for the complainant has refuted the assertion made by the applicant and vehemently opposed the bail application on the ground that the applicant intentionally and deliberately issued the cheque to the complainant, which was later on dishonored due to insufficient funds, thereafter the applicant kept the complainant on false pretexts and also issued threats of dire consequences. Learned counsel referred to the objections to the application under Section 498 Cr.P.C. and submitted that the applicant has misused the concession of bail, he absconded from the learned trial Court, caused the delay in conclusion of the trial, and filed a forged medical certificate before the learned Court. He lastly prayed that the ad-interim pre-arrest bail granted to the applicant may be recalled.

5. Learned DPG, representing the State adopted the arguments advanced by learned counsel for the complainant and further argued that the name of the applicant is mentioned in the FIR, he, therefore, prayed that the ad-interim pre-arrest bail earlier granted to the applicant may be recalled.

6. I have anxiously considered the arguments advanced by the respective counsel and had scanned the entire record.

7. The allegation against the applicant is that he issued a cheque to the complainant, which on presentation was dishonored and, therefore, a criminal case under section 489-F, P.P.C. was registered against him, and he has obtained pre-arrest bail from this court on 08.10.2021. It has become transparent that the matter in hand, ex-facie, seems to be civil, as it is evident from the contents of the F.I.R that there was a civil transaction between the parties, and both the parties agreed to the sale and purchase some property in place of certain amount which was purportedly received by the applicant, however; the complainant averred in his complaint that applicant has cheated him in the year between 2018 by issuing false cheque of the huge amount in respect of sale and purchase of plot situated at PECHS Karachi and; that he is no giving his valuable money.

8. Section 489-F, P.P.C. was originally inserted in Pakistan Penal Code, 1860 by Ordinance LXXII of 1995, providing conviction for counterfeiting or using documents resembling National Prize Bonds or unauthorized sale thereof and while the same was part of the statute, again under Ordinance LXXXV of 2002, another Section under the same number viz. 489-F of P.P.C. was inserted on 25-10-2002 providing conviction and sentence for the persons guilty of dishonestly issuing a cheque towards repayment of loan or fulfillment of an obligation, which is dishonored on its presentation. In that newly inserted section 489-F of P.P.C., the maximum relief for the complainant of the case is the conviction of the responsible person and punishment as a result thereof, which may extend to 3 years or with fine or with both. The cheque amount involved in the offense under such section is never considered stolen property. Had this been treated as stolen property, the Investigating Agency would certainly have been equipped with the power to recover the amount also as is provided in Chapter XVII of P.P.C. relating to offenses against property. The offense under section 489-F, P.P.C. is not made part of the said Chapter providing the offenses and punishments of offenses against property, rather in fact the same has been inserted in Chapter XVIII of P.P.C., regarding offenses relating to documents and to trade of property marks.

9. When on 25-10-2002, Section 489-F, P.P.C. was inserted in P.P.C., Order XXXVII, C.P.C. was already a part of statute book providing the mode of recovery of the amounts subject-matter of negotiable instruments, and a complete trial is available for the person interested in the recovery of the amounts of a dishonored cheque, therefore, not only that the complainant in a criminal case under section 489-F, P.P.C. cannot ask a Criminal Court to effect any recovery of the amount involved in the cheque, but also the amount whatsoever high it is, would not increase the volume and gravity of the offense. The maximum punishment provided for such an offense cannot exceed 3 years. Even this conviction of 3 years is not an exclusive punishment. By using the word "or" falling in between the substantive sentence and the imposition of fine, the Legislature has provided the punishment of fine as an

independent conviction, and this type of legislation brings the case of such nature outside the scope of prohibitory clause of section 497, Cr.P.C. The possibility cannot be ruled out and it would remain within the jurisdiction of the trial Court that ultimately the sentence of fine independently is imposed and in such eventuality, nobody would be in a position to compensate the accused of the period he has spent in incarceration during the trial of an offense under section 489-F, P.P.C.

