

**ORDER SHEET  
IN THE HIGH COURT OF SINDH AT KARACHI**

Criminal Bail Application No.909 of 2024

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Date

Order with signature of Judge

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1. For order on MA No.5475/2024 (Exemption)
2. For hearing of bail application

**Date of hearing and Order 02.7.2024**

Mr. Ali Haider Kamran advocate for the applicant

Mr. Zahoor Shah, Additional PG

Mr. Shaneel Memon advocate for the complainant along with the complainant

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**ORDER**

**Adnan-ul-Karim Memon, J:-** Through this bail application under Section 497 Cr.P.C., the applicant Syed Furqan Ali has sought admission to post-arrest bail in F.I.R No. 23/2024, registered under Section 489-F PPC at Police Station Eidgah Karachi. The earlier bail plea of the applicant has been declined by the XIIIth Additional Sessions Judge Karachi South vide order dated 12.03.2024 on the premise that the issuance of the cheque and its subsequent dishonoring affects society at large. Besides this is a financial murder of a member of the society. However, he agreed with the proposition that the offense under Section 489-F PPC does not fall within the prohibitory clause of Section 497 (1) Cr. P.C. and attempted to opine that the case of the applicant falls within the exception as contained in the aforesaid provision. Prima facie this finding is against the dicta laid down by the Supreme Court in the unreported case of *Muhammad Anwar Vs. The State* decided recently vide order dated 3.6.2024 an excerpt of the order is reproduced:-

*“8. This Court has held in the case titled Mian Allah Ditta, that 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 the cheque with dishonest intent, the cheque should be towards repayment of a loan or fulfillment of an obligation, and lastly the cheque is dishonored. Furthermore, this Court in the case of Abdul Rasheed v. The State, [2023 SCMR 1948] the Supreme Court has ruled as follows:*

*“Even otherwise, even if the complainant wants to recover his money, Section 489-F of PPC is not a provision which is intended by the Legislature to be used for recovery of an alleged amount. In view of the above, the question of whether the cheques were issued towards repayment of the loan or fulfillment of an obligation within the meaning of Section 489-F PPC is a question, which would be resolved by the learned Trial Court after the recording of evidence. The maximum*

*punishment provided under the statute for the offense under Section 489-F PPC is three years and the same does not fall within the prohibitory clause of Section 497 Cr.P.C. It is settled law that grant of bail in the offenses not falling within the prohibitory clause is a rule and refusal is an exception.”*

*9. Liberty of a person is a precious right that has been guaranteed by the Constitution of the Islamic Republic of Pakistan, 1973. By now it is also well settled that it is better to err in granting bail than to err in refusal because ultimate conviction and sentence can repair the wrong resulting from a mistaken relief of bail; This court in the case of Chairman NAB,<sup>3</sup> has ruled as follows:*

*“To err in granting bail is better than to err in declining; for the ultimate conviction and sentence of a guilty person can repair the wrong caused by a mistaken relief of bail, but no satisfactory reparation can be offered to an innocent person on his acquittal for his unjustified imprisonment during the trial.”*

2. The charge against the applicant as per contents of the FIR lodged by the complainant Muhammad Salman Raza is that the applicant/accused issued a cheque amounting to Rs.15,000,000/- (Rupees One core fifty lacs) in favor of the complainant in connection with the marketing business transaction, which was deposited by him in his account at the MCB Bank Bhim Pura Branch for encashment but the same was dishonored with the reason of insufficient funds. Such a report of the incident was given to Police Station Eidgah on 27.01.2024, which registered F.I.R No.23/2024, under Section 489-F PPC.

3. It is inter-alia contended by learned counsel for the applicant that the applicant is innocent and has falsely been implicated in this case by the complainant with malafide intention and ulterior motives; that there is no private witness cited in the FIR by the complainant; that the alleged offense does not fall within the ambit of prohibitory clause of Section 497 Cr. P.C. He further submitted that the business terms have been admitted and the said cheques were issued as security not for encashment hence no case under Section 489-F PPC is made out; that there is inordinate delay one and half month in the lodgment of FIR. He lastly prayed for allowing the bail application.

