ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Bail Application No. 968 of 2024

Date	Order with signature of Judge

For hearing of bail application

For hearing and Order: 19.07.2024

M/s Muhammad Aslam & Nayyar Zaidi, advocates for the applicant.
Mr. Muhammad Daud Narejo, advocate for the complainant.
Ms. Seema Zaidi APG, along with ASI Ikhlaq Ahmed, PS Gizri.

O R D E R

Adnan-ul-Karim Memon, J:- Through this bail application under Section 497 Cr.P.C., the applicant Muhammad Yameen has sought admission to post-arrest bail in F.I.R No.13/2024, registered under Sections 420/408/489-F/34 PPC at Police Station Gizri Karachi.

2. The earlier bail plea of the applicant has been declined by the learned II-Additional Sessions Judge Karachi South vide order dated 06.04.2024 in Criminal Bail Application No.977 of 2024 with the reasoning that the applicant / accused is nominated in FIR.

3. The 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 to the complainant on 07.12.2023 for certain purposes, while the FIR was lodged on 06.1.2024 i.e. after the delay of approximately 29 days, 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 the offense under Section 489-F was/is attracted as he admitted the misappropriation and issued cheque to compensate the company. Learned counsel added that Section 489-F PPC is non-bailable, however, punishable for up to three years and does not fall within the ambit of the prohibitory clause of Section 497(1) Cr.P.C. He added that the alleged cheque was obtained by the complainant through duress and pressure while keeping the applicant / accused under illegal detention, but the applicant made certain arrangements with the bank to stop payment. He argued that the applicant / accused has never issued the alleged cheque to the complainant and he is not under any liability to pay a single penny to the complainant. He next submitted that there is no business transaction or any other transaction between the applicant / accused and the

complainant has fabricated a false story. He submitted that the fundamental rights of the applicant guaranteed under the Constitution of the Islamic Republic of Pakistan 1973 are being infringed by the complainant and as such the applicant is left with no other remedy under the law, but to approach this Court. He prayed for allowing the bail application.

4. The learned counsel for the complainant has narrated the ordeal of the complainant and argued that the applicant / accused claimed that the cheque was issued to the complainant party on force but nothing is produced on record to that effect; even this version on the part of the applicant / accused amounts admission regarding liability for payment of amount. He next argued that the issuance of the cheque is neither disputed nor denied on the part of the applicant / accused. He added that the Bank statement of the accused / applicant and that of co-accused Kashif and Mst. Shabana (mother of the applicant) also reveals that amount of retailers of the complainant company has been transferred to their accounts instead of the company's account. Moreover, the applicant/ accused failed to show the return of said amount as per his plea through his statement made before the competent authority. He submitted that Payment of Rs:500000/- by co-accused Kashif to the complainant party also strengthens the case of the prosecution and connects the accused with the present crime. He further submitted that the subject cheque was issued for the discharge of the liability as admitted by the applicant through his statement. He emphasized that the subject cheque was dishonored due to the stop the payment by the drawer and said the cheque admittedly bore the signature of the applicant/accused and issuance of the cheque is neither disputed nor denied as the same cheque belongs to the present applicant/accused and same is supported by statutory presumption of being a valid instrument, a drawer cannot ward off the consequences of its failure through such plea. It is urged that the applicant/accused committed fraud, cheating, and misappropriation with the complainant Company. Learned counsel referred to the bank statements of the applicant which connects him. On the rule of consistency, learned counsel submitted that no doubt, co-accused Kashif and Mst. Shabana was granted bail based on a compromise with the complainant party and the accused made a payment of Rs.500,000/- to the complainant through cheque while accused Mst. Shabana was granted bail her being an old age Infirm woman under the first proviso to S.497 (1) Cr.P.C. about the delay in registration of F.I.R. He submitted that no doubt, there is a certain delay in the registration of FIR but the delay is not always fatal for evidence. About non-falling of the alleged offenses within the prohibition of Section 497

(1) of Cr.P.C., he argued that it is also settled law that an accused cannot seek bail as of right in any offense which does not fall within the prohibitory clause of Section 497 of Cr.P.C. He prayed for allowing the bail application.

