

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Criminal Bail Application No.1298 of 2023

Date	Order with signature of Judge
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For hearing of bail application

04.9.2023

S.M Nihal Hashmi advocate for the applicant
Mr.Aamir Ali Bhutto advocate for complainant
Mr. Zahoor Shah Assistant P.G.

Through this bail application under Section 498 Cr.P.C., the applicant Mahesh Kumar has sought admission to pre-arrest bail in F.I.R No.147/2023, registered under Section 420, 489-F and 34 PPC at Police Station Mithadar, Karachi.

2. The accusation against the applicant as per contents of the FIR lodged by the Complainant is that the applicant executed an agreement with the complainant being the partner of Nayab Rice Broker and on his behalf co-accused Vikash Kumar issued 6 cheques dated 13.7.2022, amounting to Rs.60,00,000/- to be drawn through Bank-Al Habib New Chali Branch Karachi, which had been deposited by the complainant in his account but the same was dishonored with the reason of insufficient funds vide memo of bank endorsement dated 9.6.2023. Such a report of the incident was given to Police Station Mithadar, Karachi on 5.6.2023, which registered F.I.R No. 147/2023, under Section 420, 489-F and 34 PPC. The earlier bail plea of the applicant has been declined by the learned IInd Additional Sessions Judge (South) Karachi vide order dated 14.6.2023 in Criminal Bail Application No. 1950/2023.

3. It is inter-alia contended by Mr. S.M Nihal Hashmi, 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. He has further argued that the applicant/accused has no concern with the complainant; and, the alleged business transaction and/or offense as there is no authentic evidence/proof against the applicant/accused, nor he has issued any cheque to the complainant, hence the matter requires further inquiry. Learned counsel denied having executed the alleged agreement dated 13.8.2022 with the complainant; that the above-mentioned cheques had been issued by co-accused Vikash Kumar, however, a false FIR has been lodged against the applicant based on the alleged fake agreement without any rhyme and reason. He has

further contended that there is an inordinate delay of about 09 months in lodging the FIR without a plausible explanation by the complainant. Learned counsel has raised his voice of concern about the apathy of the learned trial Court to non-suit the applicant, having full knowledge that the applicant did not issue any cheque in favor of the complainant, and left him in the lurch. He has further argued that the applicant obtained pre-arrest bail from this Court on 15.6.2023 and it has become transparent that the matter in hand, ex-facie, seems to be civil, as it is evident from the contents of the F.I.R that there was a civil transaction between the co-accused Vikash Kumar and complainant, however; the complainant averred in his complaint that applicant has cheated him by executing alleged agreement ensuring that the cheques of the huge amount in respect of business transaction will be honored. Learned counsel emphasized that 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 to 3 years or with fine or both, therefore, the complainant cannot ask to effect any recovery of the amount involved in the cheques, but also the amount, whatsoever high it is, would not increase the volume and gravity of the offense, which factum brings the case of such nature outside the scope of prohibitory clause of section 497, Cr.P.C. learned counsel asserted that 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 issuer of the cheque is often forced to surrender to their illegal demands and in the said manner, the provisions of this inserted section of the law are being misused. Per learned counsel securing the money in such a manner would be termed extortion, therefore the present FIR is based on malafide intention and ulterior motives, and the present case against the applicant requires further inquiry. He lastly prayed for allowing the bail application.

4. The learned counsel for the complainant has raised his no objection if the bail of the applicant is confirmed. Learned APG has adopted the point of view of the complainant on the same analogy.

5. I have heard learned counsel for the parties and with their assistance examined the documents and read section 420, 489-F/34 PPC applied by the prosecution in the present case.

