

2012 Y L R 930

[Islamabad]

Before Shaukat Aziz Siddiqui, J

Malik SAFDAR ALI KHAN---Petitioner

Versus

THE STATE and another---Respondents

Criminal Miscellaneous No.695-B of 2011, decided on 2nd December, 2011

Criminal Procedure Code (V of 1898)---

---S. 497---Penal Code (XLV of 1860), Ss.489-F & 406---Dishonestly issuing a cheque, criminal breach of trust---Bail, grant of---Accused had given two cheques to the complainant which were dishonoured---Bail applications of accused were refused by both the courts below---Validity---Sections 406 and 489-F, P.P.C, provided three different sets of punishments, namely imprisonment, or fine or both---Law had to be stretched in favour of the accused and beneficial interpretation had to be made in his favour---Offence under S. 489-F, P.P.C did not fall within the prohibitory clause of S. 497, Cr.P.C---Accused had no criminal history and no F.I.R. had been registered against him in the past---No exceptional circumstances existed to deny bail to the accused---Bail petition of accused was allowed and he was granted bail.

Zafar Iqbal v. Muhammad Anwar and others 2009 SCMR 1488; Shameel v. The State and others 2009 SCMR 174; Riaz Jaffar Natiq v. Muhammad Nadeem Dar and others 2011 SCMR 1708; Sikandar Zaman v. The State and others 2011 SCMR 870; Muhammad Jamil v. The State PLJ 2011 Cr.C. (Lahore) 1087 and Kshif Khan v. The State 2009 PCr.LJ 418 rel.

Malik Amir Dad Awan, for Petitioner.

Khawaja Javed Iqbal, and Manzoor Ahmed, S.I. for the State.

Mian Abdul Razzaq for Respondent No.2.

JUDGMENT

SHAUKAT AZIZ SIDDIQUI, J.---Petitioner Malik Safdar Ali Khan seeks bail in case registered vide F.I.R No.497, dated 25-7-2011, offence under section 489-F, P.P.C. at Police Station Shalimar, Islamabad.

2. Briefly, the prosecution story as gleans out from the F.I.R. is that complainant of the case namely, Brig. (R.) Syed Zulfiqar Akbar Naqvi moved an application to the I.G. Police, Islamabad with the assertion that he retired from Army 25 years ago and is residing in House No.28, St. No.60, Sector F-11/4, Islamabad. That one Malik Safadar Ali son of Malik Akhtar Nawaz (present petitioner) who was working as P.A in NHA met him through an acquaintance named Amir Latif, and offered to him open files of the plots in the newly floated NHF Housing Society, at very low cost. Petitioner tricked him into trusting, so he purchased files of seven plots and by trusting petitioner even did not go through the contents of the files and paid him in advance to deposit the first instalment of the cost prior to obtaining the files. Later on, on repeated enquires, petitioner ensured him profitable disposal of the files once the society is declared established. Petitioner met the respondent/complainant last time, in the middle of 2009 and thereafter started avoiding to face him. On scrutiny of the files, it transpired that most of the stamp papers were blank with no authentication by the vendor in token of sale to the buyer and on thorough probe it also revealed that most of the Pay Orders had been got redeemed by the petitioner and pocketed the proceeds without knowledge of the complainant. Against each file petitioner charged the complainant, double the amount, as performance for himself and complainant. On repeated demands petitioner issued two cheques which were dishonoured by the bank, detail of the same is as under:---

(i) Cheque No.CD9136111, dated 30-3-2006 amounting to Rs.5,50,000 drawn on Union Bank Jinnah Road, Rawalpindi.

(ii) Cheque No.CD9125116, dated 25-5-2006 amounting to Rs.4,50,000 drawn on Union Bank, Jinnah Road, Rawalpindi.

3. The petitioner was arrested on 8-8-2011. He approached the "Allaqa Judicial Magistrate" for grant of bail but his request was declined vide order dated 15-9-2011. Feeling aggrieved, the petitioner approached learned Sessions Judge, Islamabad who entrusted the bail petition to learned Additional Sessions Judge, Islamabad but it met the same fate. Resultantly, petitioner approached this court for grant of bail after arrest.

4. The learned counsel for the petitioner submits that complainant with mala fide intention and ulterior motives distorted the real facts while presenting application before the police for the purpose of registration of case against the present petitioner. The complainant while exercising his lucrative influence and pressure of status maneuvered with the local police and got registered the instant case. The learned counsel further contends that from the contents of the F.I.R., it revealed that complainant of the case invested an amount in the business of real estate and at the most matter being business deal is one of rendition of accounts, which can only be settled by the court of competent jurisdiction i.e. Civil Court. The learned counsel went on to submit that the petitioner is behind the bar from last about four months, moreover offence under section 489-F, P.P.C. does not fall within the prohibitory clause of section 497, Cr.P.C, therefore, the petitioner is entitled to the concession of bail.

