ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Bail Application No.452 of 2024

Date	Order with signature of Judge

For hearing of bail application

Date of hearing and order: **04.7.2024**

Mr. Ghulam Fareed advocate for the applicant alongwith applicant
Mr. Muntazir Mehdi, Additional PG alongwith IO/ASI Sajid Ali, PS Nabi Bakhsh, Karachi
Complainant Muhammad Nawaz present in person

O R D E R

Adnan-ul-Karim Memon, J:- Through this bail application under Section 498 Cr.P.C., the applicant Mehboob has sought admission to pre-arrest bail in F.I.R No. 230/2023, registered under Section 489-F/34 PPC at Police Station Nabi Bux Karachi. The earlier bail plea of the applicant was declined by the IV Additional Sessions Judge (South) Karachi vide order dated 17.02.2024 in Cr. Bail Application No.4407/2024 on the premise that grounds the applicant failed to prove malafide on the part of the complainant in terms of Negotiable Instrument. Prima facie this finding is against the dicta laid down by the Supreme Court in the unreported case of *Muhammad Anwar Vs. The State* decided recently vide order dated 3.6.2024 an excerpt of the order is reproduced:-

> ***"8. This Court has held in the case titled Mian Allah Ditta, that 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 the cheque with dishonest intent, the cheque should be towards repayment of a loan or fulfillment of an obligation, and lastly, the cheque is dishonored. Furthermore, this Court in the case of Abdul Rasheed v. The State, [2023 SCMR 1948] the Supreme Court has ruled as follows:***
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> > ***"Even otherwise, even if the complainant wants to recover his money, Section 489-F of PPC is not a provision which is intended by the Legislature to be used for recovery of an alleged amount. In view of the above, the question of whether the cheques were issued towards repayment of the loan or fulfillment of an obligation within the meaning of Section 489-F PPC is a question, which would be resolved by the learned Trial Court after the recording of evidence. The maximum punishment provided under the statute for the offense under Section 489-F PPC is three years and the same does not fall within the prohibitory clause of Section 497 Cr.P.C. It is settled law that grant of bail in the offenses not falling within the prohibitory clause is a rule and refusal is an exception."***

> ***9. Liberty of a person is a precious right that has been guaranteed by the Constitution of the Islamic Republic of Pakistan, 1973. By now it is also well settled that it is better to err in granting bail than to err in refusal because ultimate conviction and sentence can repair the wrong resulting from a mistaken relief of bail; This court in the case of Chairman NAB,3 has ruled as follows:***
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> ***"To err in granting bail is better than to err in declining; for the ultimate conviction and sentence of a guilty person can repair the wrong caused by a mistaken relief of bail, but no satisfactory reparation can be offered to an innocent person on his acquittal for his unjustified imprisonment during the trial."***

2. The charge against the applicant as per contents of the FIR lodged by the complainant Muhammad Nawaz Khan Niazi is that the applicant/accused issued one cheque amounting to Rs.36,30,000/- in his favor in connection with the Purchasing vehicles, which was deposited by him in his account at the Sindh Bank Limited Khada Market Karachi Branch for encashment but the same was dishonored with the reason of insufficient funds. Such a report of the incident was given to Police Station Nabi Bux Karachi on 12.12.2023, which registered F.I.R No.230/2023, under Section 489-F/34 PPC.

3. It is inter-alia contended by 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; that there is no private witness cited in the FIR by the complainant and the matter is purely blackmailing; that the incident took place on 12.12.2023 and FIR was lodged on 12.12.2023 after deliberation with malafide intention and ulterior motives; that the alleged offense does not fall within the ambit of prohibitory clause of Section 498 Cr. P.C. He further submitted that the business terms have been admitted and the said cheques were issued as security not for encashment hence no case under Section 489-F PPC is made out. He submitted that the trial is at the verge of conclusion as such at this stage sending the applicant behind bars is not a requirement of law. Lastly prayed for allowing the bail application. He lastly prayed for allowing the bail application.

4. Mr. Muntazir Mehdi, learned APG as assisted by the complainant has opposed the application and states that the learned trial Court has rightly dismissed the bail plea of the applicant and that the applicant does not deserve the concession of pre-arrest bail at this stage. He added that the accusation against the applicant is well founded, and the prayer of the applicant for the grant of pre-arrest bail is liable to be dismissed. Per learned counsel for the complainant, there are four ingredients of Section

