

Form No: HCJD/C-121.

**ORDER SHEET**

**IN THE ISLAMABAD HIGH COURT, ISLAMABAD**  
**JUDICIAL DEPARTMENT**

**Crl. Misc. No. 514-B of 2014**

Muhammad Abid Farooq

***Vs***

The State, etc.

S. No. of order/ proceedings	Date of proceedings	Order with signature of Judge and that of parties or counsel where necessary.
------------------------------------	------------------------	--

- 02)            **02-9-2014.** Mr Jahangir Khan Tanoli Advocate, for the petitioner.  
Mr Talat Abbas Khan, Standing Counsel.  
Complainant, in person.  
Mr Abdul Razzaq SI, with record.

The petitioner, Muhammad Abid Farooq, son of Ch. Muhammad Younis, has sought post arrest bail in case FIR No. 433 dated 10-11-2013 registered under Section 406 of Pakistan Penal Code, 1860 (hereinafter referred to as "PPC"), at Police Station Aabpara, Islamabad.

2.            Brief facts, as narrated in the FIR, are that the petitioner had obtained a loan of Rs. 1.18 million and Rs.0.6 million from the complainant. The petitioner failed to repay the loan and breached his commitment; hence, the FIR.

3.            Learned counsel for the petitioner contends that: no case is made out under Section 406 PPC, as the dispute between the parties was of a civil nature; it is obvious from bare perusal of the FIR that ingredients of Section 406 PPC are not fulfilled, because the allegation against the petitioner is that he had taken a loan from the complainant and there was no 'entrustment' of property; the offence does not fall within the prohibitory clause of Section 497 of Criminal Procedure Code, 1898 (hereinafter referred to as "Cr.P.C"); the investigation is complete and the petitioner is no more required for the purposes of investigation; the petitioner is

behind bars for the last nine months and no witness has been examined as yet; the complainant did not mention the date of occurrence nor any act or omission which would warrant initiation of criminal proceedings against the petitioner; reliance is placed on *cases of Muhammad Naeem Versus The State (PLD 2003 Karachi 76)* and *Faisal Khawaja Versus The State (2001 MLD 1237)*; hence, he prayed for enlarging the petitioner on bail.

4. The learned Standing Counsel assisted by the complainant appeared alongwith Abul Razzaq SI. They opposed the bail and argued that for the purposes of grant of bail in case of offences falling within the non-prohibitory clause of Section 497 Cr.P.C, the conduct of the accused/petitioner brings his case within the exceptions of the general rule. The learned Standing Counsel has further stated that the petitioner was convicted in FIR No. 40/2013, registered for an offence under Section 489-F PPC. It is also stated that two other cases i.e. FIR No. 578 dated 22-11-2012, registered for an offence under Section 489-F PPC and FIR No. 358 dated 18-7-2011 registered for an offence under Section 406 PPC, are pending in the respective trial Courts and no conviction has been awarded as yet. It is stressed that since the petitioner has been convicted in one case, therefore, he is not entitled to the concession of bail in the present case. It is also the case of the complainant that since a substantial amount is involved in the present case and he has not filed a civil suit, therefore, allowing the petitioner out on bail would deprive him from recovery of the amount. The learned Standing Counsel has placed reliance on *case of Shameel Ahmed Versus The State (2009 SCMR 174)* in support of his contention that even if there is no conviction, the accused will be treated as a "habitual offender" as he is involved in other cases registered under the relevant laws, and, therefore, he is not entitled to the concession of bail.

5. In rebuttal, learned counsel for the petitioner contends that the amount for which the cheque was issued is not relevant for the purposes of grant of bail. He

further states that execution of the sentence/conviction in FIR No. 40/2013 has been suspended by this Court vide order dated 29-5-2014. Copies of Crl. Revision No. 39/2014 and the order dated 29-5-2014, have been placed on file.

6. After giving careful consideration to the arguments of the learned counsels and perusal of the record with their able assistance, the findings of this Court are as follows:

7. The offence included in the FIR i.e. Section 406 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.

8. The F.I.R. in this case had been registered with a delay of three months. The contention of the learned counsel for the petitioner, that on the basis of the story narrated in the FIR, no offence under Section 406 PPC is made out, is not without force. Availing of a loan facility from the complainant and the breach

made by the petitioner prima-facie appears to be a transaction of a civil nature, and whether it constitutes a criminal offence, is yet to be determined by the trial Court, therefore making it a case of further probe. Indeed, prima facie, it appears to be a case of further inquiry and therefore, it would not be appropriate for this court to make any further observation which may prejudice the proceedings pending before the trial Court. The report under Section 173 Cr.P.C. has been submitted and trial shall proceed in accordance with law. The investigations qua the petitioner have been finalized; therefore, his continued custody is not likely to serve any beneficial purpose at this stage. The amount involved in the present case would also not influence the grant of bail, as the offences provided in the PPC are criminal in nature and can not be treated as recovery proceedings. As already explained, it is yet to be determined by the trial Court, whether on the basis of the story narrated in the FIR, and the evidence produced during the trial, a case would be made out under Section 406 PPC.

9. The learned Standing Counsel has raised two other questions which require consideration by this Court. Firstly, that if an accused is involved in other cases registered under the relevant laws, he shall not be entitled to bail as he or she shall be treated as a "habitual offender", and, secondly, previous conviction will disentitle him/her to the concession of bail in other cases.

10. The two propositions above, though distinct, have one question in common i.e if the arguments of the learned counsel were 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 defense 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 defense 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 case of *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 ruled/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.

11. 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.

12. 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.

13. In the present case, on the very face of the story narrated in the FIR, prima-facie, the ingredients of Section 406 PPC do not appear to be fulfilled. It is yet to be determined by the trial Court whether the transaction, apparently being of a civil nature, would constitute an offence. This obviously makes it a case of further inquiry, which would entitle the petitioner to be granted bail. His conviction in FIR No. 40/2013 is not the sole factor in forming an opinion whether he would be entitled to bail. The petitioner, on persuasive grounds, has made out a case for bail. This Court, therefore, after taking relevant facts into consideration, is of the view that the petitioner is entitled to the grant of bail in this case.

14. 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.2,00,000/- (Rupees two hundred thousand only) with one surety in the like amount to the satisfaction of the learned trial Court.

15. However, the bail is granted on the condition that, unless exempted by the trial Court, the petitioner/accused shall appear on each and every hearing, and in case of his absence, this bail shall be recalled.

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

**(ATHAR MINALLAH)**  
**JUDGE**

Announced in open Court, on 09<sup>th</sup> of September, 2014.

**JUDGE**

*Approved for reporting.*

**JUDGE**

Tanveer Ahmed.