ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Criminal Bail Application No.1012 of 2024

Date	Order with signature of Judge

For hearing of bail application

For hearing and Order: 19.07.2024

Mr. Aftab Ahmed B. Channa, advocate for the applicant along with applicant.

Nemo for the complainant though notices have been issued.

Ms. Seema Zaidi APG.

O R D E R

Adnan-ul-Karim Memon, J:- Through this bail application under Section 498 Cr.P.C., the applicant Muhammad Imran Ali Qureshi has sought admission to Pre-arrest bail in F.I.R No.436/2022, registered under Section 489-F PPC at Police Station Baloch Colony Karachi.

2. The earlier bail plea of the applicant has been declined by the XI-Additional Sessions Judge Karachi South vide order dated 20.03.2024 in Criminal Bail Application No.762 of 2024 on the premise that the applicant misused the concession of bail. Prima facie this finding is against the dicta laid down by the Supreme Court in the unreported case of *Muhammad Anwar v. The State* decided recently vide order dated 03.6.2024. 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."***
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> ***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, 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."***

3. The accusation against the applicant is that he obtained Rs.2,95,000/- in cash from the complainant for certain purposes, on demand, the applicant issued him a cheque, No.54135621, amounting to Rs.200,000/- from Allied Bank, promising to pay the remaining amount later. However, when the complainant presented the said cheque in his account (No.10830981015529022) at Bank Al Habib, Gujjar Chowk Manzoor Colony, Karachi, on 04.12.2022, it bounced due to incorrect and mismatched signatures, consequently, the complainant filed an FIR on 21.12.2022.

4. The learned counsel for the applicant, contended that the applicant is innocent and has been falsely implicated in the present case with malafide intention as such the complainant lodged a false FIR against the applicant to recover his alleged amount by invoking Section 489-F PPC; he next contended that the story as set out by the complainant in the FIR is concocted and fabricated. It is further contended that the alleged cheque was issued on 04.12.2022, while the FIR was lodged on 21.12.2022 i.e. after the delay of approximately 17 days, for which no reasonable explanation has been furnished. Learned counsel has raised his voice of concern about the apathy of the learned trial Court to non-suit the applicant and left him in the lurch on the premise that offense under Section 489-F was/is attracted and the applicant purportedly misused the concession of bail without deciding the *lis* on merits. Learned counsel added that Section 489-F PPC is non-bailable, however, punishable for up to three years and does not fall within the ambit of the prohibitory clause of Section 497(1) Cr.P.C. He added that the alleged cheque including the whole cheque book was obtained by the complainant through duress and pressure while keeping the applicant / accused under illegal detention, but the alleged signature was never made by the applicant / accused on the cheque leaf and the same has been forged by the complainant as reported by the Bank officials vide Bank memo dated 26.12.2022 with the endorsement that signature was unauthorizec / differ from specimen on record and inspite of that the police in connivance with the complainant lodged FIR under Section 489-F PPC, which is apathy on the part of police and complainant. He argued that the applicant / accused has never issued the alleged cheque to the complainant and he is not under any liability to pay a single penny to the complainant. He next submitted that

there is no business transaction or any other transaction between the applicant / accused and the complainant, who has fabricated a false story. It is urged that the applicant / accused was threatened, pressurized, and harassed by the complainant and he was continuously restrained by the complainant and his fellowmen not allowing him to appear before the trial Court to join the trial as well as to proceed with the bail matter. The learned counsel relied upon the statement dated 11.6.2024 along with case diaries of the trial Court and argued that applicant / accused has never absconded from the trial, nor misused the concession of pre-arrest bail as opined by the trial Court as the diary sheet explicitly show that the applicant joined the trial on 28.5.2024 to 13.6.2024, however, during the intervening period, the applicant had been restrained by the complainant from attending the trial Court as well as to attend pre-arrest bail proceedings, which is illegal action on his part. He emphasized that the applicant / accused has also instituted Civil Suit No.928/2024 against the complainant for cancellation of cheques, which is still pending adjudication before III-Senior Civil Judge Karachi East. The applicant / accused has also instituted Criminal Misc. Application No.2774/2023 against the complainant for his harassment, which was later on withdrawn by the previous counsel without his knowledge under the pressure of the complainant, who has access to advocate community of the City Court and are causing undue harassment to the applicant / accused. He argued that the applicant / accused fear that if he is arrested by the police officials, he will be humiliated, harassed, socially disgraced, and mentally tortured, as the police are raiding the house of the applicant / accused and his relatives for the arrest of the applicant / accused. He submitted that the fundamental rights of the applicant guaranteed under the Constitution of the Islamic Republic of Pakistan 1973 are being infringed by the complainant and as such the applicant is left with no other remedy under the law, but to approach this Court. He prayed for allowing the bail application.

5. Ms. Seema Zaidi APG has submitted that notices have been issued to the complainant vide order dated 11.5.2024, 20.5.2024 and on 11.6.2024, complainant put his appearance through his counsel and matter was adjourned on his request for 08.7.2024 and on the said date he was called absent and fresh notice was issued for today's hearing, but he is not turning up, however, she has refuted the assertion made by the applicant's counsel and vehemently opposed the bail application on the ground that the applicant intentionally and deliberately issued the cheque to the complainant, which was later dishonored, thereafter the applicant kept the complainant on false hopes and also issued threats of dire consequences,

compelling him to lodge report with police. She further submitted that the complainant is unable to recover his huge amount from the applicant. She further submitted that an FIR was lodged and the applicant obtained pre-arrest bail which was later dismissed from the trial Court as the applicant became a fugitive from the law and a challan was submitted under Section 512 Cr.P.C. She added that there is no malafide on the part of the complainant as such no indulgence of this Court is made out. She next argued that all ingredients required for constituting an offense punishable under Section 489-F PPC are fully available in the instant case and keeping in view the material available on record the trial Court declined bail to the applicant. She, therefore, prayed that the bail application of the applicant is liable to be dismissed on the same analogy.

