IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Bail Application No.1623 of 2023

Shabir Muhammad applicant through:	Mr. Muhammad Ali Waris Lari, advocate
The State, through:	Mr. Talib Memon, APG
Mst. Naheed Suhail, complainant through:	In person
Date of hearing: **& order :**	**04.08.2023** ----------

O R D E R

Adnan-ul-Karim Memon, J. – Applicant Shabir Muhammad seeks post-arrest bail in Crime No.26/2022, PS Aziz Bhatti, Karachi registered under Sections 489-F PPC.

2. In a nutshell, the prosecution story as per FIR is that the complainant Mst. Naheed Suhail handed over her vehicle bearing No.BSE-670 maker Vitz Model 2017 to the applicant for selling it which was subsequently sold out in the sum of Rs.2500,000/- and the applicant issued different cheques of different dates to the complainant, however, one cheque bearing No.129681125 dated 31.8.2021 amounting to Rs.20,00,000/- drawn at Habib Metropolitan Bank Limited Hassan Square branch Karachi was presented on 01.12.2021, which was dishonored due to insufficient funds. The complainant reported the matter at Aziz Bhatti Police Station on 10.01.2022. The applicant was arrested in the FIR and now is confined to judicial prison since his arrest. His bail plea was declined by the trial Court vide order dated 31.05.2023 on the premise that provision of Section 489-F PPC was/is attracted in the present case and there was/is no material on the file which remotely suggests and indicates that the matter was/is out of the ambit of Section 489-F PPC.

3. Mr. Muhammad Ali Waris Lari, learned counsel for the applicant, contended that the applicant is innocent and has been falsely implicated in the present case with malafide intention as such the complainant lodged a false FIR against the applicant to recover her alleged amount by invoking section 489-F PPC; he next contended that the story as set out by the complainant in the FIR is concocted and fabricated. It is further contended that the alleged cheque was issued on 31.08.2021, while the FIR was lodged on 10.01.2022 i.e. after the delay of approximately six months, 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 offense under Section 489-F was/is attracted though after six months the cheque becomes stale, as such no offense under Section

489-F was/is attracted. Besides, applicant is in jail since December, 2022 and the prosecution has failed to examine investigating officer or any witness in support of prosecution case, except Examination in Chief of the complainant. He next argued that the complainant has disclosed in FIR about a business transaction of selling her alleged car at the hands of the applicant, though the Polani Car Dealer had sold out the vehicle of the complainant on open letter, thus the case against the applicant requires further inquiry in terms of Section 497(2) Cr.P.C. Learned counsel added that Section 489-F PPC is non-bailable, however, punishable up to three years and does not fall within the ambit of the prohibitory clause of Section 497(1) Cr.P.C. Learned counsel emphasized that the complainant deliberately and intentionally lodged two FIRs of the same incident at the same Police Station in different Sections just to vex the applicant twice of the same offence to compel the applicant to bow before her alleged demands, thus the question of entering into alleged sale agreement on the subject issue requires proper scrutiny which is only possible if she produces the documentary evidence before the trial Court on her purported plea. He lastly prayed for allowing the bail application.

4. The complainant present in person 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 dishonored due to insufficient funds, thereafter the applicant kept the complainant on false hopes and also issued threats of dire consequences, compelling her to lodge report with police. The complainant submitted that after the death of her husband is unable to recover her huge amount from the applicant. She further submitted that FIR was lodged and the applicant obtained pre-arrest bail which was later on dismissed from this Court for non-prosecution and applicant became a fugitive from the law and a challan was submitted under Section 512 Cr.P.C. Subsequently, he was arrested and post-arrest bail was moved which was also declined by the trial Court vide order dated 18.04.2023 and thereafter another bail application was filed which was declined by the learned Additional Sessions Judge vide order dated 31.5.2023.

5. On the query as to why two FIR’s of the same incident was lodged by her, she submitted that before the instant FIR, the complainant had lodged another FIR No.1182/2021 against the applicant under Section 406, 420, 486 and 471 PPC at the same police station in respect of car bearing registration No.BSE-670 and instant FIR has also been lodged against the issuance of fake cheque, which was dishonored upon presentation, hence FIR No.26/2022 under Section 489-F PPC was lodged. She prayed for the dismissal of the instant bail application.

6. Learned APG, representing the State adopted the submissions made by the complainant and further argued that the name of the applicant is mentioned in the FIR and neither transaction of funds nor issuance of cheque has been denied by the

applicant. All ingredients as required for constituting offense punishable under Section 489-F PPC are fully available in the instant case and keeping in view the material available on record the trial Court declined bail to the applicant. He, therefore, prayed that the bail application of the applicant is liable to be dismissed on the same analogy.