5. Conversely, the learned counsel for the complainant assisted by the learned, standing counsel vehemently opposed the bail by submitting that the contents of the F.I.R. also constitute the offence under section 406, P.P.C.; the complainant has been deprived from huge amount of Rs.10,00,000; the petitioner may not be granted bail till the amount is recovered from the petitioner. And that case of the petitioner is one of exceptional circumstance, therefore, discretion may not be exercised in his favour despite the fact that the alleged offence does not fall within the prohibitory clause of section 497, Cr.P.C.

6. I have heard the learned counsel for the parties and perused the record. The plain reading of section 489-F, P.P.C. which is being reproduced hereinbelow, makes it abundantly clear that three different punishments are provided, which obviously in the facts and circumstances of the case can be inflicted as punishment upon any accused on the strength of evidence and data available on the record:--

"Whoever dishonestly issues a cheque towards re-payment of a loan or fulfilment of an obligation which is dishonoured on presentation, shall be punishable with imprisonment which may extend to three years, or with fine, or with both, unless he can establish, for which the burden of proof shall rest on him, that he had made arrangements with his bank to ensure that the cheque would be honoured and that the bank was at fault in not honouring the cheque".

As is evident from above, following three punishments are available in the section;

(i) Imprisonment which may extend to 3 years.

OR

(ii) with fine

OR

(iii) with both.

The provision itself provides a right to an accused to get himself absolved from the charge by adducing evidence that he made arrangements with his bank to ensure that the cheque was to be honoured and it was the fault of the bank not honouring the cheque. In my estimation, on the conclusion of trial despite finding any accused guilty of the offence, there is every likelihood/probability/possibility that trial court may impose fine of a meager amount of Rs.50 only as punishment.

8. Now, advertent to the arguments of the learned counsel for the complainant that contents of the F.I.R. constitute the offence under section 406, P.P.C., which provides punishment of imprisonment up to 7 years. The plain reading of the section 406, P.P.C. which being reproduced herein-below for the sake of convenience, possesses same punishment as contained in section 489-F, P.P.C. except that term of imprisonment is up to 7 years therefore, same interpretation has to be made for this also.

"Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to (seven) years, or with fine, or with both."

9. It is being observed that ever since the insertion of section 489-F, P.P.C. in the statute by Ordinance LXXXV of 2002, dated 25-10-2002, recovery proceedings by way of summary procedure on negotiable instruments, provided under Order XXXVII, C.P.C. almost has gone to six. The cheque which admittedly is a Negotiable Instruments, invariably being used for exerting pressure through device of criminal cases, although there is no mechanism provided by the provision of section 489-F to make it a recovery mode in most of the cases relating to cheques

criminal proceeding are being used as a tool to compel the family members of an accused to arrange the amount which results into penalizing the entire family for the wrong of one person. There is no doubt that when allegation of fraud, conclude in to the guilt of any accused person, he can be awarded punishment for the same but to punish the entire family before finding of guilt is recorded, for an offence which provides alternate punishment of fine only, to my mind is against all cannons of justice and golden principle of ()

10. So, in such an eventuality, to deprive any person from the concession of bail is simply harsh and unjust. It is well settled law with the mandate of the dictums of the Superior Courts of the country that law has to be stretched in favour of accused and beneficial interpretation has to be made. When there is just a remote possibility that an accused may not be awarded imprisonment of even one month, then propriety demands that discretion has to be exercised in favour of the accused. Now coming to the other extreme, that maximum punishment provided for the offence is up to 03 years, which does not fall within the prohibitory clause of section 497, Cr.P.C. The honourable Supreme Court and other Superior Courts of Pakistan through different authoritative pronouncements, time and again held, that when an offence does not fall within the prohibitory clause of section 497, Cr.P.C, bail is a rule and refusal is an exception. In this regard, I am fortified with case-law Zafar Iqbal v. Muhammad Anwar and others (2009 SCMR, page 1488), Shameel v. The State and others (2009 SCMR page 174), Riaz Jaffar Natiq v. Muhammad Nadeem Dar and others (2011 SCMR, Page 1708), Sikandar Zaman v. The State and others (2011 SCMR, page 870) Muhammad Jamil v. The State (PLJ 2011 Cr.C. (Lahore) 1087) and Kshif Khan v. The State (2009 PCr.LJ 418)

11. On enquiry, the I.O. informed the court that present petitioner has no criminal history and till to date even no other F.I.R. is registered against him. As such there is no exceptional circumstances on the basis of which petitioner may be deprived of the concession of bail. Thus for the foregoing reasons, this petition is allowed. The petitioner is granted bail subject to furnishing of bail bonds of Rs.500,000 with two sureties of like amount to the satisfaction of the trial Court.

12. All the observations made hereinabove are tentative in nature and shall have no bearing on the final determination of guilt or innocence by the trial court.

M.W.A./26/IsI

Bail granted.