10. I have experienced that in almost every case, where an accused applies for the concession of bail in the case under section 489-F, P.P.C., it is oftenly opposed on the ground that a huge amount is involved and it is yet to be recovered. The police agency also requests for the physical remand of the accused and the cancellation of bail to facilitate the process of recovery of the amount, in question, in the criminal investigation. No such process can be allowed to be adopted either by the Courts dealing with the matter of remand or trial of the offense under section 489-F, P.P.C. or the Investigating Agency to effect recovery. In business circles, the issuance of cheques for security purposes or as a guarantee is a practice of routine, but this practice is being misused by the mischief-mongers in the business community and the cheques, which were simply issued as surety or guarantee are subsequently used as a lever to exert pressure to gain the unjustified demand of the person in possession of said cheque and then by use of the investigating machinery, the issuer of the cheque is often forced to surrender to their illegal demands and in the said manner, the provisions of this newly inserted section of the law are being misused. Securing the money in such a manner would be termed extortion.

11. Primarily, in bail matters, it is the discretion of every Court to grant the bail, but such discretion should not be arbitrary, fanciful, or perverse, as the case in hand begs a question as to what constitutes an offense under section 489-F, P.P.C. 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 a cheque with dishonest intent, the cheque should be towards repayment of a loan or fulfillment of an obligation, and lastly that the cheque in question is dishonored.

12. In the instant case, prima facie, the circumstances indicate that the cheque in question was issued to the complainant in the year 2018 towards payment of some sale and purchase of plot situated at PECHS Karachi, however, the complainant lodged FIR No.19 /2020 for offenses under section 489-F/420/506 PPC, with PS Tipu Sultan, though the alleged offense took place on 12.06.2018 and reported to 14.01.2020 after approximately 02 years. Prima-facie, the complainant had tried to convert a civil dispute into a criminal case; and the learned trial Court has to evaluate the same judiciously, independently, whether the relevant offenses are attracted or otherwise. It has already been clarified by the Hon'ble Supreme Court in the cases of *Shahid Imran v The State and others* **2011 SCMR 1614** and *Rafiq Haji Usman v*

Chairman, NAB and another **2015 SCMR 1575** that the offenses are attracted only in a case of entrustment of property and not in a case of investment or payment of money. In the case in hand, it is the prosecution's case that the complainant agreed with the applicant about the sale and purchase of the subject plot and in lieu thereof received the subject cheque.

13. That being so, one of the foundational elements of section 489-F, P.P.C. is prima facie missing. The invocation of penal provision would therefore remain a moot point. The ground that prosecution is motivated by malice may not in these circumstances be ill-founded.

14. Coming to the main case, the intent behind the grant of bail is to safeguard the innocent person from the highhandedness of police/ complainant if any; and, very strong and exceptional grounds would be required to curtailing the liberty of the accused charged for, before completion of the trial, which otherwise is a precious right guaranteed under the Constitution of the country. However, the complainant has also the right to prove his case before the learned trial Court beyond the shadow of a doubt, therefore, the parties ought to be left to the learned trial Court for recording evidence of the parties so that the truth may come out.

15. Besides above in the case of *Tariq Bashir V. The State* **PLD 1995 SC 34**, the Honorable Supreme Court has taken stock of prevailing circumstances where under-trial prisoners are sent to judicial lock-up without releasing them on bail in non-bailable offenses punishable with imprisonment of fewer than 10 years and held that "grant of bail in such offenses is a rule and refusal shall be an exception, for which cogent and convincing reasons should be recorded." While elaborating exceptions, albeit it was mentioned that if there is a danger of the offense being repeated, if, the accused is released on bail, then the grant of bail may be refused but it is further elaborated that such opinion of the Court shall not be founded on mere apprehension and self-assumed factors but the same must be supported by cogent reasons and material available on record and not be based on Surmises and artificial or weak premise. Even otherwise to ensure that the accused may not repeat the same offense, if released on bail, sufficient surety bonds shall be obtained through reliable sureties besides the legal position that repetition of the same offense would disentitle the accused to stay at large as bail granting order may be recalled in that event, therefore, such ground should not be an absolute bar in the way of grant of bail. It may be noted that there is a sky-high difference between jail life and free life. If the accused person is ultimately acquitted in such cases then, no kind of compensation would be sufficient enough to repair the wrong caused to him due to his incarceration. It is a settled principle of law that once the Legislature has conferred discretion on the Court to exercise jurisdiction in a particular category of offenses without placing any prohibition on such discretion.