7. I have anxiously considered the arguments advanced by the respective parties and scanned the entire record.

8. 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. 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 of car in place of certain amount, however; the complainant averred in her complaint that applicant has cheated her in the year 2021 by issuing false cheque of the huge amount in respect of sale and purchase of car and that he is not giving her valuable money since.

9. The question involved in the present proceedings is whether the alleged amount could be recovered by keeping the applicant behind the bar for indefinite period.

10. 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 up to 3 years or with a fine or with both.

11. The cheque amount involved in the offense under such a 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.

12. 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.

13. 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 a fine, the Legislature has provided the punishment of a fine as an independent conviction, and this type of legislation brings a case of such nature outside the scope of prohibitory clause of Section 497(1), 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 for the period he has spent in incarceration during the trial of an offense under Section 489-F, P.P.C.

14. I have experience 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 often opposed on the ground that a huge amount is involved and it is yet to be recovered. No such process can be allowed to be adopted either by the Courts dealing with 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 routine practice, 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 prima facie would be termed extortion.

15. 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.

16. In the instant case, prima facie, the circumstances indicate that the cheque in question was issued to the complainant in the year 2021 towards payment of some sale and purchase of a car, however, the complainant lodged FIR No.26/2022 for offense under Section 489-F PPC, with PS Aziz Bhatti and another FIR No.1182/2021 of same police station under Section 420/406 PPC which was lodged after a delay of six months and FIR No.26/2022 was lodged after delay of one month and 10 days, though the alleged offense took place on 31.08.2021 and reported to 10.01.2022 after approximately 04 months.

17. Prima-facie, the complainant had tried to recover her alleged amount by invoking penal action against the applicant and converted a civil dispute into a criminal case by lodging two F.I.Rs of the same incident though the police could have lodged one F.I.R, however, they felt it better to book the applicant in two criminal cases and succeeded to arrest the applicant in both the cases and obtained his remand from the trial Court which is prima facie apathy on the part of police; and now the learned trial Court has to evaluate the same factum judiciously, independently, whether the relevant offenses are attracted and could be invoked together or independently.

18. It has already been clarified by the 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 car and in lieu thereof she received the subject cheque. The delay per se in lodging the F.I.R is also one of the grounds for bail in such circumstances of the case. That being so, one of the foundational elements of Section 489-F P.P.C. is prima facie missing due to peculiar facts and circumstances of the case, however, the ingredients of the same are yet to be proved before the trial Court. 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 for the reason that the complainant waited for considerable period of time and lodged two FIRs in different sections i.e. 489-F, 406, 468 and 471 PPC at the same police station by showing different story, which needs thorough probe by the trial Court in terms of Section 497(2) Cr.P.C.

19. 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 curtail 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/her 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. Besides above, in the case of *Tariq Bashir v. The State* (**PLD 1995 SC 34**), the 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.

20. Once the 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 Supreme Court under Article 189 of the Constitution of the Islamic Republic of Pakistan, 1973 has binding effect on all subordinate Courts. On the aforesaid proposition, I seek guidance from the decisions rendered by the Supreme Court in the cases of *The State v. Syed Qaim Ali Shah* (**1992 SCMR 2192**) and *Khan Asfandyar Wali and others v. Federation of Pakistan* (**PLD 2001 SC 607**).

21. I expect that 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.

22. The applicant is behind the bars since his arrest and is no more required for further investigation and concession of bail could not be withheld by way of

premature punishment. Reliance is placed upon the cases titled as *Husnain Mustafa v. The State and another* (**2019 SCMR 1914**).

23. In view of the facts and circumstances narrated above, I am of the considered view that the learned two Courts below have erred in appreciation of the law on the subject while rejecting 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 post-arrest bail in the light of the ratio of the judgments passed by the Supreme Court as discussed supra.

24. For the reasons discussed supra, the instant bail application is accepted. The applicant Shabir Muhammad is admitted to post-arrest bail in FIR No.26/2022 of PS Aziz Bhatti for the offense under Section 489-F PPC subject to his furnishing solvent surety in the sum of Rs.100,000/- (Rupees One hundred thousand only) and PR Bond in the like amount to the satisfaction of the trial Court. However, the learned trial Court would be at liberty to cancel his bail application, if the applicant misuses the concession of bail. The trial Court is directed to examine the material witnesses positively within one month. Such compliance report be submitted through the MIT-II of this Court.

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

JUDGE