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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(CRL) 1591/2012**

S K PATHRELLA Petitioner
Through Mr. Anurag Ahluwalia with
Mr. Rahul Dhankar, Advocates

versus

C.B.I. Respondent
Through Mr. Manoj Ohri, Spl. PP for CBI.

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Date of Decision: 08th November, 2012

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J. (Oral)

CRL.M.A. 18662/2012

Allowed, subject to just exceptions.

W.P.(CRL) 1591/2012

1. Present writ petition has been filed under Articles 226/227 of the Constitution of India read with Section 482 Cr.P.C. challenging the order framing charge dated 21st July, 2012 passed by Special Judge (CBI)-09, Central District, Tis Hazari Courts, Delhi under Sections 120B read with

Sections 420/467/468/471 IPC and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 as well as proceedings emanating therefrom.

2. Mr. Anurag Ahluwalia, learned counsel for the petitioner submits that the trial court has erred in framing charges against the petitioner inasmuch as no loss has been caused to the Bank. In this connection, he has drawn this Court's attention to the charge-sheet filed by the Central Bureau of Investigation (CBI) wherein it has been stated as under:-

“This case RC.1(E)/97/SIU(X)/CBI New Delhi was registered in SIU(X) Branch of CBI, New Delhi on 30.04.97 on the basis of Source Information. It has been alleged that during the year 1994 onwards Sh. Suresh Kumar Pathrella, Chief Manager, Oriental Bank of Commerce, New Friends Colony, New Delhi entered into a criminal conspiracy with S/Sh. Ghanshyam Kekkar and Joginder Singh Logani both partners in M/s. Red Cat Agency, Sh. Narender Kapoor, Proprietor, M/s. Navyug Traders, Rajesh Batra, Proprietor, M/s. Batra Tranders, Sh. Harsimran Singh, Prop. M/s. Pimco Overseas and Sh. Naveen Kakkar, Proprietor, M/s. Agronica Overseas to cheat the Oriental Bank of Commerce, New Friends Colony, Branch, New Delhi and others and in pursuance of the said criminal conspiracy, Sh. Suresh Pathrella abusing his official position in excess of the discretionary power vested in him, discounted/purchased cheques/bills in the accounts of the above said firms, which were returned unpaid. Sh. Suresh Pathrella also not allowed over draft in the other accounts and to adjust the same, he further purchased cheques which were also returned unpaid, as a result of which a wrongful loss of more than Rs.1.64 crores approx. was caused to Oriental Bank of Commerce, New Friends Colony, New Delhi. It has also been alleged that Sh. Narendra Kapoor, Sh. Rajesh Batra are employees of the J.S. Logani while Naveen Kakkar is a relative of Ghanshyam Kakkar. Sh. Suresh Pathrella unauthorisedly gave credit facility to all the firms of accused as mentioned aforesaid and amounts were credited in the accounts of said firms, exceeding his powers and did not obtain sanction from his Sr. Officers and that no security was obtained in these accounts by Sh. Pathrella to safeguard the interest of the bank.

It was revealed during the investigation that Sh. Suresh Pathrella was posted and functioning as Br. Manager of Oriental Bank of Commerce, New Friends Colony, New Delhi during the period 16.4.94 to 15.11.95. Sh. Pathrella was suspended from bank service on 21.12.95 and he was removed from service on 28.5.98.....”

3. Mr. Ahluwalia has also drawn this Court’s attention to the ‘No Due Certificate’ dated 21st July, 2007 issued by the Oriental Bank of Commerce wherein it has been stated that all four accounts of M/s. Red Cat Agencies, M/s. Batra Traders, M/s. Pimco Overseas, M/s. Agronica Overseas and M/s. Navyug Traders *“have been adjusted upon full and final payment of Rs. 127.51 lacs plus interest thereupon by the Bank through concessions granted to them under a settlement entered into between the parties and the Bank rather than a liquidation in normal due course.”*

4. Mr. Ahluwalia further submits that if any procedure was bypassed, the petitioner cannot be held liable for the same as he was a high ranking officer, holding post of Chief General Manager. He states that before a file is put up to the Chief General Manager, it is processed at different levels by subordinate officers and for the mistakes of his junior, the petitioner cannot be punished.

5. Mr. Manoj Ohri, learned Special Public Prosecutor for CBI has drawn this Court’s attention to the impugned order wherein the aforesaid submissions advanced by the petitioner have been rejected. The relevant portion of the impugned order referred to and relied upon by Mr. Ohri is reproduced hereinbelow:-

“Abuse of his position as public servant by Accused No. 1-Accused No.1 could not have had knowledge of other Accused presenting checks/Bills which would returned unpaid.