16. Once the Hon'ble Supreme Court has held in categorical terms that grant of bail in offenses not falling within the prohibitory limb of section 497 Cr.P.C. shall be a rule and refusal shall be an exception then, the subordinate Courts should follow this principle in its letter and spirit because principles of law enunciated by the Hon'ble Supreme Court under Article 189 of the Constitution of Islamic Republic of Pakistan, 1973 has binding effect on all subordinate Courts. On the aforesaid pros proposition, I seek guidance from the decisions rendered by the Honorable Supreme Court in the case of *The State v. Syed Qaim Ali Shah* (**1992 SCMR 2192**) and the famous case of *Khan Asfandyar Wali and others v. Federation of Pakistan* (**PLD 2001 SC 607**).

17. I expect the Courts below to adhere to these binding principles in the future and not to act mechanically in the matter of granting or refusal of bail because the liberty of a citizen is involved in such matters; therefore, the same should not be decided in a vacuum and without proper judicial approach.

18. In view of the facts and circumstances narrated above, I am of the considered view that learned trial Court has erred in appreciation of law on the subject while canceling the bail of the applicant, hence, the same is set at naught, as a consequent, I am of the considered view that the case of the applicant is of further inquiry and is fully covered under section 497(2) Cr.PC, entitling for the concession of pre-arrest bail in the light of ratio of the order dated 02.8.2021 passed by this Court in Criminal Bail Application No.1444 of 2021, which was converted into Criminal Miscellaneous Application No.457/2021, primarily the reasons assigned by the learned trial Court vide order dated 26.7.2021, are not sufficient to recall bail order dated 26.2.2020 for the simple reason that surety ought not to have been discharged until and unless accused is brought before the Court as on the very day applicant was called absent, at least notice to surety ought to have been issued and one chance to the applicant to arrange fresh surety should have been given, who thereafter rushed to this Court and succeeded in obtaining the order for suspending the NBW issued by the trial Court. An excerpt of the order is reproduced as under:-

> *"After arguing the matter at some length, learned counsel for the applicant submits that this protective bail application may be converted into criminal miscellaneous application. Ordered accordingly. Office is directed to allot number accordingly. Learned counsel contends that the present applicant was on bail from the learned trial Court against order obtained on 26.02.2020, however, as the misunderstanding crept with the surety before the learned trial Court, the same was withdrawn and on account of unavoidable circumstances the applicant was unable to be present before the learned trial Court in the matter and as such NBWs have been issued against him. However, he submits that the applicant intends to submit fresh surety for the required amount and as such suspension of NBWs may be considered. Let the applicant furnish fresh surety as requested within a period of three days before the learned trial Court in the matter in the sum already specified in the order dated 26.02.2020 without fail. Consequently, the NBWs ordered vide order dated 26.7.2021 stand suspended till the next*

date of hearing for which notice be issued to the complainant as well as Prosecutor General Sindh for 06.08.2021."

19. For the reasons discussed supra the interim pre-arrest bail granted to the applicant Faraz Tasneem vide order dated 08.10.2021 is hereby confirmed in the terms that the applicant shall furnish further solvent surety in the sum of Rs.500,000/- (Rupees five hundred thousand only) and PR Bond in the like amount to the satisfaction of the Nazir of this Court. However, the learned trial Court would be at liberty to cancel his bail application, if the applicant misuses the concession of bail.

20. The observation recorded hereinabove is tentative shall not prejudice either party in the trial.

JUDGE

Zahid/*