

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
Criminal Bail Application No.2055 of 2020

Date *Order with signature of Judge*

For hearing of Bail Application.

25.01.2021

Mr. Ali Asghar, Advocate for the Applicant.
Mr. Zahoor Shah, Deputy Prosecutor General, Sindh.
Mr. Muhammad Rizwan Saeed, Advocate for the Complainant.

ORDER

Muhammad Saleem Jessar, J:- Through this bail application, Applicant Nadeem Asif seeks his release on post arrest bail in Crime No.834/2020 of P.S Gulistan-e-Johar, Karachi, under Section 489-F, 506, 504. 34 PPC. The case, after registration, was investigated and subsequently has been challaned, which is now pending for trial before the Court of Judicial Magistrate-XI, Karachi (East) vide Criminal Case No.2658/2020 (re-the State Versus Naqash Asif and others). The applicant preferred his bail plea before the trial Court, which by means of order dated 30.11.2020 was declined and again he filed bail application before the Court of Sessions wherefrom it was assigned to the Court of 2nd Additional Sessions Judge, Karachi (East) (Criminal Bail Application No.4979/2020) which met with same fate; hence, this bail application.

The crux of the prosecution case as unfolded by complainant Iram Riaz is that she having business with accused, therefore, she gave Rs.6 million to the accused Nadim and Nakash in the year 2014-2017, on which they had paid profit to her; however, after lapse of sometime they refused to pay the profit; hence, lady complainant made demand of invested amount from accused Nadeem Asif, who issued a cheque of Rs.16 lacs in her favour. It is further alleged that after issuance of the cheque, accused delayed payment on one pretext or the other. Ultimately, complainant deposited same cheque in her account which was dishonoured on 24.03.2020 due to insufficient funds. It is further alleged that accused has been blackmailing,

threatening and pressurizing her for non-paying the amount. Accordingly, she lodged instant case on 18.11.2020 in the terms stated above.

After registration of the case, police carried out investigation and after completion of legal formalities, have submitted challan before the Court of law having jurisdiction.

Learned counsel submits that FIR is delayed for about 5 months; besides, complainant herself has admitted that the amount invested by her, was for some profit scheme to which accused had made payment of the profit and subsequently discontinued to pay the same. As far as, cheque in question is concerned, learned counsel submits that major portion of the amount in dispute stands paid to her and for remaining, accused have been beseeching for time, which she did not grant and lodged the FIR. He next submits that offence does not fall within the prohibitory clause of Section 497 Cr.P.C, therefore, case against applicant requires further inquiry. In support of his contention, he has placed reliance upon the cases of (i) *ZAFAR IQBAL Versus MUHAMMAD ANWAR and others (2009 SCMR 1488)* and (ii) *SIKANDAR ZAMAN Versus THE STATE and others (2011 SCMR 870)*.

On the other hand, learned Deputy P.G, Sindh opposes the bail application; however, could not controvert the fact that complainant herself has admitted repayment of profit by the accused.

Learned counsel for the complainant also opposes the bail application and submits that accused is habitual offender; besides, there is an agreement between the parties, which shows complainant has come with clean hands and the accused has cheated her, therefore, he does not deserve any leniency in shape of his release on bail. In support of his contention, he files number of FIRs along with said agreement, same are hereby taken on record. He also places reliance upon the cases (i) *SHAMEEL AHMED Versus THE STATE (2009 SCMR 174)* and (ii) *NIZAM HUSSAIN Versus The STATE (2019 P.Cr.L.J 1759)*.

Heard arguments, record perused. Admittedly, the cheque in question was allegedly issued by the applicant on 18.03.2020, which was presented by the complainant in bank concerned on 19.03.2020 as well as on

24.03.2020 but it was bounced, even then complainant remained mum upto 18.11.2020 i.e. the delay of about 5 months, for which no plausible explanation has been furnished by her for such an inordinate delay. The dispute between the parties had already been handed down through an agreement for which complainant has also a remedy provided by the law and the fact regarding their partnership or investment of the amount in question could be decided by the competent Court of law having jurisdiction. In case of Zafar Iqbal (Supra), Hon'ble Supreme Court of Pakistan while dealing with identical issue, has held in paras-7 to 9 of the judgment, as under;_

".....As far as section 489-F, P.P.C. is concerned it prescribes sentence of 3 years. The Courts, in such-like cases where offence falls within the non-prohibitory clause, consider favourably by granting bail as a rule but decline to do so in the exceptional cases. As far as exceptional circumstances are concerned those are to be taken into consideration depending upon each case. Reference may be made to the case of Tariq Bashir and 5 others v. The State PLD 1995 SC 34 wherein it has been mentioned that "section 497, Cr.P.C. divided non-bailable offences into two categories i.e. (i) offences punishable with death, imprisonment of life or imprisonment for ten years and (ii) offences punishable with imprisonment for less than ten years, the principle to be deduced from this provision of law is that in non-bailable offences falling in the second category (punishable with imprisonment for less than ten years) the grant of bail is a rule and refusal and exception. So the bail will be declined only in extraordinary and exceptional cases, for example:

- (a) where there is likelihood of abscondance of the accused;*
- (b) where there is apprehension of the accused tampering with the prosecution evidence;*
- (c) where there is danger of the offence being repeated if the accused is released on bail; and*
- (d) where the accused is a previous convict."*

This principle has also been reiterated in the case of Subhan Khan v. The State 2002 SCMR 1797.

8. It is also one of the important aspects of the case that an accused, charged for a criminal offence, ordinarily cannot be kept into custody for the purpose of punishment. As in the instant case the petitioner had already remained in jail for a period of six months and if the prosecution failed to establish guilt against him, his longer detention would cause him loss and his liberty would be curtailed for a considerable period without any legal justification.

9. We may further observe that under the non-prohibitory clause as well, an accused cannot claim bail as a matter of right but such facility can be extended to him as a matter of concession, simultaneously, keeping in mind the fact that the petitioner had already returned a huge portion of amount received by him from the complainant....."

As far as, contention advanced by learned counsel for the complainant that applicant is accused in number of cases of like nature, is not sufficient to deprive him of his liberty if otherwise he has made out a good prima facie case for his release on bail. The offence does not fall within the prohibitory clause, investigation has been completed and he is no more required by police for the purpose of investigation or interrogation. In such a like situation, bail becomes right and refusal will be an exception. As far as, exceptional circumstances are concerned, those are to be taken into consideration depending upon each case. Entire prosecution evidence depends upon documents which are in custody of the prosecution itself, therefore, question of his tampering with the prosecution evidence or his absconding, does not arise.

In view of above factual position, the case against applicant requires further inquiry within the meaning of sub-section 2 to section 497 Cr.P.C. Consequently, instant bail application is hereby allowed. Applicant Nadeem Asif son of Muhammad Aslam, shall be released on bail subject to furnishing his solvent surety in the sum of Rs.500,000/- (Rupees Five Lacs Only) and PR Bond in the like amount to the satisfaction of learned trial Court.

It need not to iterate that the observation(s) made hereinabove is/are tentative in nature and shall not prejudice the case of either party during trial. However, the learned trial Court may proceed against the Applicant, if he will be found misusing the concession of bail.

This Criminal Bail Application is disposed of in the terms indicated above.

JUDGE

Zulfiqar/P.A