41. Accused No. 1 was an experienced officer. It is nigh impossible that he would have not known what was going on right under him. Bankers more often than not know their customers at a personal level. He has been signing all the documents relating to the purchase of cheques and bills which were returning unpaid. These cheques and Bills were of certain parties only. There have been substantial transactions in the Beneficiary Account for purchasing the cheques having the money credited in these accounts retaining them for fairly long periods of time and returning of cheques and bills unpaid. In two cases the money was retained up dates 351 days! It may also be noted that these cheques were not of small amounts. They ranged from Rs.50,000/- to Rs.7,75,550 .One may notice these transactions are of the year 1994-1995 when these transactions could easily be said to be high value transaction, and therefore, could not have gone unnoticed. It was the duty of Accused to have watched the interest of the Bank. If the Accused could notice that by the purchase of cheques during the said period the Bank had been constantly suffering and still chose to turn a blind eye to it, it would only mean that he was part of the conspiracy to cheat the Bank. It may further be noted that the other Accused (other then Accused No. 1) could not have carried on the entire operation for long with impunity unless there had been some inside help. Under the given circumstances the only inference which can be drawn is that it could be none other then the Accused No. 1 with whose help this entire operation was carried out. In other words it was the abuse of his position which made allowed the other Accused to take the pecuniary benefit.

The Accused No. 1 had neither exceeded his powers nor there was any wrong committed in the opening of Accounts or irregularity committed in the operation of accounts

42. First of all, it may be clarified that the fraud by cheque-kiting could be committed even without the Accused No.1 not having exceeded his powers of discounting cheque or Bills of Exchange. In fact it was the best way to keep the entire operation under wraps. It was submitted that in none of the reports submitted by the auditors it

was stated that the Accused No. 1 had exceeded his powers. It was also argued that there had not been any irregularity on the part of Bank as far as the operation of the said Accounts is concerned. In the light what has been just stated, I am of the view even if it was so it would be immaterial as the offence of cheating by cheque-kiting still could be committed.

Accused No. 1 cannot be held responsible he was not directly dealing with the issue of purchase of checks/bills

43. According to the Ld Defence Counsel there were many other officers as well working in the Bank. The purchasing of Bills/cheques was primarily a job of the Bills Purchase Manager. Accused No. 1 was not directly involved with it. According to him if there were instances of the cheques being returned repeatedly it was his duty to have informed the Accused. I would like to point out that at this stage of framing of charge it would be too early to reach such a conclusion. There is no material on record as of now to reach such a conclusion. The Accused would be at liberty to take such a defence as the trial of this case progresses.”

(emphasis supplied)

6. At this stage, learned counsel for the petitioner tried to hand over additional volumes of documents, which this Court refused to take on record as this Court is of the view that petitioner should have filed the same along with the present petition or at least should have sought an adjournment before the arguments commenced in the matter. Consequently, this Court refused to take any additional volume of documents on record.

7. Having heard learned counsel for the parties, this Court is of the view that it is first essential to outline the scope of interference of this Court with an order framing charge. Recently, the Supreme Court in ***Amit Kapoor Vs. Ramesh Chander & Anr., 2012 (9) SCALE 58*** has outlined scope of interference with the order framing charges. The relevant portion of the said

judgment is reproduced hereinbelow:-

“19. Having discussed the scope of jurisdiction under these two provisions, i.e., Section 397 and Section 482 of the Code and the fine line of jurisdictional distinction, now it will be appropriate for us to enlist the principles with reference to which the courts should exercise such jurisdiction. However, it is not only difficult but is inherently impossible to state with precision such principles. At best and upon objective analysis of various judgments of this Court, we are able to cull out some of the principles to be considered for proper exercise of jurisdiction, particularly, with regard to quashing of charge either in exercise of jurisdiction under Section 397 or Section 482 of the Code or together, as the case may be :

1) Though there are no limits of the powers of the Court under Section 482 of the Code but the more the power, the more due care and caution is to be exercised in invoking these powers. The power of quashing criminal proceedings, particularly, the charge framed in terms of Section 228 of the Code should be exercised very sparingly and with circumspection and that too in the rarest of rare cases.

2) The Court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith prima facie establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic ingredients of a criminal offence are not satisfied then the Court may interfere.

3) The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge.

4) Where the exercise of such power is absolutely essential to prevent patent miscarriage of justice and for correcting some grave error that might be committed by the subordinate courts even in such cases, the High Court should be loathe to interfere, at the threshold, to throttle the prosecution in exercise of its inherent powers.