489-F PPC, firstly, dishonest issuance of cheque, secondly, cheque must be issued for repayment of loan or discharge of liability, thirdly, cheque must be dishonored and fourthly, it must be dishonored at the fault of accused and not on the part of Bank. Learned counsel emphasized that the word dishonestly is defined under section 24 of the Pakistan Penal Code, which provides, that whoever does anything to cause wrongful gain to one person to cause wrongful loss to the other person is said to do that thing dishonestly. Since on behalf of the applicant/accused the post-dated cheque was issued but the same was dishonored, and when he knew that, he made no arrangements for encashment of the cheque just to cause wrongful gain to himself and wrongful loss to the complainant thus section 489-F PPC is fully applicable in this case; that the cheque leaf was not issued without consideration as per Section 118 of the Negotiable Instruments Act. It is a settled principle of law that, while deciding bail application, tentative assessment is to be made, deeper appreciation avoided and only the contents of the FIR, and statements of PWs are to be looked into and there is sufficient material available with the prosecution to connect the applicant/accused with the commission of the alleged offense, therefore, bail application of the applicant was rightly rejected by the learned trial Court vide order dated 17.2.2024. He added that considerations for pre-arrest bail are different from that of post-arrest bail. He further submitted that Pre-arrest bail is an extraordinary relief, whereas post-arrest bail is an ordinary relief. While seeking pre-arrest bail it is the duty of the accused to establish and prove malafide on the part of the Investigating Agency or the complainant which he has failed to prove in the present case; that bail before the arrest is meant to protect innocent citizens who have been involved in heinous offenses with malafide and ulterior motive. Admittedly the applicant's bail application was dismissed by the trial court on merit. He added that the subject crime can safely be considered to be a crime against the whole society and granting pre-arrest bail to such like person would amount to encouraging the heinous crimes in the society. He next argued that the prosecution is equipped with sufficient incriminating material to connect the applicant with the commission of the offense. He further submitted that the applicant is also involved in other criminal cases of similar nature, therefore, according to him, the applicant is habitual of committing forgery and fraud. He prayed for the dismissal of this bail application.

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

6. There is no cavil to the proposition that considerations for pre-arrest bail are different from that of post-arrest bail. Pre-arrest bail is an extraordinary relief, whereas post-arrest bail is an ordinary relief. While seeking pre-arrest bail it is the duty of the accused to establish and prove malafide on the part of the Investigating Agency or the complainant. However, at the same time, this Court can look into the merits of the case so far as allegations and counter-allegations are concerned, if the same are based on mala fide intention and ulterior motives, therefore, this bail application can be heard and decided on merits.

7. In the present case, it is claimed that the applicant/accused issued one cheque amounting to Rs.36,30,000/- in favor of the complainant in connection with the Purchasing vehicle, which was deposited by him in his account at the Sindh Bank Limited Khada Market Karachi Branch for encashment but the same was dishonored with the reason of insufficient funds. However, in the present case, this Court has to see whether the trial is in progress or otherwise in this regard, the learned counsel for the applicant has filed a statement along with a copy of the deposition of complainant Muhammad Nawaz Khan with the narration that the complainant has deposed that original files of six vehicles were/are in his possession till today; that the complainant added that he received 92 lacs from the applicant. He also admitted that he made so many complaints against several persons in the offenses under Section 406/420/489-F PPC. He also admitted that he has business dealing with the accused persons. If this is the position of the case, when the trial is in progress it would be more appropriate to direct the trial Court to conclude the proceedings within one month in terms of law laid down by the Supreme Court.

8. The question involved in the present proceedings is whether the alleged amount could be recovered by sending the applicant behind bars for an indefinite period for an offense punishable by up to three years.

9. Primarily, to prove the charge against an accused under Section 489-F. P.P.C. all the ingredients of section 489-F, P.P.C. must be proved through cogent evidence and beyond any shadow of a doubt, however, in this case, the applicant/accused issued two cheques amounting to Rs.20,00,000/- in favor of the complainant in connection with the School business transaction, which was deposited by him in his account at the Meezan Bank Phase-IV DHA, Karachi for encashment of the same but the same were dishonored with the reason of insufficient funds. In principle, provisions of Section 489-F, P.P.C. will only be attracted if the following essential ingredients 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 defense 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.

10. The controversy between the parties seems to be civil as per narration made by the complainant in the FIR, however, the law on the aforesaid subject is now settled and 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 a fine or with both.

11. It is also settled now that the offense under Section 489-F, P.P.C. is not made out on the 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.

12. 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.

13. 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.

14. 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.

15. There is a delay in lodging the F.I.R. 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 the school business based on loss and profit, 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 P.P.C. 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 of time and lodged an FIR by showing a different story, which needs a thorough probe by the trial Court as the applicant has based his case on malfide intention of the complainant and police.

16. Coming to the main case, the intent behind the grant of pre-arrest 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.

17. 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)** and *Khan Asfandyar Wali and others v. Federation of Pakistan* **(PLD 2001 SC 607)**.

18. 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.

19. In view of the facts and circumstances narrated above as well as keeping in view that dicta laid down by the Supreme Court in the unreported case of *Muhammad Anwar Vs. The State* as discussed supra and progression in the trial, I am of the considered view that the learned Court below has erred in appreciation of the law on the subject while rejecting the pre-arrest bail of the applicant, hence, the same is set at naught, as a consequent, I am of the considered view that let the trial Court record the statement of remaining witnesses within one month as the case of the applicant is fully covered under the dicta laid down by the Suprme Court in the case of Rehamatullah v The State 2011 SCMR 1332.

20. For the above reasons, this bail application is allowed in the same terms vide order dated 1.2.2024 passed by this Court with an additional surety amount of Rs. 300,000/ - (Rupees three lacs) to be furnished by the applicant with the Nazir of this Court within one week. The trial court shall conclude the trial within two months positively and if the charge is not framed the same shall be framed on the date so fixed by the Court.in case of failure, the matter shall be referred to the competent authority on the administrative side for appropriate order.

JUDGE