4. Mr. Zahoor Shah Additional Prosecutor General assisted by learned counsel for the complainant has opposed the application and states that the learned trial Court has rightly dismissed the bail plea of the applicant and that the applicant does not deserve the concession of post-arrest bail in a crime, which is a financial murder of the complainant. He added that the accusation against the applicant is well founded, and the prayer of the applicant for the grant of post-arrest bail is liable to be dismissed. Per learned counsel for the complainant, 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 counsel emphasized that the word dishonestly is defined under 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 applicant/accused the post-dated cheque was issued but the same was dishonored, and when he knew that, he made no arrangements for encashment of the cheque just to cause wrongful gain to himself and wrongful loss to the complainant thus section 489-F PPC is fully applicable in this case; that the cheque was not issued without consideration as per Section 118 of the Negotiable Instruments Act. It is a settled principle of law that, while deciding bail application, tentative assessment is to be made, deeper appreciation to be avoided, and only the contents of the FIR, and statements of PWs are to be looked into and there is sufficient material available with the prosecution to connect the applicant/accused with the commission of the alleged offense, therefore, bail application of the applicant was rightly rejected by the learned trial Court as well as learned Additional Sessions Judge vide order dated 12.03.2024. He prayed for the dismissal of this bail application on the same analogy.

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

6. To prove the charge against an accused under Section 489-F, P.P.C. all the ingredients of section 489-F, P.P.C. must be proved through cogent evidence and beyond any shadow of a doubt, however, in this case, the complainant claims that he made a Marketing business transaction with the applicant and the applicant issued a cheque for an amount of Rs.15000,000/- and in this regard, and the applicant has pleaded that the subject cheques were issued as a security amount in a business transaction which was not for the encashment as such he made an attempt to stop the payment but the Bank refused to entertain his request due to insufficient funds which are wrong notion on the part of Bank, however this aspect of the case is to be determined by the trial Court under what circumstances, the cheque (s) was/were issued and what was the intention of the person, issuing it.

7. Prima facie, the mere issuance of a cheque(s) and its being dishonored by itself is not an offense, unless and until dishonesty on the part of a payer is proved.

8. Provisions of Section 489-F, P.P.C. will only be attracted if the following essential ingredients 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 defense 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 honored; and*
  - (ii) *that the bank was at fault in dishonoring the cheque.*

9. Merely, receiving a huge amount of money in a business transaction and its subsequent not delivery to the concerned person requires declaration on the subject by the competent court of law and as such there are remedies available to the aggrieved party, however at this stage this court cannot determine the validity of such transaction between the parties on the subject issue at the bail stage, therefore, the controversy between the parties seems to be of a civil nature based on documentary evidence as per narration made by the complainant in the FIR, however, the law on the aforesaid subject is now settled and 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. Primarily, the offense under Section 489-F, P.P.C. has been inserted in Chapter XVIII of P.P.C., regarding offenses relating to documents and to trade of property marks.

10. 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. 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.

12. 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 a pressure tactic.

13. 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.

14. For the above reasons, this bail application is accepted. The applicant Syed Furqan Ali is admitted to bail in F.I.R No. 23/2024, registered under Section 489-F PPC at Police Station Eidgah Karachi, subject to furnishing his bail bond in the sum of Rs. 500,000/- (Five lac only ) with one surety in the like amount to the satisfaction of the trial Court.

15. Before parting, it is reiterated that the observations made hereinabove are tentative. The trial court is at liberty to independently adjudicate the case on its own merits, without being influenced by the observations made hereinabove with further direction to the trial court to conclude the trial within two months positively without fail however if the charge is not framed the same shall positively be framed on the date so fixed by the trial court in case of failure on the part of the trial court the matter shall be referred to MIT-II of this Court for placing the matter before the competent authority for appropriate orders on the administrative side.

JUDGE