

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Miscellaneous Application No.257 of 2023

Date	Order with signature of Judge
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1. For hearing of main case
2. For hearing of MA No.4800/2023

04.12.2023

Malik Altaf Hussain advocate for the applicant
Mr. Saleem Akhtar Buriro, Additional PG
Mr. Tariq Hussain advocate for respondent No.3

Respondent Naveed Hussain had sought a Pre-arrest Bail in Crime No.892/ 2022, registered at Police Station Ferozeabad Karachi, for an offense punishable under section 489-F PPC. The trial court confirmed his pre-arrest bail with the following reasoning:-

“Heard and perused both sides prima facie contents of FIR, it transpires that the incident allegedly had taken place on 07.10.2022 but it was reported on 26.11.2022, after the delay for about 49 days, not plausibly explained within column no.5 of the FIR. Not only this but from the perusal of the final report prepared under section 173 Cr.P.C. by the concerned investigation officer, it transpires that the officer had been able only to seize the evidence with regard to dishonour of the instrument Only. Whereas the grievance of the complainant is such that the applicant/accused has not been able to repay his loan. Nothing has been provided by the complainant or seized by the investigation officer with regard to extending of loan to the applicant/accused by the complainant. The issue between the parties requires deeper appreciation, not permissible as well as possible at the bail stage. Whereas the offense is also not hit by the prohibitory clause of section 497 Cr.P.C.

In my humble view although the issuance and dishonor of cheque are on record but remaining essential ingredients of the alleged offense, dishonesty, and obligation on the part of the accused person are yet to be ascertained under the scheme of Qanoon e Shahadat 1984. Consequently, I deem it appropriate to allow instant bail application. The pre-arrest bail granted to the applicant/accused person is hereby confirmed on the same terms and conditions.”

2. The applicant/complainant being aggrieved by and dissatisfied with the aforesaid order has filed this Criminal Miscellaneous Application inter-alia on the ground that the complainant was not heard by the trial court. At this stage, I asked the learned counsel whether the complainant was required to be heard in the criminal case or only the complainant is required to assist the prosecution. He in principle agreed to the proposition that the complainant can apply to assist the prosecution, however in bail matters the complainant must be heard who is the main victim of the case.

3. The learned Additional Prosecutor General assisted by the learned counsel for the respondent has supported the impugned order and submitted that the applicant has failed to show the grounds for cancellation of bail in terms of Section 497(5) Cr. P.C. He further

contended that the judicial proprietary demand that the trial Court may be directed to conclude the trial within reasonable time as such there is no need to recall the bail granted by the trial Court for offense under Section 489-F PPC which is punishable upto 3 years.

4. I have heard learned counsel for Applicant, learned A.P.G for State, learned counsel for the respondent, and perused the material available on record.

5. 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 honored; and**
 - (ii) that the bank was at fault in dishonoring the cheque.**

6. 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 offense then he would be absolved from the punishment.

7. Chapter XXXIX of the Code sets out the law relating to bail. Section 497(5) provides for the cancellation of bail. It reads as under:

(5) A High Court or Court of Sessions and, in the case of a person released by itself, any other court may cause any person who has been released under this section to be arrested and may commit him to custody.

The power conferred by section 497(5) was akin to revisionary powers under sections 435 and 439 Cr.P.C. The relevant excerpt is reproduced below:

“Since no specific manner/procedure for filing of a petition for cancellation of bail has been prescribed either in Control of Narcotic Substances Act, 1997 or in the Criminal Procedure Code 1898 and its section 497(5) conferred unrestricted powers on this Court and the Court of Session in case of a person released by itself or by any other Court, for his arrest for committing to custody. We are of the view that invocation of this jurisdiction can be made on an application of any concerned person and, in the absence of any such application, by the court itself, whenever any lapse, capriciousness, or arbitrariness amenable to its jurisdiction comes to its notice. Powers of canceling bail under sub-section (5) of section 497 Cr.P.C. can in no manner be restricted for any specific class of persons because such intention of the legislature does not flow out of those provisions. These powers are also similar to the revisional powers for which, as well, right of invocation is also not restricted.”

8. Let's now turn to the merits of the case, the alleged incident took place 07.10.2022 but it was reported on 26.11.2022, after a delay of about 49 days, the grievance of the complainant is that the respondent had not been able to repay his loan, if this is the position of the case, the scope of interference by this Court under Section 497(5) Cr. P.C. is well settled and hardly needs reiteration in terms of law laid down by the Supreme Court in the case of *Ahmed Shakeel Bhatti v The State* **2023 SCMR-1**. At this stage learned counsel for the applicant has asserted that a perverse order can be set at naught by this Court under Section 497(5) Cr. P.C. and in the present case the impugned order is not only perverse but against the dicta laid down by the Supreme Court in its various pronouncements.

9. I have noted that Applicant is charged with an offense punishable under section 489-F P.P.C. maximum sentence for which is three years imprisonment thus, the same does not fall within the prohibitory clause of section 497 Cr.P.C.

10. The Supreme Court has already held that the exceptions for refusing bail in offenses that do not fall within the prohibitory clause of Section 497(1) CrPC are therefore also applicable to the accused who pray for bail under the first proviso to Section 497(1) CrPC in an offense falling within the prohibitory clause. These exceptions are well settled by several judgments of this Court. They are the likelihood that the accused: (a) abscond to escape trial; (b) tamper with the prosecution evidence or influence the prosecution witnesses to obstruct the course of justice; or (c) repeat the offense keeping in view his previous criminal record, nature of the offense or the desperate manner in which he has prima facie acted in the commission of the offense. In the present case, the complainant has not described the alleged transaction of loan to the respondent as to how, when, and by what process such transaction was exchanged between the parties, these factual aspects of the matter will be determined by the learned trial Court at the time of recording of evidence.

11. The bail may be canceled on any one or more of the following grounds:

If the bail-granting order is patently illegal, erroneous, factually incorrect, and has resulted in a miscarriage of justice.

ii) That the accused has misused the concession of bail in any manner.

iii) That the accused has tried to hamper prosecution evidence by persuading/pressurizing prosecution witnesses. That there is a likelihood of absconson of the accused beyond the jurisdiction of the court.

iv) That the accused has attempted to interfere with the smooth course of the investigation.

v) That the accused misused his liberty while indulging in a similar offence.

vi) That some fresh facts and material have been collected during the investigation which tends to establish the guilt of the accused.

12. From the above it transpires that considerations for cancellation of bail are very different to those for the grant or dismissal of bail. Prima facie, the applicants' case does not fall within the aforesaid exceptions for the reason that Prima facie, the case against the respondent is based on documentary evidence which is yet to be determined by the Trial Court. 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.

13. In the present case, the progress report submitted by the learned trial Court explicitly shows that the challan was submitted on 20.12.2022 and cognizance was taken. The case proceeded on 04.03.2023 and thereafter charge was framed by the trial Court on 14.07.2023, the matter was fixed for evidence on 17.10.2023 and NBWs were issued against the PW through the Investigating Officer, the aforesaid progress report explicitly shows that the respondent has not misused the concession of bail to attract Section 497(5) Cr. P.C.

14. As a result of the above discussion, I feel no hesitation to hold that the learned counsel for the applicant failed to demonstrate that the bail-granting order is patently illegal, erroneous, and factually incorrect and has resulted in a miscarriage of justice. No reasonable ground exists for the cancellation of bail granted to Respondent No.1. Consequently, this Criminal Miscellaneous Application is dismissed.

JUDGE