

Form No: HCJD/C-121
ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Crl. Misc. No. 1367-B/2021

Mohsin Ayub

Vs.

The State.

S. No. of order/proceedings	Date of order/proceedings	Order with signature of Judge and that of parties or counsel where necessary.
		Asad (corrected vide order dt. 12.1.2022, in CM 6/22)

27.12.2021

Mr. Muhammad Bin ~~Saad~~, Advocate alongwith petitioner in person.
Mr. Asif Ali Tamboli, Advocate for respondent No. 2
NiazUllahNiazi, Advocate General, Islamabad.
Shahzaib Nawaz Khan, State Counsel alongwith Talat, S.I.

ARBAB MUHAMMAD TAHIR J: Through this Criminal Miscellaneous, petitioner/accused (Mohsin Ayub) has prayed for pre-arrest bail in case FIR No. 653 dated 24.09.2021, under Section 489-F PPC, Police Station Golra, Islamabad, after its dismissal from the Court of learned Additional Session Judge, Islamabad (West) vide order dated 08.12.2021. It was the second pre-arrest bail petition of the petitioner before ASJ while the first pre-arrest bail petition was dismissed for non-prosecution vide order dated 08.10.2021.

2. The allegation against the petitioner is that he has to pay outstanding amount of Rs. 585000/- to the complainant for which he issued cheque which was dishonored by the concerned bank.

3. Learned counsel for the petitioner submitted that there was a rent agreement between the

petitioner and the complainant; that suit of the petitioner for declaration and cancellation of said cheque is already pending; that complainant intended to involve the petitioner in FIR with malafide intention; that the security amount of the petitioner is still with the complainant and that the offence does not fall within the ambit of prohibitory clause of Section 497 Cr.P.C. Learned counsel placed reliance upon case law reported as "Abdul Ghafoor Gondal v. The State through PG. Punjab & another" (2020 SCMR 861).

4. Mr. Niaz Ullah Niazi, learned Advocate General assisted by Mr. Shahzaib Nawaz Khan, learned State Counsel contended that for seeking extra ordinary relief of pre arrest bail, petitioner has to show malice and malafide on the part of complainant or police which he has failed to show; that the remedy is not equal to post-arrest bail in every run of mill criminal case as it would amount to hamper the course of investigation. According to the learned AG, petitioner, at the first instance, has to give reason of his absence during hearing of first pre-arrest bail petition before the learned lower court; that incriminating material is available on record and that as both civil and criminal cases can run side by side with varying results. Learned AG has placed reliance upon "Abdul Khaliq v. The State" (2019 SCMR 1129).

5. Learned counsel for the complainant added that issuance of cheque and its dishonoring are admitted facts while there is no denial of the receipt of the amount; that petitioner has deprived the

complainant of his hard-earned money and cannot ask for extraordinary concession, therefore, petition is liable to be dismissed.

6. Arguments heard, record perused.

7. The facts arising out of the record are that the FIR was registered against the petitioner on 24.09.2021. The first pre arrest bail petition of the petitioner was dismissed for non-prosecution on 08.10.2021. He again filed second pre-arrest bail petition which was dismissed by the Learned ASJ, Islamabad (West) vide order dated 08.12.2021 on merits.

8. Section 498-A Cr PC is relevant on the subject which is as under:-

" Nothing in Section 497, or Section 498 shall be deemed to require or authorize a Court to release on bail, or to direct to be admitted to bail, any person who is not in custody or is not present in Court or against whom no case stands registered for the time being and an order for the release of a person on bail, or a direction that a person be admitted to bail, shall be effective only in respect of the; case that so stands registered against him and is specified in the order or direction".

9. According to said provision of law, the Court is not authorized to release a person on bail who is not present in the Court. The presence of the accused before the Court at the time of decision of the bail application under the said provision, is necessary

10. The Hon'ble Supreme Court of Pakistan vide order dated 29.07.2021, in the case of "Shahzaib etc v. The State" (Crl. Petition 1075-

L/2020) has been pleased to hold that *"in case the petitioner (accused) is not personally present in the Court, the Court is not authorized to grant him bail and the petition is to be dismissed for his lack of presence in the Court."* It has also been held that *"However, in case some explanation is furnished for his non-appearance the Court, may if it finds that explanation to be satisfactory exempt his presence for that day and adjourn the hearing of the petition for a short period."*

