

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

+ **CRL. REV. P. No. 443/2010**

Date of Decision : 24.05.2011

ARVIND KHANNA

..... Petitioner

Through: Mr. N.D.Pancholi, Adv.

Versus

CBI

..... Respondent

Through: Counsel (Appearance not given)

CORAM :

HON'BLE MR. JUSTICE V.K. SHALI

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| 1. Whether Reporters of local papers may be allowed to see the judgment? | YES |
| 2. To be referred to the Reporter or not ? | YES |
| 3. Whether the judgment should be reported in the Digest ? | YES |

V.K. SHALI, J. (Oral)

1. By virtue of the present petition, the petitioner has challenged the order dated 8.6.2010 vide which a request of the petitioner for grant of pardon was turned down.
2. Briefly stated the facts of the case are that a case under Section 420/419/468/471 r/w Section 120B IPC along with Sec. 477/120B r/w Sec. 13(2) IPC and 13(1) (2) of the Prevention of Corruption Act, 1988 was filed against the present petitioner and the other 27 accused persons.
3. In nutshell, so far as the allegations against the present petitioner were concerned, it was alleged that Ms.Anju Dhanda, Sr. Manager, National Insurance Company, Haus Khas Main, New Delhi and Sh.Narender Singh, Sr. Assistant,

New Delhi in the same branch had entered into the conspiracy with the present petitioner for the purpose of false, fictitious claims of Insurance Policies which was connected with the passing of fictitious claims/policies of some persons.

4. It may be pertinent here to mention that this was being done by the said two co-accused persons in collusion with the present petitioner who used the act of surveyor along with the other accused persons.
5. On the basis of his application, the petitioner got his statement recorded under Section 164 Cr.P.C. before the learned Special Judge, wherein he has made inculpatory statement qua his own self, as well as incriminating statements involving and showing complicity of the other aforesaid two co-accused persons.
6. After getting the said statement under Section 164 Cr.P.C. recorded, the matter was taken up by the learned Special Judge whereupon reply from the CBI was also called for. In the reply filed by the CBI, it was stated that although there is sufficient evidence against the two co-accused persons and the present petitioner for procuring their conviction, they have no objection in case the present petitioner is permitted a conditional pardon to procure conviction of the other co-accused persons.
7. The learned Special Judge after hearing arguments on the application, passed in the impugned order rejecting the

application of the present petitioner for grant of pardon on the ground that there was a delay in filing the application apart from the fact that the CBI in its reply had admitted that they have sufficient evidence in their possession which would be good enough to procure the conviction of the co-accused persons. On the basis of this reasoning, the learned Special Judge dismissed the application for grant of pardon.

8. The present petitioner feeling aggrieved by the said dismissal order has preferred the present revision petition before this Court.
9. I have heard the learned counsel for the petitioner as well as learned counsel for CBI.
10. The learned counsel for the petitioner has contended that the impugned order passed by the Special Judge rejecting the application under Section 306 Cr.P.C. for grant of a conditional pardon is erroneous on account of the fact that the CBI had itself taken a stand that they have no objection to the grant of pardon to the petitioner, subject to his procuring the conviction of the other two co-accused persons. It was also stated by counsel for the petitioner that if at all the permission was to be refused to the petitioner then his statement u/S 164 Cr.P.C. ought not to have been recorded. Having recorded the statement of the petitioner u/S 164 Cr.P.C. wherein he has made inculpatory statement against his own self, not only the said statement can be read against

the petitioner to his detriment, but it has also created an impression in his mind and his conviction can be based on the basis of the said statement itself without any corroboration.

11. The learned counsel has placed reliance on order dated 21.5.2010 passed by the learned Single Judge of this Court in Crl.Rev.P.No.246/2010, wherein in somewhat similar circumstance, the order of rejection of grant of pardon by the learned Special Judge, was set aside by the High Court on the ground that CBI had stated that they had no objection to the grant of pardon to enable such co-accused to turn as an approver and testify against the remaining co-accused persons.
12. I have carefully considered the submissions made by the respective sides.
13. Section 306(1) to (3) of Cr.P.C. deal with the question of pardon, which may be conditional or unconditional. The relevant sections read as under:

“306. Tender of pardon to accomplice.- (1) With a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence to which this section applies, the Chief Judicial Magistrate or a Metropolitan Magistrate at any stage of the investigation or inquiry into, or the trial of, the offence, and the Magistrate of the first class inquiring into or trying the offence, at any stage of the inquiry or trial, may tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every

other person concerned, whether as principal or abettor, in the commission thereof.

(2) This section applies to-

(a) Any offence triable exclusively by the Court of Session or by the Court of a Special Judge appointed under the Criminal Law Amendment Act, 1952 (46 of 1952).

(b) Any offence punishable with imprisonment, which may extend to seven years or with a more severe sentence.

(3) Every Magistrate who tenders a pardon under sub-section (1) shall record-

(a) His reasons for so doing;

(b) Whether the tender was or was not accepted by the person to whom it was made,

and shall, on application made by the accused, furnish him with a copy of such record free of cost.

(4) Every person accepting a tender of pardon made under sub-section (1)-

(a) Shall be examined as a witness in the court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any;

(b) Shall, unless he is already on bail, be detained in custody until the termination of the trial.

(5) Where a person has accepted a tender of pardon made under sub-section (1) and has, been examined under sub-section (4), the Magistrate taking cognizance of the offence shall, without making any further inquiry in the case.

