

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
Cr.B.A.No.1644 of 2018

Date Order with signature of Judge

For hearing of bail application.

12.02.2019

Ms. Fareeda Mangrio, advocate for applicant/accused.
Mr. Muhammad Zaheer, advocate for complainant alongwith
complainant.
Mr. Siraj Ali Khan Chandio, Addl. P.G. Sindh.

Salahduddin Panhwar, J:- Applicant/accused Nazim Hussain is booked in case Crime No.223/2018 registered at Police Station Gulshan-e-Maymar, Karachi under section 489-F, P.P.C who has approached this Court by filing the captioned application for post-arrest bail.

2. Per prosecution, the accusation against the applicant/accused is that in order to pay off some liability towards business he issued some cheques to the complainant, out of which one cheque, on its presentation before the concerned, was bounced on account of insufficient funds. Hence, this FIR.

3. Learned counsel for the applicant/accused submits that applicant is innocent and he has been falsely implicated in this case by the complainant; that no any amount is payable by the applicant to complainant and the cheque in question was given as security and on demand the same was not returned to applicant/accused but complainant told him that the same has been misplaced; that applicant/accused has also sent legal notice to the complainant for return of Rs.70,00,000/- invested by applicant/accused in the joint business; that there is civil dispute between the parties. He further submitted that there is more than 08 months delay in lodging of the FIR; that offence with which applicant/accused is booked is not falling within the prohibitory clause of section 497 Cr.P.C, hence she prayed for grant of bail to the applicant/accused and has relied upon case laws reported as 2013 SCMR 51 and 2017 P.Cr.LJ 1305 [Balochistan].

4. Learned counsel for the complainant argued that applicant/accused has admitted investment of complainant amounting to Rs.48,00,000/- in the business; that applicant/accused is habitual offender in such like cases and applicant/accused has been convicted and sentenced by Judicial Magistrate No.18 Karachi South vide judgment dated 29.11.2016 passed in Criminal case No.3293/2014 (FIR No.62/2014 u/s 489-F PPC registered at P.S City Court). He explained that delay in lodging of the FIR occurred as applicant/accused engaged complainant in negotiations to settle the dispute and on his failure to do so the delay is caused in lodging of the FIR; that in view of the above facts, applicant/accused is not entitled for concession of bail.

5. Learned Deputy Prosecutor General, Sindh has adopted the submissions of learned counsel for the complainant and vehemently opposed the grant of bail to applicant/accused.

6. Heard learned counsel and perused the record.

7. Before proceeding, it may be advantageous to mention here that to constitute an offence under section 489-F, P.P.C, following ingredients should be satisfied:

- i) cheque was issued with *dishonest* intention;
- ii) it (cheque) was issued to repay a loan or to fulfill an obligation;
- iii) it (cheque), on its presentation, is not encashed;

Here, I would add that issuance of cheque, by itself, carries an implied impression that same is towards repayment of loan or fulfilling an obligation unless there is some other agreed condition whereby encashment of a cheque is made subject to. Needful to add that '**cheque**', if unconditional, enjoys the status of '**negotiable instrument**' hence normally holder thereof feels *guarantee* of its encashment on its presentation. Thus, I would say that when a cheque (*unconditional one*) is bounced the *prima facie* presumption would be that i.e:-

'cheque was to repay loan or to fulfill some obligations but failed'

Since, I am quite conscious that existence of above two facts *alone* would not be sufficient to attract the provision of Section 489-F PPC as same has

been subject to a specific condition i.e '*dishonest intention*' i.e knowledge at time of issuance that same (*cheque*), on its presentation, shall not be honoured,. Same, by any stretch of imagination, cannot be believed to be known to holder who, *otherwise*, believes guarantee of encashment thereof, therefore, *prima facie*, the burden would be upon the accused to bring on record those circumstances, documents etc which could, even bail stage, *prima facie* establish that issuance of cheque never carried *implied guarantee of encashment but was issued otherwise*'.

I shall also add that mere claim or denial on part of the accused would never be sufficient to disbelieve the implied presumption else the very purpose of insertion of provision of Section 489-F PPC in the book shall fail. It, worth, adding that Criminal Justice delivery system cannot be all exclusively to the benefits of the offender, making it unidirectional exercise rather a proper administration for the criminal justice delivery system requires balancing the rights of the accused as well prosecution. The insertion thereof was never with intent to ensure recovery but to punish those who take benefit of *implied* guarantee, attached with a cheque, for defrauding the innocent people.

8. Having said so, now would revert to merits of the case. The applicant / accused has not denied issuance of the cheque as well bouncing thereof but claimed that it was issued as '*security*' but, *prima facie*, no such proof in shape of document or fact has been placed on record. A claim of engagement in joint business *alone*, in absence of some *prima facie* proof / material, would not be sole ground to get bail for an offence which was / is aimed to protect ordinary innocent person. Thus, *prima facie*, the provision of section 489-F, P.P.C. is squarely attracted in the present case.

9. Further, it is also admitted fact that applicant/accused has been convicted in similar like case by learned Judicial Magistrate No.18 Karachi South in Criminal case No.3293/2014 which, *fact*, goes to suggest that applicant / accused is habitual in exploiting the implied presumption, attached with a '**cheque**'. This fact, *prima facie*, tilts the case in favour of the prosecution. Further, none can deny that insertion of section 489-F PPC is recent while remedy of '**civil jurisdiction**' for recovery on cheque is *old* one hence bail cannot be claimed as a *right* merely by saying that complainant (holder) has a remedy to recover the amount. When, the law,

itself, provides a parallel remedy to resort criminal proceedings then the complainant cannot be bound down to seek his remedy *only* by approaching the civil court. As regards delay in lodging of the FIR is concerned, the counsel explained that same was occurred as applicant/accused engaged complainant in negotiations, hence argument of learned counsel for applicant/accused regarding delay in lodging of FIR is of no avail.

10. The mere fact that the offence for which the applicant is charged does not attract the prohibitory clause of section 497, Cr.P.C. cannot per se make him entitled to the concession of bail. Grant of bail in such like cases is not a rule of universal application as each case merits decision on the basis of its own facts and circumstances. Reliance in this respect may advantageously be placed on the cases of **Muhammad Siddique v. Imtiaz Begum and 2 others (2002 SCMR 442)** and **Shameel Ahmed v. The State (2009 SCMR 174)**. Worth to add that in case of Shameel Ahmed, considering the involvement of accused in cases of similar nature the bail for offence u/s 489-F PPC was declined, as the same situation in the instant case is.

11. As to the case laws cited by the learned counsel for the applicant, in support of her submissions, the facts and circumstances of the said cases are distinct and different from the present case, therefore, none of the precedents cited by the learned counsel are helpful to the applicant.

12. It is settled that for deciding the bail application the court has to observe the tentative assessment and deeper appreciation of evidence is not required and it will not be fair to go into discussion about the merits of the case at this juncture. Thus taking a tentative assessment of the available record, the applicant/accused is not entitled to the concession of bail at this stage of case. Accordingly, the bail plea is hereby dismissed. However, while parting the trial Court is directed to conclude the trial within a period of two months.

13. Needless to mention that the above observations are purely tentative in nature and would not prejudice to the merits of case.

JUDGE