6. I am cognizant of the fact that the grant of pre-arrest bail is an extraordinary remedy in criminal jurisdiction; it is the diversion of the usual course of law, arrest in cognizable cases; protection to the innocent being hounded on trump-up charges through abuse of process of law, therefore the accused seeking judicial protection is required to reasonably demonstrate that intended arrest is calculated to humiliate him with taints of mala fide; it is not a substitute for post-arrest bail in every run of the mill in criminal case as it seriously hampers the course of the investigation. However, in the present case, it appears that in the F.I.R. and challan prosecution has applied section 420,489-F/34 P.P.C. which does not fall within the prohibitory clause of section 497 Cr. P.C. On the subject issue, the Supreme Court has already decided the legal issue of the subject matter in the cases of Riaz Jafar Natiq Vs. Muhammad Nadeem Dar and others (2011 SCMR 1708), Abdul Hafeez vs. The State [2016 SCMR 1439], Dr. Abdul Rauf Vs. The State [2020 SCMR 1258] and Muhammad Ramzan vs. State [2020 SCMR 717], thus no further deliberation is required on the part of this Court.

7. Prima facie as yet no proof has been tendered by the complainant to show that the amount of Rs.60, 00000/- was owed by the complainant toward the applicant, and in lieu thereof the applicant had issued the subject 9 cheques, though the complainant was well aware of the factum that the purported cheques were issued by co-accused Vikash Kumar proprietor of Nayab Rice Broker in favor of the complainant. Besides the complainant has not produced any document to show at this stage, whether the applicant was/is a member/director of Nayab Rice Broker and all were/are in league with each other to cheat the complainant of his legitimate amount. Even the prosecution has not produced sufficient material to attract the element of cheating on the part of the applicant. As far as the ingredients of Section 489-F of the Code are concerned the subject cheques were issued by Vikash Kumar for encashment in favor of the complainant and the applicant has neither been shown as co-signatory nor privy to the alleged contract/agreement. Merely relying upon the alleged agreement does not justify invoking section 420 PPC, which is required to be trashed out by the trial Court after recording the evidence of the complainant

8. In the instant case, prima facie, the circumstances indicate that the cheques in question were issued to the complainant by Vikash Kumar towards payment of an alleged business transaction, and the applicant has been shown as guarantor, however, the applicant has denied having signed such agreement but complainant succeeded in lodging F.I.R No.147/2023,

under Section 420, 489-F and 34 PPC at Police Station Mithadar, Karachi, though the alleged offense took place on 15.9.2022 and reported to police after approximately Nine months late i.e. 5.6.2023.

9. Prima facie, the complainant had tried to convert a civil dispute into a criminal case as per the agreement cited supra; and the learned trial Court has to evaluate the same judiciously, independently, whether the relevant offense is attracted or otherwise based on purported agreement. Even otherwise, 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 5 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 Vikash Kumar about the business transaction and in lieu thereof received the subject cheques.

10. As far as the liability of the applicant is concerned, the same is to be judicially seen by the trial Court after recording the evidence to the extent whether the applicant is one of the directors and /or proprietor of the Nayab Rice company and equally responsible to return the amount to the complainant as guarantor. In the facts of the present case, such an assessment can be made at the trial to evaluate whether any improper benefit, if at all, has been derived by the applicant, and whether the aforesaid Nayab Rice company is to be prosecuted or only a person who allegedly signed the cheques could be responsible under the law. This aspect of the matter cannot be determined at the bail stage in the present case; however, the trial court would be in a better position to thrash out the aforesaid analogy under the law.

11. At this stage it is important to note that Section 489-F of PPC is not a provision that is intended by the Legislature to be used for recovery of an alleged amount through the present proceedings. It is only to determine the guilt of a criminal act and award of a sentence, fine, or both as provided under Section 489-F PPC. On the other hand, for recovery of any amount, civil proceedings provide remedies, inter alia, under Order XXXVII of CPC. The Supreme Court has held in the recent judgment that commercial integrity is an ethical standard that would require evidence for establishing, its absence in the conduct of an accused to a degree that constitutes dishonesty by him within the meaning of section 489-F, P.P.C.

12. For what has been discussed above, this bail application is accepted and the earlier ad-interim pre-arrest bail granted to the applicant

vide order dated 15.6.2023, is hereby confirmed, against the surety bond already furnished, however, the applicant shall appear before the Trial Court on every date of hearing without fail.

13. All the observations made hereinabove are tentative and shall have no bearing on the final determination of guilt or innocence by the trial Court.

JUDGE