

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

Criminal Misc. No. 819-BC of 2021

Professor Muhammad Anwar
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.
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07.04.2022:	Mr.Arif Chaudhry, learned ASC for petitioner, Mr. Abdul Wahid Qureshi, Advocate for respondent No.3. Syed Nazar Hussain Shah, AAG with Bilal Abbasi, S.I., FIA.
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The instant Crl Misc. under Section 497(5) of the Code of Criminal Procedure, 1898 (“**Cr.P.C**”) is arising out of order dated 08.07.2021, passed by the Special Judge Central, Islamabad whereby respondent No.3/accused (Raja Ansar Mahmood) was allowed pre-arrest bail in FIR No. 05, dated 30.04.2020, under Sections 409, 420, 109 PPC read with Section 5(2)47 of PCA, Police Station FIA/CCC, Islamabad.

2- According to the allegations set-forth in the FIR, petitioner (complainant) purchased 02 commercial plots No.CP-03 and CP-04 in Block G Lilly Market Shalimar Road and 01 residential plot bearing No.5-A, Block-H in Soan Garden in the year 2003 and cleared all dues of the said plots. In the year 2018, when he approached the society for taking possession of the said plots, it revealed that possession of his plots have already been given illegally to owners of Commercial Plot No. 7 Chaudhry Akram and Plot No.8 to Chaudhry Arshad who have constructed plazas on his plots. (Ch. Ashad & Akram are co accused in the subject FIR)The complainant further alleged that his residential plot No.5-A also does not exist on the ground. It revealed that wife of Chaudhry Arshad purchased CP-8A on 20.02.2008 but she was given possession illegally on plot No.CP-04 owned by the complainant as Chaudhry Arshad was Ex-Executive Member of the Society. Similarly,Ch. Muhammad Akram had purchased commercial plot No.07 on 09.05.2003 but he was given possession of plot No.CP-3

owned by the complainant by misuse of authority who was also constructing plaza on said plot. It is further alleged that accused Ahmad Saeed & Adeel Shafiq Ex-Presidents, Qaiser Riaz Cheema & Riaz Ansar Ex-General Secretaries, Zulfiqar Ali & Aftab Anjum Surveyors have connived in illegal handing over of possession of plots owned by the complainant to Ch. Arshad, Ex-Executive Member and Ch. Akram (*beneficiary*) without the knowledge of complainant by misusing their authority.

3- On the application of the petitioner, FIA conducted inquiry bearing No. RE-22/18 and thereafter subject FIR was registered against the accused persons on the allegations of fraud, criminal breach of trust and misuse of authority under Section 109/420/409 PPC r/w 5(2)47 PCA.

4- After the registration of FIR, respondent No.3 and co accused Arshad & Akram filed pre arrest bail petitions. The learned Special Judge Central Islamabad vide order dated 14.06.2021 dismissed the application to the extent of accused Arshad while that of Akram was allowed. On the same day, application of the respondent No.3 was dismissed for non-prosecution. The petitioner then filed second pre arrest bail before the same Court on 18.06.2021 which was allowed by the learned Special Judge Central Islamabad vide order dated 08.07.2021, hence instant bail cancellation petition.

5- Learned counsel for the petitioner argued that the impugned order could not have been passed without setting aside the earlier order dated 14.06.2021 whereby first pre-arrest bail petition of the petitioner was dismissed for non-prosecution as the respondent No.3 has failed to advance plausible explanation for his non-appearance on the date fixed; that the role of the petitioner and that of co-accused whose pre-arrest bail petition was dismissed is identical but the petitioner was granted extra ordinary relief in arbitrary manner; that the impugned order is contrary to the principles governing exercise of extra-ordinary discretion which is meant only to save innocent from false implication while the respondent No.3 is involved in number of corruption cases and embezzlement of huge amounts and assets of the society; that the learned trial court failed to adhere the principles laid down by the

Apex Court with regard to cases of Housing Societies and criteria for the grant of pre-arrest bail in such like matters and that the impugned order being perverse arbitrary and whimsical is liable to be set aside. Learned counsel placed reliance upon case law reported as PLD 2021 SC 886 (Shahzaib etc v. The State) and order dated 02.09.2021 passed by this Court in Crl. Misc. 598-B/2021.

