

(1998) 12 BOM CK 0050

In the Bombay High Court

Case No : Criminal Application No. 392 of 1997

Manoj Jaswantra Sheth

APPELLANT

Vs

Central Bureau of Investigation and another

RESPONDENT

Date of Decision : 24-12-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Penal Code, 1860 (IPC) — Section 120B

Citation : (1999) 5 BomCR 392 : (1999) BomCR(Cri) 392 : (1999) 2 BOMLR 277 : (1999) 1 MhLj 679

Hon'ble Judges : D.G. Deshpande, J

Bench : Single Bench

Advocate : Shrish Gupte, Prakash Naik and Vijay Gard, for the Appellant; D.Y. Chandrachud, A.S.G. of India, H.V. Mehta, Smt. J.S. Pawar, Assistant Public Prosecutor, for the Respondent

Judgement

G. Deshpande, J.—Heard Mr. Shirish Gupte with Mr. Prakash Naik and Shri Vijay Garg for the petitioner and Mr. D.Y. Chandrachud, Additional Solicitor General of India, with Mr. H.V. Mehta for the respondent No. 1 and learned A.P.P. for respondent No. 2.

2. This petition is filed by original accused No. 5 against the order of Special Judge Mrs. R.S. Dalvi rejecting his application for discharge. Before appreciating respective arguments it is necessary to quote certain facts of the prosecution case.

3. According to prosecution, accused S.D. Patil was working as a Branch Manager of Bank of Maharashtra, Deonar Branch, Bombay during relevant period and he entered into criminal conspiracy with Ompratap Singh, the proprietor of M/s. Delhi Oil Emporium, M/s. Dwarkadhish Commodities and M/s. Godavari Films with the help of his wife Smt. Madhu Pratap Singh and one Vikaram Singh and present accused M.J. Sheth to the common object of cheating and defrauding the Bank of Maharashtra. Modus operandi, according to prosecution, was that with

the help of present accused/petitioner Ompratap Singh opened a fictitious Bank account in different Banks in the name of one non-existing firm M/s. Chemox Corporation. This account was opened by the present petitioner. Some cheques were issued by him towards the said account and when the cheques went to the respective Banks for encashment, on the same day requisite cash was deposited in the account, as a result of which, the cheques came to be honoured and in this manner confidence of those Banks was gained by present accused and Ompratap Singh with a view to make rosy picture before the Bank of Maharashtra and to induce Bank of Maharashtra to enter into cheque purchasing facility with Dwarkadhish Commodities. According to prosecution, M/s. Chemox Corporation never existed, it had no business transaction, it had not issued any cheque to any other persons but to M/s. Dwarkadhish Commodities and black money of M/s. Dwarkadhish was deposited in the respective banks for honouring the cheques only and in this manner the present accused became a party to the conspiracy and aided and abetted the said offence in collusion with other accused.

4. In this back ground it was contended by Mr. Shirish Gupte that this accused was merely a sales representative getting monthly salary of Rs. 1000/ and commission at 2% on the products sold. Since he was a subordinate employee, his employer Ompratap Singh asked for help to over come financial difficulties, and therefore, just to oblige the employer, accused/petitioner opened an account with Bharat Over Seas Bank and thereafter he was made to sign five cheques and cash which was deposited in that account was given by Ompratap Singh. Mr. Gupte also contended that role played by the accused did not at all show that he has entered into conspiracy with main accused Ompratap Singh. Mr. Gupte also contended that the alleged cheating of the Bank of Maharashtra by Ompratap Singh and others took place subsequent to the closure of his account by accused No. 5 i.e. the present petitioner in the name of M/s. Chemox Corporation in Bharat Over Seas Bank. Mr. Gupte relied upon judgments of the Supreme Court reported in State of Maharashtra, Etc. Etc. Vs. Som Nath Thapa, Etc. Etc., , Lennart Schussler and Another Vs. The Director of Enforcement and Another, , and Bhagwandas Keshwani and Another Vs. State of Rajasthan, .

5. On the other hand it was contended by Additional Solicitor General of India Mr. Chandrachud that even if the judgment of the Supreme Court reported in State of Maharashtra, Etc. Etc. Vs. Som Nath Thapa, Etc. Etc., is taken for consideration as relied upon by Mr. Gupte, it was not necessary that each of the conspirators should have knowledge of what the other collaborator would do, and therefore, even if it is accepted for the sake of arguments that the present petitioner had no knowledge of the conspiracy of Ompratap Singh that could not be the ground to discharge the petitioner. Secondly, it was pointed out by him that account of M/s. Chemox Corporation in the Bharat Over Seas Bank was not closed by the present petitioner, but from the statement of officer of Bharat Over Seas Bank Mr. Hariharan it was clear that the Bank of its own accord closed the account. Further he contended that role played by the accused in opening fictitious account in the name of M/s. Chemox Corporation and the dubious

manner in which the said account was operated and the manner in which the Bank of Maharashtra was cheated were sufficient circumstances at this stage to proceed against the accused and to reject his application for discharge.

