ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Cr. Bail No. 1582 of 2023

DATE ORDER WITH SIGNATURE(S) OF JUDGE(S)

For hearing of bail application.

29.08.2023

Mr. Aftab Anjum advocate for the applicant
Mr. Zahoor Shah, Additional PG
Mr. Muhammad Aslam Bhutta advocate and Mr. Muhammad Zareef Lakho advocate for the complainant alongwith complainant Adeel Younus

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Through the instant bail application, the applicant Arif Ali has approached this Court for a grant of post-arrest bail in terms of Section 497 Cr. P.C. in FIR No. 106/2023 registered for offense under Section 489-F,420, and 34 PPC of P.S Docks Karachi. His post-arrest bail was declined by the trial Court vide order dated 17.07.2023.

2. The accusation against the applicant is that on 5.9.2022, he issued a cheque of Rs. 22,00,000/-in favor of the complainant, which on presentation in MCB Bank was dishonored vide memo dated 7.2.2023, such report of the incident was given to P.S Docks Karachi, who registered the case under Section 489-F,420 and 34 PPC against the applicant.

3. Learned counsel for the applicant has submitted that the case lodged against the applicant is of a civil nature but the complainant with malafide intention converted it to Criminal litigation to harass the applicant. It is further contended that the cheque was issued on 5.9.2022, while the FIR was lodged on 3.3.2023 i.e. after the delay of 6 months, for which no reasonable explanation has been furnished. Per learned counsel, the complainant requested the applicant to arrange an investor/depositor for the shipping line upon which the applicant introduced one Adeel Ahmed, who is the owner of "AA Logistic" and another one Ayaz Ahmed with the complainant; the agreement was executed among them and one Ayaz issued a cheque of account of "Ayaz enterprises". He has further submitted that the applicant has no role in the alleged crime, however, the complainant approached with his companions forcibly took a cheque from the applicant of Rs. 22,00,000/- at gunpoint; and the son of the applicant handed over the original title documents of the house as a further guarantee, the same was taken by the complainant, who told to the applicant that the said cheques are being taken by him as a security purpose, which shall not be deposited into the bank but the same cheques were deposited into MCB Hussain Trade Centre Karachi. He has further contended that the applicant has no concern with the said

agreement; that neither mentioned the name of the applicant in the said agreement nor he has dealt with them. He relied upon the cases of *Nazir Ahmed alias Bhaga vs. The State* **2022 SCMR 1467**, *Riaz Jafar Natiq vs. The State* **2011 SCMR 1708**, *Adnan Shehzad vs. The State and another* **2021 P. Cr. L J 914**, *Ahmar Altaf vs The State* **2020 YLR 2294**, *Muhammad Shabbir vs The State* **2020 YLR Note 22**, *Haji Sardar Ali vs The State* **2017 P. Cr. L J 34** and *Sohail Alam Siddique vs The State* **2020 P. Cr. L.J 1445**. He lastly prayed for allowing the bail application.

4. 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 dishonored due to insufficient funds, thereafter the applicant kept the complainant on false pretexts and also issued threats of dire consequences. Learned counsel further submitted that the offense under Section 489-F PPC is non-bailable and the conduct of the applicant displays his malafide intention to compel the complainant to room around and seek recovery of his legitimate amount, which is apathy on the part of the applicant, in such circumstances the applicant has failed to show his innocence and now seeking judicial protection as such he is not entitled to the concession of bail. Per learned counsel dishonoring of cheque was/is a financial murder of the complainant. Learned counsel emphasized that the dishonoring of the cheque is a prima facie offense and the ingredients of Section 489-F, have been made out. Learned counsel also submitted that previous criminal cases filed against the applicant, which prima-facie shows that he is not entitled to the concession of post arrest bail. He further submitted that the applicant is involved with fraud and forgery and cheated the complainant as such the case under Section 489-F and 420 PPC has rightly been registered against him. Learned counsel also referred to various documents and emphatically urged that the plea taken by the applicant that he signed the cheque on gun point is a false plea just to cover up his case to seek judicial protection from this Court. In support of his contention, he relied upon the cases of *Iqbal Alam Khan vs The State* **2018 YLR Note 221**, *Ghulam Jilani vs The State 2014 YLR 1253, Farhaj Ahmed vs The State* **2014 MLD 433,** *Shah Alam vs The State* **2018 YLR 338**, *Faheemullah vs The State* **2018 MLD 273**, *Syed Amir Jalali vs The State* **2013 YLR 626,** *Ghulam Murtaza vs The State* **2013 YLR 566**, *Liaquat Ali vs The State* **2022 YLR 1662**, *Zulfiqar Ali vs The State* **2018 MLD 1521**, *Syed Hasnain Haider vs The State* **2021 SCMR 1466**, *Farman Hussain vs. The State* **2023 P. Cr. L.J 398.** He prayed for the dismissal of the bail application.