6- On the other hand, learned counsel for the respondent No.3 repelled the above submission by contending that the bail once granted cannot be cancelled without having compelling circumstances; that bail cannot be recalled merely on technicalities; that the respondent No.3 committed no mischief which could be made basis to cancel his bail; that the second bail petition entails certificate wherein petitioner had specifically mentioned about the dismissal of first pre arrest bail petition; that challan has already been submitted; nothing is to be recovered from petitioner, therefore, petition is liable to be dismissed. Learned counsel relied upon case law reported as 2008 YLR 330, PLD 2008 Peshawar 45, 2011 SCMR 1438, PLD 2021 SC 892, 2015 SCMR 1394, 2017 SCMR 944, 2020 PCr.LJ 338, PLD 2019 HC (AJ&K) 9 & judgment dated 26.01.2022 passed by this Court is W.P. No. 2406/2021.

7- Heard, record perused.

8- It is settled principle that the considerations for the grant of bail and for cancellation of the same are altogether different. Once the bail is granted by a Court of competent jurisdiction, then strong and exceptional grounds would be required for cancellation thereof. Reliance is placed upon judgment of the Hon'ble apex Court in the case of "Tariq Bashir and 5 others v. The State (**PLD 1995 SC 34**) reiterated in the recent pronouncement in the case of "Sharif Khan v. The State (**2021 SCMR 87**).

9- In the case of **Sharif Khan supra**, principles governing cancellation of bail in the case of "Samiullah and another v. Laiq Zada and other" (**2020 SCMR 115**) have been reiterated in following terms:-

- i) If the bail granting order is patently illegal, erroneous, factually incorrect and has resulted into miscarriage of justice.
- ii) That the accused has misused the concession of bail in any manner.
- iii) That accused has tried to hamper prosecution evidence by persuading/pressurizing prosecution witnesses.
- iv) That there is likelihood of absconsion of the accused beyond the jurisdiction of court.
- v) That the accused has attempted to interfere with the smooth course of investigation.
- vi) That accused misused his liberty while indulging into similar offence.
- vii) That some fresh facts and material has been collected during the course of investigation which tends to establish guilt of the accused.

10- In the case of **Sharif Khan** *supra* it has graciously been observed that:-

“Ordinarily the superior courts are hesitant to interfere into the order extending concession of bail; rather they have shown reluctance to intervene in such like matters. This very aspect was dealt by this Court in a judgment reported as **Shahid Arshad Versus Muhammad Naqi Butt and 02 others** (1976 SCMR 360). Though this Court was not pleased with the order passed by the learned single bench of the High Court however they refrain to exercise the power on this very ground which is reproduced as under: -

“In these circumstances although we are not happy about the order passed by the learned Single Judge of the High Court, we do not think it advisable to interfere with his order at this stage. If at any time any one of the said two respondents misuses the privilege of bail it will be open to the petitioner to approach the High Court for cancellation of bail.”

The intent behind is that once concession of bail is granted by a court of competent jurisdiction then very strong and exceptional grounds would be required to interfere with the concession extended to an accused who is otherwise clothed with free life, as a consequent of concession and if any view taken by the court it would be synonymous to curtailing the liberty of said accused prior to completion of trial, which otherwise is a precious right guaranteed under the Constitution of the country.”

11- It is to be seen as to whether in the light of the principles *ibid*, impugned order warrants any interference. The main submission of the learned counsel is that case of petitioner and that of co-accused Arshed Mehmood is identical while the application of the latter was refused but the petitioner has been extended the same concession in arbitrary manner, therefore, impugned order being against the record and the material placed on record is liable to be reversed.

