

JUDGMENT SHEET

PESHAWAR HIGH COURT, ABBOTTABAD BENCH

JUDICIAL DEPARTMENT

Cr.Misc.B.A.No.924-A/2018

JUDGMENT

Date of hearing.....14-12-2018.....

*Petitioner (s)... (Waqas Aslam Awan) by Mr. Siraj Hussain,
Advocate.....*

*Respondent (s)..... (The State etc) M/S by Sardar
Muhammad Asif, Assistant AG and
Muhammad Shafiq Awan, Advocate.....*

SYED MUHAMMAD ATTIQUE SHAH, J.-

Through this single judgment, this Court shall dispose of bail petition and bail cancellation application, as both arising out of one and the same case registered vide F.I.R No.726 dated 20.07.2018 under sections 419/420/467/471/34 PPC in Police Station Cantt, Abbottabad. The particulars of the petitions are as under:

- (i) **Cr.M (BA) No.924-A of 2018 Waqas Aslam Awan Vs. The State etc.**
- (ii) **Cr.M (BCA) No.941-A of 2018 Col. Retd. Muhammad Khalid Khan Vs. Imran Khan etc.**

2. Accused-petitioner, Waqas Aslam Awan seeks his post arrest bail in case FIR No.726 dated

20.07.2018 under sections 419/420/467/471/34 of Pakistan Penal Code, 1860 registered at Police Station Cantt, Abbottabad.

3. The case of the prosecution against the petitioners, registered on the report of complainant Col. Retd Khalid Khan, after issuance of direction under section 22-A Cr.P.C by the Justice of Peace, wherein, he stated that his brother, having a house constructed in '*Khasra*' No.3003 measuring 5 '*Marlas*', situated in '*Mauza*' Sheikh-ul-Bandi, Tehsil & District Abbottabad, died issueless and his inheritance mutation No.31106 was attested on 29.04.2016 in favour of his widow, Mst. Zahida Rani, brothers and sisters; that accused/petitioner Waqas Aslam Awan, who is maternal nephew of the wife of complainant and the widow of his brother late Muhammad Tariq; that accused/petitioner, in order to obtain fraudulently the house with malafide and forgery, in connivance with accused Fida Hussain, Muhammad Tayyab Yaseen, residents of Dhok Syedan, Rawalpindi and Imran Khan, relatives of complainant and the accused/petitioner, prepared a forged affidavit dated 12.04.2016, on behalf of accused Fida Hussain in favour of accused/petitioner Waqas Aslam Awan, showing payment of earnest

money by the former to the latter for the said house, while Muhammad Tayyib Yaseen and Imran Khan were shown witnesses of the said affidavit; that they all played fraud and cheating with the complainant and others in order to deprive them from their property, without having any right to do so. Accused/petitioner Waqas Aslam and co-accused Imran Khan moved application for their release on bail to the learned Judicial Magistrate, Abbottabad, who after hearing learned counsel for the parties granted post arrest bail to both the accused vide order dated 13.08.2018. The complainant moved an application for cancellation of bail granted to the accused/ petitioner and accused/respondent in (Cr.M No. BCA No.941-A/2018) before the learned Additional Sessions Judge-I, Abbottabad, which was partially allowed vide order dated 09.11.2018, whereby, bail granted to accused/petitioner Waqas Aslam Khan was recalled, while application to the extent of accused/respondent Imran Khan was dismissed. Hence, the present bail petition and bail cancellation petition before this Court.

4. Arguments of the learned counsel for the accused/petitioner and learned AAG assisted by

learned counsel for the complainant heard and record perused with their able assistance.

5. Perusal of record reveals that an affidavit-cum-agreement to sell was scribed between accused Fida Hussain and accused/petitioner Waqas Aslam Awan on 12.04.2016 at Rawalpindi, whereby, the former agreed to sell a house to the latter, measuring 5 'Marlas', situated in Mohallah Supply, Abbottabad for a sum of Rs.4,600,000/- and a sum of Rs.1,500,000/- as earnest money was paid to the seller and the remaining amount was to be paid on 12.10.2016, where-after, the buyer was bound to transfer the suit house in the name of the seller i.e. accused/petitioner. Besides, the possession of the disputed house was also handed over to the accused/petitioner by said Fida Hussain. It is evident from record of the case that before the target date fixed for payment of remaining amount, accused/petitioner filed a suit for specific performance of contract etc on 24.09.2016 against accused Fida Hussain and he has also impleaded the present complainant including widow, brothers and sisters of late Muhammad Tariq Khan as defendant in the suit. The civil Court has issued temporary injunction in favour of the accused/petitioner. It is also an admitted

