ORDER SHEET
IN THE HIGH COURT OF SINDH KARACHI

Crl. Bail Application No. 2333 of 2022
Crl. Bail Application No. 2338 of 2022

DATE	**ORDER WITH SIGNATURE OF JUDGES**

For hearing of bail application.

07-03-2023

Mr. Munir A. Malik, Mr. Ali Almani a/w applicant Faisal Maqbool Sheikh.
Mr. Mian Ali Ashfaq a/w applicant Tariq Shafi.
Mr. Mohammad Ahmed, Assistant Attorney General for the State assisted by Nabeel Mehboob, Assistant Director F.I.A.

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Omar Sial, J.: Mr. Faisal Maqbool Shaikh (**"Mr. Shaikh"**) (through Criminal Bail App No. 2333 of 2022) and Mr. Tariq Shafi (through Criminal Bail App No. 2338 of 2022) **("Mr. Shafi"**) have sought pre-arrest bail in a case arising out of F.I.R. No. 14 of 2022 registered under sections 4, 5, 13 and 23 of the Foreign Exchange Regulations Act, 1947 as well as sections 417, 420 and 109 P.P.C. at the F.I.A.'s SBC Wing in Karachi. Earlier, their respective applications seeking bail were dismissed on 26.11.2022 by the learned Foreign Exchange Tribunal, Karachi South.

2. As far as Mr. Shafi is concerned the allegations against him, as reflected in the F.I.R., are (i) receiving USD 575,000 from Wooton Cricket Club into his own account maintained and operated with Standard Chartered Bank, Karachi through a transfer made on 07.05.2013, which was then transferred by Mr. Shafi, the following day into the account of a political party in Pakistan, and (ii) receiving USD 1.84 million into his account from certain off shore companies owned by him, without seeking the requisite approvals of the State Bank of Pakistan.

3. Mr. Shaikh's name does not transpire in the F.I.R nor does it transpire in the challan filed by the F.I.A.; however, I understand from the counsels that his name was included in the case in November 2022. Mr. Shaikh is admittedly not a member of the political party and according to him he had

never remitted any funds to the political party. The allegation against him is that he is one of the signatories authorized by the political party to operate its account. He however solely cannot sign any cheques. Repeated queries from the State did not however emanate a reply in order to explain as to what was the breach of law in being a signatory, authorized to operate the account of a political party. While the allegations against Mr. Shaikh are not that clear, and it appears that the State too is not quite sure what offence, if any, has been committed by him, I understand from Mr. Munir A. Malik that an amount of USD 600,000 were remitted from an off shore company by the name of Harbour Services Limited to an account owned and operated by Mr. Shafi. The USD 600,000 was converted into Pakistan Rupees through official channels. The money amount was then transferred to another company, Cresox (Private) Limited, apparently owned and operated by Mr. Shafi.

4. The State has focused its arguments on Mr. Shafi and the transfers made to his account. While several sections of the law are said to be allegedly violated, learned AAG has argued that section 5(1)(c) of the FERA is applicable in the current case as it is alleged that Mr. Shafi, being resident in Pakistan, has made the transfer of the money to the account of the political party on behalf of Mr. Arif Naqvi (**"Mr. Naqvi"**). Indeed, it has not been explained to me during the arguments as to what law has been violated in connection with the allegation regarding USD 1.84 million. No specific evidence has been shown to me in this regard. Further, while the learned AAG has put on record written arguments to show that the conduct and actions of Mr. Naqvi have led to the initiation of regulatory and penal actions against him in Dubai and the USA; he however agreed that there is no conclusive pronouncement from any court of law that the money that Mr. Naqvi sent to Mr. Shafi were proceeds of crime.