5. Ms. Seema Zaidi APG has submitted that the applicant intentionally and deliberately issued the cheque to the complainant, which was later dishonored, thereafter the applicant kept the complainant in false hopes, compelling him to lodge a report with police. She further submitted that the complainant is unable to recover his huge amount from the applicant. She further submitted that there is no maalfide on the part of the complainant as such no indulgence of this Court is made out. She next argued that all ingredients required for constituting an 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. She, therefore, prayed that the bail application of the applicant is liable to be dismissed on the same analogy.

6. The accusation against the applicant is that he was an accountant in the company i.e. Elite Corporation, situated at Plot No.40/C, Rahat Commercial, Phase-VI, DHA. Karachi failed to deposit the sale proceeds in the account of the company rather he started depositing the company's amount in the account of his mother, and co-accused Kashif Usman, of committing cheating and fraud with the company, however, he admitted his guilt and issued cheque No.156280135, dated 11.12.2023, Habib Metro Bank. Khayaban-e-Rahat, Phase-VI, Karachi, the value of Rs.74,00,000/-, however, the said cheque was bounced due to stop payment, such report of the incident was given to the police who registered the F.I.R on 06.1.2024.

7. I have anxiously considered the arguments advanced by the respective parties and scanned the entire record with their assistance and case law cited at the bar.

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, however; the complainant averred in his complaint that the applicant has cheated the company by issuing false cheque of the huge amount in respect of a misappropriation committed by the applicant from the company’s account that he is not giving the valuable money misappropriated by him.

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

10. 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 both. 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. 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 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.

11. 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.

12. 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 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.

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 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.

14. In the instant case, prima facie, the circumstances indicate that the cash cheque of Rs.74,00,000/- was issued on 07.12.2023 for that applicant claims that he was pressurized to make paymen of purported misappropriation, whichi took place in the account of the company and he made arrangement with the concerned bank and payment was stopped, which factum is disclosed by the memo of cheque presented on 14.12.2023, while the FIR was lodged on 06.1.2024 i.e. after the delay of approximately 29 days. The question is whether the cash cheque can be dishonoured when the payment was stopped by the issuer and whether the complaint can be filed by the representative of the company and whether there is privity of contract between the parties to attract Section 489-F PPC. These all questions needs to be thrashed out by the trial Court after recording evidence of the complainant.

15. Prima facie, the complainant had tried to recover his alleged amount by invoking penal action against the applicant and converted a civil dispute into a criminal case by lodging F.I.R, 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 offense under Section 408, 420, 489-F/34 PPC are attracted and could be invoked and the applicant has stated that not a single witness has been cited, who may have said that the applicant committed misappropriation of the alleged amount of the company.

16. 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 a certain business, and in lieu thereof, he 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 PPC 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 a considerable period and lodged an FIR which needs a thorough probe by the trial Court in terms of Section 497(2) Cr. P.C

17. 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 to record evidence of the parties so that the truth may come out. 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 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**), *Raja Jaffar Natiq v. Muhammad Nadeem Dar* (**2011 SCMR 1708**) and *Khan Asfandyar Wali and others v. Federation of Pakistan* (**PLD 2001 SC 607**).

19. The arguments advanced by the learned counsel for the complainant cannot be appreciated at the bail stage for the reasons that the Supreme Court has held in the recent judgment that when the offence does not fall within the ambit of prohibitory clause, then bail cannot be refused merely on the ground that applicant is allegedly involved in 489-F PPC case. The rule of consistency is also applicable in the present case, however, trial Court will see the ingredients of the offence, as setforth by the prosecution in the FIR and challan, to be made out or otherwise.

20. 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.

21. In view of the facts and circumstances narrated above, I am of the considered view that the learned Court below has erred in appreciation of the law on the subject while rejecting the post-arrest bail of the applicant, hence, the same is set at naught, as a consequence, I am of the tentative 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.

22. For the reasons discussed supra, the instant bail application is accepted. The applicant is admitted to post-arrest subject to furnishing his surety in the sum of Rs.300,000/- (Rupees three Lac only) with one more solvent surety of the like amount as well as P.R Bond of the same amount with 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 reports be submitted through the MIT-II of this Court.

23. The observation recorded hereinabove is tentative and shall not prejudice the case of either party at trial.

JUDGE

Shafi