12- The perusal of impugned order reveals that pre arrest bail petition of co accused Arshed Mehmood was dismissed on different premises as his involvement was quite apparent from the statements recorded u/s 161 Cr.P.C coupled with the findings of the Investigating Officer while the respondent No.3 was extended concession of pre arrest bail by observing as under:-

“Perusal of record shows that plot No.5A, street No.45 was admittedly allotted to the complainant by the then President Col. Muhammad Azhar on 26.06.2003. **Admittedly the said Col. Azhar the then President is brother of wife of the complainant and if the said President has issued fake allotment letter to the complainant then he has a remedy for registration of this case against him, but on query of court he remained silent in this regard. The petitioner had issued certificate of possession regarding plot No.7 in the name of Muhammad Akram which plot was exchanged by the complainant with his plot No.CP-03.** As regards, the claim of the complainant that he paid amount of Rs.25,000/- as a possession fee on 12.12.2011 and maintenance charges along with development charges of Rs.215,000/- on the said date with the Society, it is a matter of further probe to fix the responsibility of the said amount. **It is strange that when the complainant had deposited the possession fee of the plot in the year 2011, then why he remained silent for the period 8/9 years**if the possession of the plot was not given to him. This fact is also a matter of further inquiry. **It is notable that the plot No.CP4 was allegedly occupied by brother of the petitioner namely Ch. Muhammad Ashraf and his bail before arrest was declined by this court but petitioner is not beneficiary of the said transaction.** No useful purpose would be served by handing over the custody of the petitioner to the FIA as he has joined investigation and no recovery has been effected from him. Hence, the bail petition of Raja Ansar Mahmood respondent No.3/accused is accepted and already granted ad interim bail is confirmed subject to the bail bonds already submitted by him.”
{Emphasis added}

13- In presence of observations highlighted above, it cannot be said that the impugned order is perverse or arbitrary. The offence under sections 420 PPC is bailable wherein bail is to be granted as a matter of right while offence under section 5(2)47 PCA does not fall within the ambit of prohibitory clause of section 497 Cr. P.C wherein grant of bail is a rule and refusal is an exception. The Hon'ble Supreme Court of Pakistan in a recent judgment reported as "Muhammad Ramzan alias Jani v. The State and others" (2020 **SCMR 717**) has laid down the principle that when alleged offence is outside the prohibitory clause of Section 497 Cr.P.C, grant of bail is a rule and refusal is an exception.

14- The case comprised of documents, already in possession of the prosecution. In like offences bail was granted by the Hon'ble Supreme Court of Pakistan in case reported as "Saeed Ahmed v. State" (1996 **SCMR 1132**) by holding that:-

"The objection of the learned counsel regarding addition of section 409 PPC may carry some weight while considering the bail application. As there is no possibility of tempering with the evidence, which is entirely documentary in nature and in possession of the prosecution."

15- Adverting to the contention of learned counsel qua dismissal of first pre arrest bail petition due to non-prosecution, it is noticed that first pre arrest bail petition of the respondent No.3 was dismissed for non-prosecution vide order dated 14.06.2021. He then filed second pre arrest bail petition after about three days on 18.06.2021 as per Certificate on the Memo of the said application that earlier petition was dismissed due to non-prosecution and nothing had been concealed. The concealment of fact cannot be attributed to respondent No.3, however, it is noticed that the learned Court of 1st instance while deciding the second pre arrest bail petition has not taken into consideration this aspect of the matter, therefore, it would not be just to burden the respondent No.3 for the fault of the Court. The respondent No.3 soon after dismissal of first pre arrest bail petition filed the second one by mentioning the fact of dismissal of first pre arrest bail petition,

therefore, in absence of any departure from the law and facts of the case by the learned Court of 1st instance, the concession granted to the respondent No.3 cannot be interfered with in terms of Section 497(5) Cr P.C.

16- In view of above discussion and in the attending circumstances of the case and by following the wisdom laid down by the Hon'ble Apex Court in the case of Sharif ***Khan supra*** there exists no justification to interference into the impugned order. However, it is clarified that if at any time the respondent No.3 misuses the privilege of bail it will be open to the petitioner to approach the court concerned for cancellation of bail. Consequently, instant Crl. Misc. fails and accordingly **dismissed**.

(ARBAB MUHAMAMD TAHIR)
JUDGE

A.R. Ansari

APPROVED FOR REPORTING