5. It would facilitate reference if section 5(1)(c) of the Foreign Exchange Regulation Act, 1947 is reproduced:

(1) Save as may be provided in and in accordance with any general or special exemption from the provisions of this sub-section which may be

granted conditionally or unconditionally by the State Bank, no person in, or resident in, Pakistan shall—

(c) make any payment to or for the credit of any person by order or on behalf of any person resident outside Pakistan;

As the FIA investigator, during the hearing put it "*why didn't the cricket club put it directly in the account of the political party*". That is for the FIA to figure out. If a political party violated a law governing political parties and received money it could not have pursuant to that law, then perhaps an action under that law would be justified. As far as this case is concerned, Rule 1(i)(a) of Chapter 6 of the Foreign Exchange Manual provides that a resident of Pakistan (which Mr. Shafi is) is permitted to open a foreign exchange account with an authorized dealer in Pakistan (which he did). Rule (1)(iv) of Chapter 6 provides that foreign currency accounts can be fed by remittances received from abroad (as was done in the current case). Rule (i)(vi) makes all such foreign currency accounts free from all foreign exchange restrictions. Account holders have been given full freedom to operate their accounts to the extent of the balance available in the accounts for local payments in Rupees (which I understand was the situation in the present case). The learned Assistant Attorney General agreed that there is absolutely nothing wrong in bringing in foreign currency into the country through legitimate banking channels; however, he was of the view that the intent of the parties behind the current disputed transaction was dubious. It is an admitted position that the transactions complained of are transactions conducted through the normal banking channels and I understand, that not only have they been declared to the State Bank of Pakistan, but that they are also reflected in the accounts submitted to the Federal Board of Revenue. This was not a hidden or a clandestine transfer. Much needed foreign currency came into our economy through legitimate banking channels. There seems to be little evidence, which would prima facie show the *mens rea* of the players involved at this preliminary stage. The relevancy of the Protection of Economic Reforms Act, 1992 and the different circulars issued by the State

Bank of Pakistan for the protection of foreign exchange transactions may also be relevant in this particular case and I have no doubt that the same will be explored at trial. Conspicuous because of its absence in these proceedings initiated by the Agency is the State Bank of Pakistan.

6. While during the hearing of this application, the F.I.A. kept referring to the transaction complained of as a *hundi/hawala* transaction, perhaps the use of these words was not correct. Often used interchangeably, "*hundi*" and "*hawala*" while not officially defined in the FERA, are said to be alternative remittance systems that operate outside formal banking channels. F.I.A. acknowledged at this stage that the transaction complained of was executed through formal banking channels; that there is no conclusive evidence on record to show yet that the inward remittance was from proceeds of crime. Even otherwise, there is no evidence on record to show that Mr. Shafi believed or had reasons to believe at the stage he received the remittance that these were proceeds of crime. No evidence has been shown to me which would show that Mr. Naqvi sent the money to Mr. Shafi with the *mens rea* of circumventing the law. Similarly, there is no evidence shown to me which would show that the transfer of money to the political party account was on the order of Mr. Naqvi (as is required for an offence under section 5(1)(c) of the FERA). These are all matters that will have to be proved at trial after the learned trial court has had an opportunity to evaluate the evidence produced before it. Upon a tentative assessment it appears that had their intention been such, the money would not have been transmitted through normal banking channels and the transfer would not have been declared to the concerned authorities.

7. I notice that the transaction of which the FIA complains was made in the year 2013. The FIA seems to have noticed it 10 years later. This gap in time raises the concern that if it took the Agency a decade to notice what it now calls a "*suspicious transaction*", whether an immediate capacity building of the Agency is required. Such a slow and delayed response of law

enforcement agencies to an offence allegedly committed by making full declarations to the regulators is not only unacceptable but should also be a cause of concern for the State. While initiating such actions, an enormous responsibility rests upon the law enforcement agencies. The law does not give any agency the right to humiliate people by seeking their arrests in half-cooked actions. The dignity and self-respect of a citizen of Pakistan should not be allowed to be trampled upon so easily at the whims and fancies of the law enforcement agencies. It is also pertinent to note that the F.I.A.'s action is against foreign currency coming into the country through official banking channels. Keeping in view the financial distress that the country faces, any action by the State against remittances coming in, if not thought out properly and not initiated with good intent has the enormous potential of having an adverse impact on the confidence of foreign investors who might become apprehensive of bringing in funds to the country because of the fear that a decade later, the F.I.A. may decide that they are guilty of a crime. I do not suggest that this action is necessarily as a consequence of political maneuvering, however, if it even remotely is, the country's economy will be negatively impacted. At the same time, I also notice that there are areas of the case that need to be looked at closely at trial and for which the applicants should be given a fair opportunity to respond to without the fear of arrest looming in the background. Incarceration pending trial simply does not make sense nor does it seem fair in the circumstances of the case. With the passage of time we seem to be drifting away from the natural human right of being innocent until proven guilty. I did make a query from the F.I.A. as to why would they want to arrest the applicants at this stage. The officer chose to remain silent, perhaps conflicted between his mind and his heart. Article 9 of the Constitution, security of person, which rightly perhaps is mentioned at the beginning of the articles laying down fundamental rights in the Constitution, must be guarded with jealousy. There must always be real solid grounds backed by solid prima facie evidence which is seen in the light of the wisdom of the Supreme Court of Pakistan and the High Courts of this country, repeatedly on the exercise of the power of arrest by law enforcing

