HCJD/C-121

ORDER SHEET

ISLAMABAD HIGH COURT
ISLAMABAD

CRL. MISC. NO.476-B/2014

REHMAN SHAH
VERSUS
THE STATE

S.No. of order/ Proceeding	Date of hearing	Order with signature of Judge, and that of parties or counsel, where necessary.

29-08-2014 Mr Shoukat Mehmood Malik, advocate for the petitioner.
Mr Talat Abbas, Standing Counsel.
Sardar Abdul Sami, advocate for the complainant.
Mr Falak Naz S.I. with record.

The petitioner Rehman Shah son of Khair Ali Shah has sought post arrest bail in case, F.I.R. No.198, dated 23-05-2014, registered under Section 489-F of Pakistan Penal Code, 1860 (hereinafter referred to as "PPC") at Police Station Ramna, Islamabad.

2. Brief facts as narrated in the FIR are that the petitioner, who is stated to be a property agent, was approached by the complainant for the purchase of a plot. The complainant paid Rs. 4.0 million but the petitioner could not arrange a plot. On demanding the return of the money, petitioner gave the complainant a cheque which has dishonoured on presentation. Hence, the FIR.

3. The learned counsel for the petitioner contends that; the petitioner has had no obligation towards the complainant; no offence is made out under section 489-F of PPC; the cheque was issued as a guarantee; the petitioner is innocent and has no concern with the alleged offence; the offence does not fall within the prohibitory clause of Section 497 Cr.P.C.; the investigation is complete and petitioner is no more required for the purposes of investigation; states that there

are four other cases registered against and he is on bail in the said cases; suit for recovery is pending in the court of Additional District Judge, Islamabad; places reliance on 2009 SCMR 1488, 2009 SCMR 174, 2011 SCMR 178, 2011 SCMR 870; hence he prays for enlarging the petitioner on bail.

4. The learned Standing Counsel assisted by the learned counsel for the complainant appeared alongwith Falak Naz S.I. and opposed the bail. It is contended that; it is evident from the record that there was an existing business relationship between the accused and the complainant to whom the cheque was issued; the conduct of the accused brings his case within the exception to the general rule in case of offences falling within the non-prohibatory clause of section 497 Cr.P.C; the cheque has been issued by the accused; petitioner is a "habitual offender" as other cases are registered against him; reliance is placed on *2012 MLD 799*. The learned Standing Counsel and the Investigating Officer gave reference of F.I.Rs. i.e.

i) F.I.R. No.203 dated 18-06-2014 registered under Section 489-F PPC at Police Station Shalimar,
ii) F.I.R. No.342 dated 08-11-2013 registered under Section 489-F PPC at Police Station Shalimar,
iii) F.I.R. No.345 dated 18-10-2012, registered under Section 489-F PPC at Police Station Shalimar, and
iv) F.I.R. No.634 dated 03-11-2010 registered under Section 489-F PPC at Police Station Shalimar.

5. The learned Standing Counsel states that a huge amount is involved and, therefore, in the circumstances the accused is not entitled to bail.

6. In rebuttal, the learned Counsel for the petitioner contends that the amount for which the alleged cheque has been issued is not relevant for the purposes of grant of bail. He placed reliance on several judgments of various High Courts. It is further contended that the proceedings in which bail has been sought, is for determining the criminal guilt and not for recovery of the amount for which appropriate proceedings have been initiated under the law, inter alia, Order-XXXVII C.P.C.

7. After giving careful consideration to the arguments of the learned counsels for the parties, finding of this Court are as follows:

8. The offence included in the FIR i.e. Section 489-F, PPC is, admittedly of the category which falls within the non-prohibitory clause of Section 497 Cr.P.C. By now the law and principles for granting bail in such cases are well settled. It is important to note that in the case of *'Zafar Iqbal Versus Muhammad Anwar and others'* (2009 SCMR 1488), a larger Bench of the Honourable Supreme Court has elucidated the principles for considering the grant of bail, where offences fall within the non-prohibitory clause. In the light of the said principles it has been held that where offences fall within the non-prohibitory clause, the granting of bail has to be considered favourably as a rule, but may be declined in exceptional cases. Examples, though not exhaustive, of such extraordinary and exceptional cases have further been listed as follows:

i) Where there is likelihood of abscondance of the accused;
ii) Where there is apprehension of the accused tampering with the prosecution evidence;
iii) Where there is danger of the offence being repeated, if the accused is released on bail; and
iv) Where the accused is a previous convict.

9. The Hon'ble Supreme Court of Pakistan reaffirmed and reiterated the principles as laid down in the earlier judgments of *"Subhan Khan Versus the State" (2002 SCMR 1797)* and *"Tariq Bashir and five other Versus The State"* (PLD 1995 SC 34). The said principles have been consistently followed. Reliance may also be placed on the case of *Riaz Jafar Natiq Versus Muhammad Nadeem Dar and others* (2011 SCMR 1708).

10. The learned Standing Counsel has raised a question which requires consideration by this Court i.e. if an accused is involved in other cases registered

under the relevant laws, will he / she be entitled to bail and treated as a "habitual offender"?