5) *Where there is an express legal bar enacted in any of the provisions of the Code or any specific law in force to the very initiation or institution and continuance of such criminal proceedings, such a bar is intended to provide specific protection to an accused.*

6) *The Court has a duty to balance the freedom of a person and the right of the complainant or prosecution to investigate and prosecute the offender.*

7) *The process of the Court cannot be permitted to be used for an oblique or ultimate/ulterior purpose.*

8) *Where the allegations made and as they appeared from the record and documents annexed therewith to predominantly give rise and constitute a 'civil wrong' with no 'element of criminality' and does not satisfy the basic ingredients of a criminal offence, the Court may be justified in quashing the charge. Even in such cases, the Court would not embark upon the critical analysis of the evidence.*

9) *Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction, the Court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.*

10) *It is neither necessary nor is the court called upon to hold a full-fledged enquiry or to appreciate evidence collected by the investigating agencies to find out whether it is a case of acquittal or conviction.*

11) *Where allegations give rise to a civil claim and also amount to an offence, merely because a civil claim is maintainable, does not mean that a criminal complaint cannot be maintained.*

12) *In exercise of its jurisdiction under Section 228 and/or under Section 482, the Court cannot take into consideration external materials given by an accused for reaching*

the conclusion that no offence was disclosed or that there was possibility of his acquittal. The Court has to consider the record and documents annexed with by the prosecution.

13) Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. The Court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie.

14) Where the charge-sheet, report under Section 173(2) of the Code, suffers from fundamental legal defects, the Court may be well within its jurisdiction to frame a charge.

15) Coupled with any or all of the above, where the Court finds that it would amount to abuse of process of the Code or that interest of justice favours, otherwise it may quash the charge. The power is to be exercised ex debito justitiae, i.e. to do real and substantial justice for administration of which alone, the courts exist.”

(emphasis supplied)

8. A perusal of the well reasoned impugned order reveals that it is the case of the prosecution that a unique scheme had been devised to defraud the Bank. The trial court has described it as ‘cheque-kiting’, that means, a scheme whereby false credit is obtained by exchange and passing of worthless cheques between two or more banks. The illustration quoted by the trial court to explain the methodology of fraud by ‘cheque-kiting’ is as under:-

"3.....The cheque kiter opens an account at Bank A with a nominal deposit. He then writes a cheque on that account for a large sum, such as \$50,000. The cheque kiter then opens an account at Bank B and deposits the \$50,000 cheque from Bank A in that account. At the time of deposit, the cheque is not supported by sufficient funds in the

account at Bank A. However, Bank B, unaware of this fact, gives the cheque kiter immediate credit on his account at Bank B. During the several day period that the cheque on Bank A is being processed for collection from that bank, the cheque kiter writes a \$50,000 cheque on his account at Bank B and deposits it into his account at Bank A. At the time of the deposit of that cheque, Bank A gives the cheque kiter immediate credit on his account there and on the basis of that grant of credit pays the original \$50,000 cheque when it is presented for collection.”

9. This Court is in agreement with the trial court’s opinion that keeping in view the complexity of the cheque-kiting scheme, the same could have carried on for a long time only with some inside help. Since the petitioner as Chief General Manager was at the helm of affairs of the concerned branch wherein he not just failed to take notice of repeated bouncing of the cheques and bills of exchange purchased from certain persons but has signed most of the documents relating to the discounting of bill of exchange and cheques presented by the same party even subsequent to such defaults. From the aforesaid, it can be said, at this stage, that there is grave suspicion that the petitioner is involved in the aforesaid offences. However, it will be open to the petitioner to lead evidence and take the defence that he is not involved in the fraud. It is pertinent to mention that onus of proof that has to be discharged by the prosecution is different at the stage of framing of charge and for the purpose of conviction. (See ***Soma Charkravarty Vs. State through CBI, 2007 (5) SCC 403***). It is pertinent to mention the SLP filed by the petitioner against order of Division Bench of this Court whereby his termination order was upheld, has been dismissed by the Supreme Court.

10. As far as the ‘No Due Certificate’ relied upon by the petitioner is concerned, this Court is of the opinion that said Certificate itself states that

the Bank adjusted its accounts and gave concessions under a settlement rather than going for liquidation and that too in 2007 even though the offences had been committed between 1994 and 1995. Consequently, this Court is of the view that 'No Due Certificate' would not absolve the petitioner or estop the trial court from framing charges. With the aforesaid observations, present petition is dismissed but with no order as to costs.

MANMOHAN, J

NOVEMBER 08, 2012

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