

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Criminal Bail Application No.1735 of 2023

Date	Order with signature of Judge
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For hearing of bail application

19.9.2023

Mr. Tariq Mahmood advocate for the applicants along with applicants.
Mr. Talib Ali Memon, Assistant P.G along with IO/SI Faraz Shahnawaz of
P.S Rizvia Society Karachi and former IO/SI Saeed Iqbal, P.S Aram Bagh
Karachi.

Through this bail application under Section 498 Cr.P.C., the applicants have sought admission to pre-arrest bail in F.I.R No.41/2023, registered under Section 489-F/420/506 PPC at Police Station Aram Bagh Karachi.

2. The charge against the applicants as per contents of the FIR lodged by the Complainant is that he purchased machinery from the applicants, who are doing business in the name and style of Sama Engineering and he paid the amount of Rs. 1,84,66,000/- in different dates to them and the applicants executed an agreement with the complainant and on their behalf one cheque bearing No. 97460908 dated 06.10.2022, amounting to Rs. 87,00,000/- was issued which was deposited by the complainant in his account but the same was dishonored with the reason of insufficient funds vide memo of bank endorsement dated 24.01.2023. Such a report of the incident was given to Police Station Aram Bagh, Karachi on 02.02.2023, which registered F.I.R No. 41/2023, under Section 489-F/420/506 PPC. The earlier bail plea of the applicant has been declined by the learned Xth Additional Sessions Judge (South) Karachi vide order dated 31.07.2023 in Criminal Bail Application No. 2583/2023.

3. It is inter-alia contended by learned counsel for the applicants that the applicants are innocent and have falsely been implicated in this case by the complainant with malafide intention and ulterior motives. Learned counsel submits that there is a civil dispute between the parties and in this regard, civil suit bearing No.1231/2020 is also pending adjudication before the learned VIth Senior Civil Judge Karachi Central; that there is no amount payable by the applicants/accused to the complainant and the subject cheque does not belong to present applicants/accused; that FIR has been lodged after the delay of about 08 days and complainant has miserably failed to give any explanation of such delay, which creates doubts and needs further inquiry. He has further argued that neither the

complainant has any business dealing with the present applicants nor any concern with them; that the offenses do not fall under the prohibitory clause of Section 497 Cr.P.C., this case requires further inquiry within the meaning of under Section 497(2) Cr. P.C. He lastly prayed for allowing the bail application.

4. Learned APG assisted by the complainant who is present in person has opposed the application and states that the learned trial Court has rightly dismissed the bail plea of the applicants and that the applicants do not deserve the concession of pre-arrest bail. He added that the accusation against the applicants is well founded, and the prayer of the applicants for the grant of pre-arrest bail is liable to be dismissed. Per learned APG there are four ingredients of Section 489-F PPC, firstly, dishonest issuance of cheque, secondly, cheque must be issued for repayment of loan or discharge of liability, thirdly, cheque must be dishonored and fourthly, it must be dishonored at the fault of accused and not on the part of Bank. Learned APG emphasized that the word dishonestly is defined under section 24 of the Pakistan Penal Code, which provides, that whoever does anything to cause wrongful gain to one person to cause wrongful loss to the other person is said to do that thing dishonestly." Since on behalf of the applicants/accused the post-dated cheque leaf was issued but the same was dishonored, and when he knew that, they had made no arrangements for encashment of the cheque just to cause wrongful gain to themselves and wrongful loss to the complainant thus section 420 PPC is fully applicable in this case; that the cheque leaf was not issued without consideration as per Section 118 of the Negotiable Instruments Act. Learned APG further argued that since, no malice whatsoever has been alleged against the complainant for falsely implicating the applicant/accused with the commission of the alleged offense, who are in connivance with each other, which is a condition precedent for seeking pre-arrest bail, besides, it is a settled principle of law that, while deciding bail application, tentative assessment is to be made, deeper appreciation avoided and only the contents of the FIR, statements of PWs are to be looked into and there is sufficient material available with the prosecution to connect the applicants/accused with the commission of the alleged offense, therefore, bail application of the applicants was rightly rejected by the learned trial Court. He prayed for the dismissal of this bail application.