5. Learned APG, representing the State adopted the arguments advanced by the learned counsel for the complainant and further argued that the name of the

applicant is mentioned in the FIR, he, therefore, prayed that the instant bail application is liable to be dismissed.

6. I have heard learned counsel for the parties and with their assistance examined the documents and read Sections 489-F and 420 PPC applied by the prosecution.

7. A perusal of Section 489-F, P.P.C. reveals that the provision will be attracted if the following conditions are fulfilled and proved by the prosecution:-

> ***(i) issuance of the cheque;***
>
> ***(ii) such issuance was with dishonest intention;***
>
> ***(iii) the purpose of issuance of cheques should be:-***
>
> > ***(a) to repay a loan; or***
> >
> > ***(b) to fulfill an obligation (which in wide term inter-alia applicable to lawful agreements, contracts, services, promises by which one is bound or an act which binds a person to some performance).***
>
> ***(iv) on presentation, the cheques are dishonored. However, a valid defence can be taken by the accused, if he proves that;-***
>
> > ***(i) he had made arrangements with his bank to ensure that the cheques would be honoured; and***
> >
> > ***(ii) that the bank was at fault in dishonoring the cheque.***

8. The law on the aforesaid proposition is very clear that if the applicant/accused establishes the above two facts through tangible evidence and that too after the prosecution proves the ingredients of the offence then he would be absolved from the punishment. 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 a fine or with both. The cheque amount involved in the offense under such Section is never considered as 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 out on the 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 the statute book providing the mode of recovery of the amounts on the 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 the 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, 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.

10. 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, and 420 P.P.C. was registered against him and to others. The complainant has not described the alleged business, as to how, when, and by what process the subject transaction exchanged between the parties. These factual aspects of the matter will be determined by the learned trial Court at the time of recording of the evidence. The case against Applicant is based on documentary evidence, which is yet to be determined by the learned Trial Court. That being so, one of the foundational elements of Section 489-F, P.P.C. as discussed supra 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. On the aforesaid proposition, I am fortified by the decision rendered by the Supreme Court in the case of *Muhammad Sarfraz vs. The State* (**2014 SCMR 1032**) wherein bail was granted for the offense under Section 489-F P.P.C and in the case of *Saeed Ahmed vs. the state* (**1995 SCMR 170**) wherein concession of bail was extended to accused based on documentary evidence.

11. 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 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 matter of 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 issue of the cheque is often forced to surrender to their illegal demands and in the said manner, the provisions of this Section of the law is being misused. Securing the money in such a manner prima facie, would be termed as pressure tactic.

12. 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 or the issuance of a cheque with dishonest intent, the cheque should be towards repayment of a loan or fulfillment of an obligation, and that the cheque in question is dishonored.

13. In the instant case, prima facie, the circumstances indicate that the cheque in question was issued to the complainant on 5.9.2022, however, he lodged the FIR No. 106/2023, registered for an offense under Section 489-F, 420 and 34 PPC of P.S Docks Karachi, on 3.3 2023 i.e. after the delay of 6 months; and the validity of the cheque remains intact if the cheque is presented to the bank within six months from the date on which it is drawn or within the period of its validity, whichever is earlier.

14. The foundational elements to constitute an offense under Section 489-F PPC as discussed supra are clear in its terms.

15. 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 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.

16. 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 case before the learned trial Court beyond the shadow of a doubt, therefore, the parties ought to be left to the learned trial Court to record evidence of the parties so that the truth may come out.

17. Besides the 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.

18. 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 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 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**).

19. 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.

20. In view of the tentative assessment of the record as discussed supra, the case of the Applicant requires further inquiry as provided under Section 497 (2) Cr.P.C for the simple reason that the Supreme Court in the cases of *Shaikh Abdul Raheem v. The State* **2021 SCMR 822** and *Muhammad Imran v. The State* (**PLD 2021 Supreme Court 903**) has already settled the subject issue involved in the matter as such no further deliberation is required on the part of this Court.

21. In view of the above, this bail application is allowed. The applicant is admitted to post-arrest bail subject to his furnishing surety in the sum of Rs.200,000/- (Rupees two hundred thousand) and P.R bond in the like amount to the satisfaction of the learned trial Court.

JUDGE

Shahzad