fact that inheritance mutation No.31106 in respect of the disputed house has also been attested on 29.04.2016 in favour of the legal heirs of late Muhammad Tariq. Thereafter, the complainant and others also instituted a suit on 17.10.2016 against accused/petitioner Waqas Aslam Awan, Mst.Zahida Rani, widow of late Muhammad Tariq and Fida Hussain, for declaration, permanent injunction, possession and recovery of compensation and possession through partition and also challenged the deed. Both the suits are pending before the civil Court.

6. It appears from record of the case that the affidavit in question was scribed on 12.04.2016, whereas, the report was lodged against the accused/petitioner and others on 08.03.2018, after delay of about two years, that too, when prima facie, the complainant could not succeed to get the temporary injunction vacated, moreover particularly, when widow of the deceased has admittedly been residing in the said house. It is yet to be determined by the learned Civil Court whether the deed in question was forged or accused Fida Hussain has any right to transfer the disputed house or not after recording evidence. At this moment this Court cannot

enter into threadbare discussion regarding the transaction took place between the parties, as it is the job of the trial Court, however, in view of the peculiar facts and circumstances, this Court considers that the case against the petitioner is that of further inquiry into his guilt. Moreover, the offence under section 419 PPC provides seven years imprisonment or fine or both, whereas section 420 PPC, is bailable and in view of the facts of the present case, the applicability of sections 467/471, would also be seen by the learned trial Court at the relevant time during trial.

7. **In Zafar Iqbal's case (2009 SCMR 1488)**, a larger Bench of the august Apex Court has explicitly expressed the principles for considering the grant of bail, where offences do not fall within the prohibitory clause of section 497 Cr.P.C. The said principles have consistently been followed by the Honourable Supreme Court, as it has been held in **Riaz Jafar Natiq's case (2011 SCMR 1708)** that:

“Thus keeping in view the law laid down in the case of Zafar Iqbal v. Muhammad Anwar and others (2009 SCMR 1488) ordaining that where a case falls within non-prohibitory clause the concession of granting bail must be favourably considered and should only be declined in exceptional cases. We do not find this to be a case where it should be refused as an exception. Thus, this petition is converted into an appeal and the same is allowed and, resultantly, the

petitioner is admitted to bail subject to furnishing bail bond in the sum of Rs. 1,00,000 (Rupees one hundred thousand only) with two sureties each in the like amount to the satisfaction of the learned trial Court.”

8. In any case, investigation in the present case is complete and the accused/petitioner is not required to the police for the purpose of further investigation. In peculiar facts and circumstances of the present case, no useful purpose is going to be served by keeping him behind the bars.

9. Consequently, the instant bail application is accepted and accused-petitioner, Waqas Aslam Awan is admitted to bail, subject to his furnishing bail bonds in the sum of Rs.200,000/- (Rupees two Hundred Thousands), with two sureties, each in the like amount to the satisfaction of the *Illaq*a/Duty Magistrate, Abbottabad.

10. So far as the connected bail cancellation petition is concerned, this Court considers that the grounds and the reasons, rendered by the learned Judicial Magistrate, Abbottabad and maintained by Additional Sessions Judge-I, Abbottabad, for grant of post arrest bail to accused/respondent, Imran Khan are

based on proper appreciation of facts and the law applicable thereto. Thus, this Court is of the view that said order of the learned Magistrate granting bail to him is neither arbitrary nor perverse, warranting interference by this Court at this stage. Therefore, the bail cancellation petition being bereft of merits is dismissed.

11. Before parting with the judgment, it is to be noted that the observations rendered hereinabove being tentative in nature, would not affect the mind of the trial Court in any manner whatsoever, during trial of the case.

Above are the detailed reasons for short order of this Court of even date.

Dt.14-12-2018.

J U D G E

M. Saleem/*

(SB) Mr. Justice Syed Muhammad Attique Shah