ORDER SHEET.
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT

Criminal Misc. No. 683-B/2022
Muhammad Arslan Saeed
Versus
The State, etc.

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	24.06.2022:	Mr. Adeel Arshad, Advocate for petitioner. Mr.Atif Nisar, Advocate for respondent. Mian Zain Qureshi, State Counsel with Abdul Ahad, A.S.I

Through the instant bail petition, the petitioner is seeking pre arrest bail in FIR No. 259 dated 22.03.2022 under Section 406 PPC at P.S. Sihala, Islamabad.

2. According to the allegations set-forth in the FIR, the complainant namely Mst. Kalsoom Akhtar had invested an amount of Rs. 4600,000/- in the business with the petitioner; that by the said amount, the latter purchased a house in the year 2017 and subsequently sold it in 2018 but did not pay the amount to the complainant; that on her demand and due to intervention of notables, petitioner got executed an affidavit wherein he acknowledged the claim of the complainant and its receipt as a trust and return of the same within one year. According to the complainant, the petitioner usurped her hard-earned money and committed criminal breach of trust.

3. The learned counsel contended that the petitioner has falsely been implicated in the instant case as no such agreement was ever executed between the complainant and the petitioner; that bare perusal of the agreement reveals that it is civil dispute between the parties; that the complainant in order to exert pressure upon the petitioner, got registered the subject FIR in connivance with the local police; that even otherwise the offence does not fall within the ambit of prohibitory clause of Section 497 Cr.P.C; that the petitioner has already joined the investigation and no more

required for further probe; that incarceration of the petitioner would serve no purpose as the alleged document is already in the possession of police and that nothing is to be recovered from his possession, therefore, petitioner is entitled to the concession of pre-arrest bail. Reliance is placed upon case law reported as 2022 MLD 444, 2017 P Cr. LJ 133 (Islamabad), 2020 P Cr. LJ 1661 and PLD 2021 SC 708 & 733.

4. Learned counsel for the respondent assisted by learned State Counsel opposed the bail petition by contending that the petitioner has defrauded the complainant and as such not entitled to extra ordinary relief; that recovery of original stamp paper is yet to be effected; that case of the complainant falls under illustration-C of section 406 PPC as the petitioner has allegedly deprived an old aged lady of her valuable property, as such not entitled to extra ordinary concession of pre-arrest bail.

5. Arguments heard, record perused.

6. The petitioner is accused of criminal breach of trust. The document "*affidavit*", on the basis of which instant FIR stood registered is being questioned by the petitioner in terms that he was forced to sign the same while, on the other hand, the complainant along with two witnesses in their respective statements recorded under section 161 Cr.P.C corroborated the execution of the affidavit and its contents as well.

7. It also emerges from the record that the petitioner has filed suit for cancellation of the said document. The recovery memo dated 22.02.2022 shows that photocopy of the affidavit was taken in possession by the police which the complainant herself produced and it is also evident form the said memo that the original stamp paper is in her possession and she has committed to produce the same before the Court, therefore, the question of recovery of the said document from the petitioner does not arise.

8. Furthermore, in presence of allegation and counter response, the fact is that nothing incriminating has yet come on record which could be made basis even to draw tentative assessment with regard

to involvement of the petiotner in the commission of alleged offence and that there is no opinion of the prosecution with regard to guilt or otherwise of the petitioner, therefore, at present there exists no justification to hold the petitioner disentitled to the extra ordinary concession of pre arrest bail particularly when nothing is to be recovered from his possession.

9. The Hon'ble apex Court in a recent pronouncement in the case of ***Shahzada Qaiser Arfat alias Qaiser v. The State and another"*** **(PLD 2021 Supreme Court 708)** has graciously held that:-

> *"The power of the High Courts and the Courts of Sessions to grant pre-arrest bail, first and foremost, must be examined in the constitutional context of* ***liberty, dignity, due process and fair trial****. Pre-arrest bail is in the nature of a check on the police power to arrest a person.* ***The non-availability of incriminating material against the accused or non-existence of a sufficient ground including a valid purpose for making arrest of the accused person in a case by the investigating officer would as a corollary be a ground for admitting the accused to pre-arrest bail****, and vice versa. Reluctance of the courts in admitting the accused persons to pre-arrest bail by treating such a relief as an extraordinary one without examining* ***whether there is sufficient incriminating material available on record to connect the accused with the commission of the alleged offence and for what purpose his arrest and detention is required during investigation or trial of the case, and their insistence only on showing mala fide on part of the complainant or the Police for granting pre-arrest bail does not appear to be correct****, especially after recognition of the right to fair trial as a fundamental right under Article 10A of Constitution of Pakistan, 1973. Protection against arbitrary arrest and detention is part of the right to liberty and fair trial. This Court has, in many cases, granted pre-arrest bail to accused persons after finding that there are no reasonable grounds for believing their involvement in the commission of the alleged offences and has not required independent proof of mala fide on part of the Police or the complainant before granting such relief. Despite non-availability of the incriminating material against the accused, his implication by the complainant and the insistence of the Police to arrest him are the circumstances which by themselves indicate the mala*

> *fide on the part of the complainant and the Police, and the accused need not lead any other evidence to prove mala fide on their part."*
> *(Emphasis added)*

10. The ratio set in the case of ***Shahzada Qaiser Arfat (supra)*** guides to hold that if there is non-availability of incriminating material against an accused, his/her implication by the complainant or the persistence of the police to arrest him, would be construed as the circumstances, which by themselves indicate malafide on the part of the complainant or the police and in that eventuality, an accused need not to lead any evidence to substantiate the malice or malafide on part of the complainant or the police.

11. In view of above tentative assessment, petitioner has succeeded to make out a case for grant of pre arrest bail at this stage. **However, in case any incriminating material connecting the petitioner with the commission of alleged offence is surfaced, the prosecution would be at liberty to seek cancellation of his bail in due course in accordance with law**.

12. Consequently, instant criminal misc. is **allowed** and ad-interim pre-arrest bail granted to the petitioner vide order dated 31.05.2022 is confirmed subject to his furnishing fresh bail bonds in the sum of Rs.30,000/- with one surety in the like amount to the satisfaction of the learned trial Court.

13. The observations made hereinabove are tentative in nature and shall not prejudice the case of either party.

//Kamran//