11. The above judgment clarified that *"in case the petition is dismissed for non-appearance of the accused in a pre-arrest bail matter under Section 498-A, the petitioner can file a fresh bail petition before the same court provided that he furnishes sufficient explanation for his non-appearance in the earlier bail petition and the court is satisfied with his said explanation. But if he fails to furnish any satisfactory explanation, his second bail petition is liable to be dismissed on account of his conduct of misusing the process of Court disentitling him to the grant of discretionary relief of pre-arrest bail."*

12. The Hon'ble Supreme Court of Pakistan further clarified the principal vide order dated 06.08.2021, in the case of "Azam Saleem and Shaan Ali v. The State etc" (Crl. Petition 797-L/2021 & Crl. Petition 799-L/2021) as under:-

"In the end we reiterate, for the sake of clarity, that if a pre-arrest bail petition is dismissed for non-appearance of the petitioner under Section 498-A Cr.P.C, the second pre-arrest bail petition is maintainable only if the petitioner furnished satisfactory explanation for his absence in the first petition. Only if the

explanation is found satisfactory can the Court proceed further and decide the second petition on merits. However, if the explanation is found to be unsatisfactory, the second petition is not maintainable and is liable to be dismissed without going into the merits of the case."

13. The principles laid down by the Hon'ble Supreme Court of Pakistan have to be followed in letter and spirit. Where first pre-arrest bail petition is dismissed for non-prosecution, it is mandatory for the petitioner to give reasonable explanation of his non-appearance in the second pre-arrest bail petition and the Court should adjudge the satisfactory or otherwise state of the said explanation before deciding the application on merits. If it reaches the conclusion that the furnished explanation is unsatisfactory, immediately shall dismiss the petition on that score alone without discussing merits of the case.

14. Through the directions of the Hon'ble Supreme Court of Pakistan not only delay in process of investigation would be curtailed but the practice to file frequent pre arrest bail applications in every criminal case would also be closed.

15. If the principles are applied on the facts of instant case, it is noticed that the first pre-arrest bail petition of the petitioner was dismissed for non-prosecution vide order dated 08.10.2021. The petitioner has not given any explanation of his non-appearance at the time of hearing of first pre-arrest bail petition which is mandatory in terms of section 498-A Cr.P.C as in his absence, the

Court is not authorized to decide the bail application, in either way. The petitioner in the certificate at the bottom of his second pre-arrest bail petition simply mentioned that "the first pre-arrest bail application was dismissed due to non-prosecution on 08.10.2021." There was no mention of any explanation in the said memo of the petition. Similarly, the learned Court of first instance without adverting to this aspect decided the second pre arrest bail petition on merits, which is not sustainable in the eye of law.

16. The learned counsel for the petitioner has also been asked by this Court to give explanation of non-appearance of the petitioner, but no plausible explanation has been advanced. Before this Court also the petitioner has not explained his absence before the Court of first instance. Keeping in view the conduct of the petitioner regarding misusing the process of Court and non furnishing of justification of his absence before the Court in his first bail petition, the instant application is hereby **dismissed**. Ad-interim pre-arrest bail granted to the petitioner vide order dated 22.12.2021 is recalled.

17. The decisions of the Hon'ble Supreme Court of Pakistan to the extent it decides a question of law or enunciates a principle of law, is binding on all other courts of the country including the High Courts, under the mandate of Article 189 of the Constitution of the Islamic Republic of Pakistan 1973. Reliance is placed upon **order dated 09.11.2021**, passed by the

Hon'ble Supreme Court of Pakistan in CPLAs No.1862-L & 1863-L of 2021, titled *Hasnain Raza & Nazia Ali v. Lahore High Court, Lahore & others.* Office is, therefore, directed to transmit copy of this order to the learned Member Inspection Team (MIT) for its circulations amongst the learned Presiding Officers of both the Sessions Divisions (East & West) of ICT.

(ARBAB MUHAMMAD TAHIR)
~~JUDGE~~

Kamarn

APPROVED FOR REPORTING

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	12.01.2022	Mr. Muhammad Bin Asad, Advocate for applicant/petitioner.

C.M. No. 06/2022

Learned counsel contends that his name is "Muhammad Bin Asad" which has inadvertently been mentioned as "Muhammad Bin Saad" therefore, necessary correction may be made in due course.

Order accordingly. C.M stands disposed of.

(ARBAB MUHAMMAD TAHIR)
JUDGE