6. I have given my anxious consideration to the submissions made by both the advocates. It is true that the accused/petitioner was merely a sales representative earning paltry amount towards his salary coupled with some commission for sales. It may be that he opened an account in the name of M/ s. Chemox Corporation at the instance of his employer Ompratap Singh and if his defence is accepted it may be that he had no knowledge of the conspiracy which Ompratap Singh and other accused entered into for defrauding Bank of Maharashtra. However, the Supreme Court in the case of Safe of Maharashtra v. Som Nath Thapa referred to above has held in paragraph No. 24 of its judgment,

"when the ultimate offence consists of a chain of actions, it would not be necessary for the prosecution to establish, to bring home the charge of conspiracy, that each of the conspirators had the knowledge of what the collaborator would do so, so long as it is known that the collaborator would put the goods or service to an unlawful use."

In view of these observations of the Supreme Court if the case of the petitioner is considered, then even though he was an employee i.e. sales representative, he was supposed to know that opening of an account by him in the name of M/s. Chemox Corporation, a firm which did not exist at all, was illegal. Secondly, he also knew that he was not going to issue any cheques or deposit any amount in the said account because M/s. Chemox Corporation did not exist at all and he had no funds with him for that purpose. Further when Ompratap Singh asked him to issue cheques drawn on the said account he knew that the cheques were likely to be dishonoured for want of funds and he also knew that giving of cash by Ompratap Singh for the purpose of meeting the cheques deposited with Bharat Over Seas Bank was itself suspicious and illegal activity. From the aforesaid circumstances, therefore, it cannot be said that the petitioner did not know that he was indulging in illegal activities of the aforesaid nature, may be at the behest of his employer.

7. It may be that these activities in themselves may not constitute offence or may not constitute any of the offences alleged in the present case. However, when the case of conspiracy is alleged by the prosecution then entire case of the prosecution is required to be considered by Court and one particular angle or aspect or part of the case cannot be segregated from the rest. If, according to prosecution, other accused in this case cheated Bank of Maharashtra on the basis of account opened in the name of M/s. Chemox Corporation and dealings made therein by issuance of cheques or by honouring of the cheques, then it has to be prima facie accepted that the activities of the petitioner where the part of the conspiracy. As has been observed by the Supreme Court it is not necessary for the prosecution to prove that the petitioner had knowledge of what other collaborators would do, but from the circumstances mentioned above it has to be

held that the petitioner knew that his services were put to unlawful use because opening of an account in fictitious name and the manner in which it was operated were illegal and the petitioner must be presumed to have knowledge that his services were being put to illegal use.

8. For making out prima facie case this much is sufficient for the prosecution. The judgment of the Supreme Court in the case of Bhagwandas Keshwani and another v. State of Rajasthan referred to above and relied upon by Mr. Gupta in order to show that the circumstances of the present case brought on record do not point out to the guilt of the accused. It is difficult to accept the contention of Mr. Gupte, firstly, because in Bhagwandas Keshwani v. State of Rajasthan's case the Supreme Court was dealing with conviction of the accused in a case of conspiracy. Admittedly, the rules for appreciation of evidence at the time of trial and the rules for appreciation of prosecution case at the time of application of mind for discharge are totally different. When the accused faces trial, the prosecution has to prove the guilty beyond reasonable doubt. But in earlier stages the prosecution has to make out a prima facie case and since this is a case of conspiracy all the acts done by different accused or collaborators are to be considered simultaneously and jointly, and the role played by one accused cannot be isolated and separated from the rest.

9. Mr. Gupte also relied upon judgment of the Supreme Court in the case of Lennart Schussler and another v. Director of Enforcement and another to show that the prosecution has not been able to prima facie prove that there was meeting of mind of the petitioner with Ompratap Singh or with other accused, in doing illegal Act or doing legal Act by illegal means. In that case the Supreme Court has held;

"if in the furtherance of conspiracy certain persons are induced to do an unlawful act without the knowledge of the conspiracy of the plot they cannot be held to be conspirators, though they may be guilty of an offence pertaining to the specific unlawful act."

The facts of this case were as under ;

"As has been noticed earlier at the time A-1 and A-2 entered into an agreement though A-2 thought it was an offence to acquire foreign exchange by the method he was employing it was not in fact an offence. It is none the less alleged that A-1 agreed to help in the belief that what he is doing would be to assist A-2 to acquire foreign exchange illegally. This agreement continued and A-1 was assisting A-2 even after the acquisition of foreign exchange became illegal and is said to have agreed even after he came to Madras in 1965 to continue to help in acquiring the foreign exchange. It is however contended that the agreement of A-1 with A-2 does not amount to a criminal conspiracy because all that A-1 has agreed to do was to help A-2 to open an account in the Swedish Bank, have the amounts lying to the credit of A-2 with Atvidabergs to that account and to help A-2 by keeping a watch over the account. It is true that none of these acts