5. I have heard learned counsel for the parties and with their assistance examined the documents and read sections 420, 489-F, and 506 PPC applied by the prosecution in the present case.

6. I am cognizant of the fact that the grant of pre-arrest bail is an extraordinary remedy in criminal jurisdiction; it is the diversion of the usual course of law, arrest in cognizable cases; protection to the innocent being hounded on trump-up charges through abuse of process of law, therefore the accused seeking judicial protection is required to reasonably demonstrate that intended arrest is calculated to humiliate him with taints of malafide; it is not a substitute for post-arrest bail in every run of the mill in the criminal case as it seriously hampers the course of the investigation. However, in the present case, it appears that in the F.I.R. and challan prosecution has applied section 420,489-F/506 P.P.C. which does not fall within the prohibitory clause of section 497 Cr. P.C. On the subject issue, the Supreme Court has already decided the legal issue of the subject matter in the cases of Riaz, Jafar Natiq Vs. Muhammad Nadeem Dar and others (2011 SCMR 1708), Abdul Hafeez vs. The State [2016 SCMR 1439], Dr. Abdul Rauf Vs. The State [2020 SCMR 1258] and Muhammad Ramzan vs. State [2020 SCMR 717], thus no further deliberation is required on the part of this Court.

7. Prima facie as yet no proof has been tendered by the complainant to show that the amount of Rs. 1,84,66,000/- was owed by the complainant toward the applicants, and in lieu thereof the applicants had issued the subject cheque, though the complainant was well aware of the factum that the purported cheque was issued by co-accused in favor of the complainant, who have obtained bail from the trial Court vide orders dated 22.03.2023 and 29.05.2023. Besides the complainant has not produced any document to show at this stage, whether the applicants were/are a member/director of M/s Sama Engineering Company and all were/are in league with each other to cheat the complainant of his legitimate amount. Even the prosecution has not produced sufficient material to attract the element of cheating on the part of the applicants. As far as the ingredients of Section 489-F of the Code are concerned the subject cheque was issued by co-accused for encashment in favor of the complainant and the applicants have neither been shown as co-signatory nor privy to the contract/agreement if any. Merely relying upon the alleged agreement does not justify invoking section 420 PPC, which is required to be trashed out by the trial Court after recording the evidence of the complainant.

8. 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. Even 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 M/s Sama Engineering about the business transaction and in lieu thereof received the subject cheque.

9. As far as the liability of the applicants is concerned, the same is to be judicially seen by the trial Court after recording the evidence to the extent whether the applicants are amongst the directors and /or proprietor of M/s Sama Engineering Company and equally responsible to return the amount to the complainant as guarantor. In the facts of the present case, such an assessment can be made at the trial to evaluate whether any improper benefit, if at all, has been derived by the applicants, and whether the aforesaid M/s Sama Engineering Company is to be prosecuted or only a person who allegedly signed the cheque could be responsible under the law. This aspect of the matter cannot be determined at the bail stage in the present case; however, the trial court would be in a better position to thrash out the aforesaid analogy under the law. So far as the allegation of tempering with the record is concerned the same could also be attended by the trial Court as this Court is not in a position to say for and against such allegation at the bail stage.

10. At this stage it is important to note that Section 489-F of PPC is not a provision that is intended by the Legislature to be used for recovery of an alleged amount through the present proceedings. It is only to determine the guilt of a criminal act and award of a sentence, fine, or both as provided under Section 489-F PPC. On the other hand, for recovery of any amount, civil proceedings provide remedies, inter alia, under Order XXXVII of CPC. The Supreme Court has held in the recent judgment that commercial integrity is an ethical standard that would require evidence for establishing, its absence in the conduct of an accused to a degree that constitutes dishonesty by him within the meaning of section 489-F, P.P.C.

11. For what has been discussed above, this bail application is accepted and the earlier ad-interim pre-arrest bail granted to the applicants vide order dated 7.8.2023, is hereby confirmed, subject to furnishing the additional surety in the Sum of Rs.100,000/-each and P.R Bond in the like amount to the satisfaction of the Nazir of this Court, however, the applicant shall appear before the trial Court on every date of hearing without fail.

12. All the observations made hereinabove are tentative and shall have no bearing on the final determination of guilt or innocence by the trial Court.

JUDGE