(a) Commit it for trial-

(i) To the Court of Session if the offence is triable exclusively by that court or if the Magistrate

taking cognizance is the Chief Judicial Magistrate;

(ii) To a court of Special Judge appointed under the Criminal Law Amendment Act 1952 (46 of 1952), if the offence is triable exclusively by that court;

(b) In any other case, make over the case to the Chief Judicial Magistrate who shall try the case himself.

307. Power to direct tender Pardon.-At any time after commitment of a case but before Judgment is passed, the court to which the commitment is made may, with a view, to obtaining at the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender a pardon on the same condition to such person.

308. Trial of person not complying with conditions of pardon. (1) Where, in regard to a person who has accepted a tender of pardon made under section 306 or section 307, the Public Prosecutor certifies that in his opinion such person has, either the condition on which the tender was made, such person may be tried for the offence in respect of which the pardon was so tendered or for any other offence of which he appears to have been guilty in connection with the same matter, and also for the offence of giving false evidence:

Provided that such person shall not be tried jointly with any of the other accused:

Provided further that such person shall not be tried for the offence of giving false evidence except with the sanction of the High Court, and nothing contained in section 195 or section 340 shall apply to that offence.

(2) Any statement made by such person accepting the tender of pardon and recorded by a Magistrate under section 164 or by a court under

sub-section (4) of section 306 may be given in evidence against him at such trial.

(3) At such trial, the accused shall be entitled to plead that he has complied with the condition upon which such tender was made, in which case it shall be for the prosecution to prove that the condition has not been complied with.

(4) At such trial the court shall-

(a) If it is a Court of Session, before the charge is read out and explained to the accused;

(b) If it is the court of a Magistrate before the evidence of the witnesses for the prosecution is taken, ask the accused whether he pleads that he has complied with the conditions on which the tender of pardon was made.

(5) If the accused does so plead, the court shall record the plea and proceed with the trial and it shall, before passing judgment in the case, find whether or not the accused has complied with the conditions of the pardon, and, if it finds that he has so complied, it shall notwithstanding anything contained in this Code, pass judgment of acquittal.”

14. A perusal of the aforesaid provisions would clearly show that these sections are very special provision which enables the investigating agency during the course of investigation, inquiry or trial to file the application before the Court to grant permission to take one of the co-accused persons as an approver so that the conviction of the remaining accused person can be obtained. This is done in a case where the prosecution finds its case lacking on certain aspects in material particulars, which will not help them to procure the conviction of the co-accused persons.

15. In the instant case, the investing agency had not filed an application for making the present petitioner as an approver. On the contrary, the application was filed by the petitioner for turning the approver. This application of the petitioner was not opposed by the CBI. If the CBI had sufficient evidence available with them, they ought to have opposed the application, rather they conceded that they had no objection in case he turns approver. The petitioner /accused after this, has chosen to get his statement already recorded under Section 164 Cr.P.C. which was in the knowledge of the CBI as they had not opposed the request. Under these circumstances, the dismissal of the application holding that the CBI had sufficient evidence and the application has been filed belatedly is neither proper nor legal.
16. A perusal of Section 306 Cr.P.C. prima facie will show that an application for turning an approver can be filed either by the co-accused himself or by the investing agency.
17. In the instant case, the application for turning an approver had been filed by the petitioner to which the respondent had filed reply and taken no objection for turning the approver. On the contrary, they stated that they have no objection to the petitioner turning an approver despite the fact that they claim that they have sufficient evidence in their possession, which will be sufficient enough to procure the conviction of the other co-accused persons.

18. Having said so, I feel that it was not proper for the Trial Court to have rejected the application under Section 306 for grant of conditional pardon to the present petitioner for procuring the conviction of the remaining two co-accused persons.
19. There is another aspect of the matter, that is that before the application for grant of permission to turn approver was rejected by the learned Special Judge, the statement of the present petitioner u/S 164 had already been recorded. In the said statement, he had not only inculpated himself but also incriminated the other co-accused persons. Having done so, the petitioner had in fact testified against his own self and thereafter to deny the permission given to him would have been very fatal to the case of the petitioner inasmuch as a statement recorded u/S 164 of the Cr.P.C. would be treated as a confession of the co-accused u/S 30 of the Evidence Act and can certainly be relevant not only in procuring the conviction of his own self but also of the other co-accused persons subject to the condition that the same is corroborated in material opportunities as regards the other accused persons which need not be required for the petitioner. On this ground also, I feel that the learned Trial Judge has fallen into an error in rejecting the application of the present petitioner.
20. The other aspect of the matter is that the learned Special Judge has rejected the application of the present petitioner on

the ground that the application had been filed belatedly. In this regard, Section 306 clearly shows that an application for grant of permission to turn approver can be filed 'at any stage'. Therefore, the timing of the filing of the application is not material. What is material is the application of mind and the proper exercise of the discretion according to the settled judicial principles.

21. In the instant case, despite their being no objection from either of the Investigating agency to in the petitioner's application for turning approver, I feel that it was not proper for the Special Judge to have rejected the application.
22. For the reasons mentioned above, I feel that the rejection of the application for grant of permission to turn approver by the Special Judge was erroneous and exercise of discretion by the Special Court was not proper and accordingly, the impugned order is set aside and a conditional pardon is granted to the petitioner to testify against the remaining two accused persons. He shall be given pardon subject to the condition that he is able to procure the conviction of the two accused persons.
23. It is made clear that in case he is not able to procure the conviction of the remaining two co-accused persons, who are involved in transaction in respect of whom there is an allegation of conspiracy qua him also, he will not be able to get the said benefit and will be tried in accordance with law.

24. With these observations, the petition stands allowed.
25. Copy of this order be sent to the learned Special Judge.

MAY 24, 2011
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V.K. SHALI, J.