amounts to an offence, because the opening of the account in the Bank and having the amounts transferred from Atvidabergs was not an offence in August 1963, and there is nothing to show that A 1 had not completed that part of the agreement relating to Atvidabergs and the opening of the account with the Bank before January, 1964, or that he had rendered the assistance after that date. If this part of the agreement does not amount to a conspiracy to do an unlawful act, then it is submitted that the subsequent watching over the account and sending or bringing a statement of the account of A-2 relating to the acquisition of the foreign exchange does not amount to an offence. The agreement which constitutes an offence, it is said is the one between A-2 and ASSAB. The subsequent act of A-1 was neither necessary to acquire nor does it further the acquisition of the foreign exchange in contravention of the provisions of the Act and is therefore not an offence u/s 120B of the Penal Code. This argument would postulate that the several acts which constitute it can be split up in parts and the criminal liability of A-1 must only be judged by the part he has played. It appears to us that this is not a justifiable contention, because what has to be seen is whether the agreement between A-1 and A-2 is a conspiracy to do or continue to do something which is illegal and if it is, it is immaterial whether the agreement to do any of the acts in furtherance of the commission of the offence do not strictly amount to an offence. The entire agreement must be viewed as a whole and it has to be ascertained as to what in fact the conspirators intended to do or the object they wanted to achieve. As observed by Willis, J., in his 11th answer given on behalf of the Judges when consulted by the Lord Chancellor in *Denis Dowling Mucahy v. Queen*, L.R. 3 H.L. 305.

A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each Of the parties promise against promise, *actus contra acetum* capable of being enforced, if lawful punishable if for a criminal object or for the use of criminal means."

"However, after considering the facts and the relevant questions, the prayer of the accused for quashing the proceedings was not entertained. The Supreme Court has held that on the allegations contained in the application A-1 and A-2 could be charged with an offence u/s 120-B.

10. The Supreme Court, in *State of Maharashtra v. Som Nath Thapa*'s case, held that it is not necessary for the prosecution to establish a charge of conspiracy that each of the conspirators had the knowledge of what the collaborator would do, so long as it is known that the collaborator would put the goods or service an unlawful use. In view of these observations the submissions made by Mr. Gupte that the petitioner did not know the conspiracy entered into by Ompratap Singh with Bank of Maharashtra or that the petitioner was merely a sales representative, cannot be accepted.

11. It is necessary to point out here that the statement of the petitioner that he closed the account in the name M/s. Chemox Corporation in Bharat Over Seas Bank of his own accord is contradictory to the statement of Devinder Kumar, the Sub-Inspector, Anti Corruption Branch in his affidavit, wherein he has stated that it was the Bharat Over Seas Bank which closed the account and not the petitioner.

12. Lastly it was contended by Mr. Gupte that so called cheating of Bank of Maharashtra took place after closure of the account by Bharat Over Seas Bank and therefore, no connection can be established between the act of the accused in opening the account in the name of M/s. Chemox Corporation and alleged cheating of the Bank of Maharashtra. I am not convinced by this argument at all. Firstly because the account in the name of M/s. Chemox Corporation was not closed by the petitioner/accused but it was closed by Bharat Over Seas Bank. Might be that if Bharat Over Seas Bank did not close the account, the accused/petitioner would have continued operating of the account in collusion with M/s Dwarkadhish Commodities or Ompratap Singh indefinitely. Secondly, it is this account in the name of M/s. Chemox Corporation and its operation in the aforesaid manner which was made by Ompratap Singh to cheat the Bank of Maharashtra to the tune of Rs. 72/- lacs. Therefore, time gap or time factor between closure of account with Bharat Over Seas Bank and cheating of Bank of Maharashtra is of little consequence. For all the aforesaid reasons the judgment of the Special Judge Smt. R.S. Dalvi is not liable to be interfered with.

13. However, while rejecting the application for discharge the Special Judge Smt. R.S. Dalvi has observed as under :--

"The application for discharge lacks bonafides. The accused No. 5 can not be discharged. The case was adjourned for framing charges against all the accused. However, since this order required to be tested, the charge is not framed at present though the draft charge has been prepared by the prosecution."

This part of the order does not appear to be inconformity with judicial discipline. The courts are required to pass orders and proceed ahead with trial for completing other stages subsequent to those orders. It is for the litigants to test those orders before the Appellate Courts or before the higher courts. A Judge cannot refuse to take further steps as permitted by law after passing the order. A Judge cannot say that his order should be tested by the Appellate Court or the higher Authorities and a Judge cannot refrain from framing charges, if stage of the case requires him to do so. The learned Special Judge was not supposed to wait for her order being put to be tested before this Court. She should have immediately framed the charge or if prayed by the accused she could have granted them time to challenge her order before the Appellate Court or higher Court, and therefore, learned Special Judge is directed not to pass such remarks in her order or wait for her order to be tested before the higher Authorities. For all these reasons the petition is dismissed. Rule is discharged. Ad interim order if any, vacated. Any observation on merits of the case made in this order will not

be come in the way of trial at the time of final hearing. Copy of this order be sent to the Smt. R.S. Dalvi, the Judge of City Civil Court, Bombay immediately and compliance informed to this Court.

14. Petition dismissed.