6. I have anxiously considered the arguments advanced by the respective parties and scanned the entire record with their assistance and case law cited at the bar.

7. The allegation against the applicant / accused is that he issued a cheque to the complainant, which on presentation was dishonored, and, therefore, a criminal case under Section 489-F, PPC was registered against him. 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 parties, and the applicant has filed Civil Suit for cancellation of the purported cheque, however; the complainant averred in his complaint that applicant has cheated him by issuing false cheque of the huge amount in respect of certain transactions that he is not giving him valuable money since.

8. The question involved in the present proceedings is whether the alleged amount could be recovered by detaining the applicant for an indefinite period. Section 489-F, PPC was originally inserted in Pakistan Penal Code, 1860 by the Ordinance LXXII of 1995, providing conviction for counterfeiting or using documents resembling National Prize Bonds or unauthorized sale thereof and while the same was part of the statute, again under Ordinance LXXXV of 2002, another Section under the same number viz. 489-F of PPC was inserted on 25.10.2002 providing conviction and sentence for the persons guilty of dishonestly issuing a cheque towards repayment of loan or fulfillment of an obligation, which is dishonored on its presentation.

9. In that newly inserted Section 489-F of PPC, 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 up to 3 years or with a fine or both. The cheque amount involved in the offense under such

a section is never considered stolen property. Had this been treated as stolen property, the Investigating Agency would certainly have been equipped with the power to recover the amount also as is provided in Chapter XVII of PPC relating to offenses against property. The offense under Section 489-F, PPC is not made 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 PPC, regarding offenses relating to documents and to trade of property marks. When on 25.10.2002, Section 489-F, PPC was inserted in PPC, Order XXXVII, C.P.C. was already a part of the statute book providing the mode of recovery of the amounts subject matter of negotiable instruments, and a complete trial is available for the person interested in the recovery of the amounts of a dishonored cheque, therefore, not only that the complainant in a criminal case under Section 489-F, PPC cannot ask a Criminal Court to effect any recovery of the amount involved in the cheque, but also the amount whatsoever high it is, would not increase the volume and gravity of the offense.

10. 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, PPC.

11. I have experience that in almost every case, where an accused applies for the concession of bail in the case under Section 489-F, PPC, 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, PPC 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.

12. 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.

13. In the instant case, prima facie, the circumstances indicate that the cheque in question was issued to the complainant on 04.12.2022 for certain purposes, and that purpose has not been disclosed under what circumstances the applicant was bound to deliver a cheque to the complainant and what was the reason, in absence of such a material fact it cannot be said that there was certain obligations on the part of the applicant to fulfil and prima facie this was the reason the FIR was lodged on 21.12.2022 i.e. after the delay of approximately 17 days, which shows the intention of the police and complainant to book the applicant in 489-F PPC case.

14. Prima facie, the complainant had tried to recover his alleged amount by invoking penal action against the applicant and converted a civil dispute into a criminal case by lodging F.I.R, which is prima facie apathy on the part of the police; and now the learned trial Court has to evaluate the same factum judiciously, independently, whether the relevant offense is are attracted and could be invoked.

15. 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 a certain business, 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 PPC 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 and lodged an FIR which needs a thorough probe by the trial Court in terms of Section 497(2) Cr. P.C

16. Coming to the main case, the intent behind the grant of 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 for recording evidence of the parties so that the truth may come out. Besides 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**). The grounds raised by the learned Additional PG cannot be appreciated at this stage in terms of the ratio of the judgment passed by the Supreme Court in the case of *Muhammad Anwar* (supra).

18. The question is whether the present cash cheque can be dishonoured and attracts the provisions of Section 489-F PPC, when the concerned bank returned the memo with the endorsement that signature of the applicant was unauthorized and differ from specimen on record. So far as the dishonesty for issuing the cheque is concerned, it is for the trial Court to see each and every aspect of the case after examining the complainant and bank official within one month.

19. 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.

20. In view of the facts and circumstances narrated above, more particularly, the dicta laid down by the Supreme Court in the unreported case of *Muhammad Anwar* (supra), I am of the tentative 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 tentative view that the case of the applicant is fully covered under Section 498 Cr.PC, based on malafide intention of the police, entitling him to the concession of pre-arrest bail in the light of the ratio of the judgments passed by the Supreme Court as discussed supra.

21. For the reasons discussed supra, the instant bail application is accepted. The applicant Muhammad Imran Ali is admitted to pre-arrest bail in the same terms and conditions vide order dated 11.5.2024 with additional surety of Rs.50,000/- (Rupees fifty thousand only) and PR bond in the like amount to the satisfaction of the Nazir of this Court. However, the learned trial Court would be at liberty to cancel his bail application if the applicant misuses the concession of bail. The trial Court is directed to

examine the material witnesses positively within one month. Such compliance report be submitted through the MIT-II of this Court.

22. The observation recorded hereinabove is tentative and shall not prejudice the case of either party at trial.

JUDGE

Shafi