agencies, before an arrest is effected. It should be incumbent upon the law enforcement agencies to lay down and strictly follow a stringent criteria for arresting people. The reasons for seeking arrest should clearly be in writing. The State must not permit the use of the power of arrest by any of its organs as a tool of oppression.

8. No cogent reason has been given to me by the Agency as to why bail should not be confirmed. In fact, no cogent reason has been given to me to justify an arrest in this case in the first place. The F.I.A. was unable to provide an explanation as to why the Agency felt the need to arrest individuals when neither are they hardened or desperate criminal nor is it feared that they are a flight risk nor is the sanctity of the evidence collected at stake nor is it apprehended that the applicant will repeat the offence. Offences with which the applicants are charged under the Code, are bailable offences where bail is to be granted as of a right. Further, the punishment for the offence complained of pursuant to the FERA is a prison term of up to 5 years. Mr. Munir A. Malik argued that when the offence is said to have occurred i.e. 2013, the punishment for the offence was up to 2 years imprisonment. The law was amended in the year 2020 to enhance the punishment to 5 years. I am sure that the learned trial court will look into this aspect, however for the moment, being cognizant of the principle laid down by the Supreme Court of Pakistan in the **Tariq Bashir and 5 others vs The State (PLD 1995 SC 34)** regarding grant of bails in non-bailable cases falling within the non-prohibitory clause of section 497 Cr.P.C., I do not see any exceptional or extra-ordinary grounds to deny the applicant bail. Apart from this, I am also of the view that the case against the applicants is also one of further inquiry.

9. A pre-requisite to pre-arrest bail is the presence of *malafide*. The mere fact that the case was initiated in the year 2022 for a transaction that took place in 2013 and that it has been highlighted by the F.I.A., after a change in the government, appears prima facie to be *malafide*. The applicants are respectable members of society whose record shows that they have contributed extensively to the economy of the country. Immense

humiliation will be caused to them with the rejection of their bails specially keeping in view the evidence with and the spirit of the F.I.A. in this action.

10. I also note that the learned Tribunal had dismissed the bail applications, not so much on merits, but because of non-attendance of the applicants before the learned Tribunal. Mr. Munir A. Malik, learned counsel, has explained to me that the absence of Mr. Shaikh was unintentional and due to a heart attack he had suffered during the period when he missed the hearing before the learned trial court. Mr. Mian Ali Ashfaq, learned counsel for Mr. Shafi submitted that Mr. Shafi being an old man, was also ill having contracted dengue and the requisite documentation was made available to the learned trial court. Looking at all the facts holistically, I am inclined to accept the grounds taken by the applicants for their absence. While Mr. Malik requested that the learned trial court be directed to hear the bail applications on merits, I am of the view that as I already have had the advantage to have heard the learned counsels and the learned AAG and have extensively heard the F.I.A., it will mitigate the inconvenience for the lawyers and the litigants as well as the learned trial court, which is already inundated with cases before it, if the bail applications are heard and decided by this court.

11. The interim pre-arrest bails granted to the applicants are confirmed on the same terms and conditions. Both, applicants are however directed to co-operate fully with the Agency in its probe and to be more cautious of the hearings in the learned trial court. In the event the State is of the view that the applicants are not co-operating with the investigation, it may move the requisite application for cancellation of bail. Similarly, if the learned trial court is of the view at any stage that trial is being delayed due to the intentional absence of the applicants, the learned Tribunal shall itself be empowered to cancel the bail.

JUDGE