11. The above proposition can be answered by addressing the question i.e. if the argument of the learned Standing Counsel was to be accepted, what would be the effect on the right to defence and fair trial of an accused in another case in which trial is proceeding? The presumption of innocence is the basic and fundamental pillar of criminal law. It is a universal principle that every person is to be presumed to be innocent until proved guilty. This is the basis of the right to defence of an accused, and a key to a fair trial. This cardinal principle is embedded in the fundamental right guaranteed under Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973 which declares that "For the determination of ------ in any criminal charge against him a person shall be entitled to a fair trial and due process". Fair trial and due process essentially envisages being free from Bias of every kind. A person may be facing trial in multiple cases registered under the relevant laws, and in each case he or she has an independent right to defence and to be presumed innocent unless proved guilty. If registration of a case or even multiple cases is to influence a court it will be seen as giving rise to a Bias and thus depriving such an accused of his right to a fair trial. Undoubtedly, justice is not only to be done but should be seen to be done. Even a conviction in another case may only be relevant for consideration for specific purposes, as for example, when the Court is considering enhanced punishment under section 75 of the PPC, because that is what the legislature has provided. The august Supreme Court in the case, *Mounder versus The State, PLD 1990 SC 934*, has held that the mere factum of registration of cases is not sufficient for forming an opinion under the fourth proviso to section 497(1) Cr.P.C. In the case titled, *Jafar & Jafari Versus The State (2012 SCMR 606),* it was held that the mere registration of a case by itself is not sufficient to declare an accused as a habitual offender, unless it is proved / established that he has been convicted in any of the said cases. In order to safeguard the valuable rights to

defence and fair trial of the accused, the Court cannot allow itself to be prejudiced or in any manner influenced by the registration of another case, multiple cases or even conviction. Any such influence will deny an accused the right to a fair trial and due process, as it is inherent in the said rights that the Court is not only free from bias but ought to be seen as such.

12. It is a settled principle of law that each case has to be seen through its own facts and circumstances. The grant of bail, no doubt, is the discretion vested in a Court, which cannot be exercised in a manner that is arbitrary, fanciful or perverse. If an accused has made out a case for the grant of bail on reasonable grounds, then refusing the same merely because he is convicted in some other case would give rise to the factor of bias and, thereby, take away the right of such an accused to defence, due process and above all, fair trial. The presumption of innocence until proved guilty will also be negated. It will result in an absurd situation in the sense that conviction in one case would be deemed as a conviction in every case. On the same analogy, the accused will never be able to get bail in other cases and, therefore, remain incarcerated without trial. This Court is, therefore, not impressed with the arguments of the learned Standing Counsel that being involved in multiple cases will disentitle the petitioner to the concession of bail by considering him as "habitual offender".

13. The *case of Shameel Ahmed Versus The State*, reported *as (2009 SCMR 174)*, cited by the learned Standing Counsel has been examined and it has been found distinguishable on facts and circumstances. It was the overall conduct of the accused which was relevant and weighed by the august court, inter alia, his abscondance for more than a year without obtaining bail, and ultimately when he did get bail; it was by suppressing material facts from the court, including other cases registered against him. Moreover, the judgment in the case 2012 SCMR 606 has been delivered by a larger Bench wherein it has been held that mere

registration of cases is not sufficient for declaring an accused as a "habitual offender". Hence, this Court is of the view that the petitioner is entitled to bail.

14. The prosecution has not placed on record any material to suggest that the accused has been previously convicted. The questions, whether there was a business relationship between the parties and any contractual commitment giving rise to the issuance of cheque, calls for further probe. At this stage and keeping in view the facts and circumstances in the present case, it would not be appropriate to be influenced by cases registered in Police Station Shalimar, as it is a cardinal principle of criminal law that a person is presumed innocent unless proved guilty. The petitioner was arrested on 23-05-2014 and since then he is behind the bars and trial has not yet commenced. The investigations qua the petitioner have already been finalized; therefore, his continued custody is not likely to serve any beneficial purpose at this stage. The amount involved in a case registered under section 489-F PPC cannot be treated as an exception of the general rule that in such cases bail shall be considered favourably. Even otherwise, section 489-F of PPC is not a provision which is intended by the legislature to be used for recovery of an alleged amount. It is only to determine the guilt of a criminal act, and award 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 PPC. It is also important to note that the offence does not fall within the prohibitory clause of sub-Section 1 of Section 497 Cr.P.C. In the light of principles and law laid down by the Honourable Supreme Court in cases where offences fall within the non-prohibitory clause of Section 497 Cr.P.C., this Court is of the view that the petitioner is entitled to bail.

15. In the circumstances as mentioned above, this petition is allowed and the petitioner is admitted to bail, subject to furnishing bail bonds in the sum of Rs.200,000/- (Rupees Two Hundred Thousand) with two sureties in the like

amount to the satisfaction of learned Trial Court. However, keeping in view the four cases registered against the petitioner, the bail is granted on the condition that he shall make personal appearance on every hearing, unless exempted by the learned trial Court. In case he violates this condition, this bail shall be recalled.

16. Needless to mention that this is tentative assessment, which shall not affect trial of this case in any manner.

(ATHAR MINALLAH)
JUDGE

Asad K/*

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