

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON:23.11.2015

DELIVERED ON: 14.12.2015

CORAM:

THE HONOURABLE MR.JUSTICE A.SELVAM

Crl.R.C.No.1091 of 2015

A.M.Ashiq Arafat

... Petitioner/Accused No.6

vs.

State, rep.by

The Inspector of Police,
Special Police Establishment,
Central Bureau of Investigation,
Anti-Corruption Branch,
Chennai-600 006

..... Respondent/Complainant

Criminal Revision Case filed under Section 397(1) and 401 Cr.P.C., r/w.27 of Prevention of Corruption Act, 1988, to call for the records from the file of XI Additional Special Judge for CBI cases, relating to Banks and Financial Institution, Chennai and set-aside the order of the trial Court passed in Crl.M.P.No.5515 of 2014 dated 29.09.015 in C.C.No.28 of 2012.

For Petitioner : Mr.A.V.Somasundaram for
M/s.Lakshmipriya Associates

For Respondent : Mr.K.Srinivasan,
Spl.P.P. For CBI Cases

ORDER

This Criminal revision case has been directed against the order dated 29.9.2015 passed in Crl.M.P.No.5515 of 2014, in Calendar Case No.28 of 2012, by XI Additional Special Judge for CBI cases, relating to Banks and Financial Institutions.

2. The revision petitioner, as petitioner, has filed Crl.M.P.No.5515 of 2014 in Calendar Case No.28 of 2012, on the file of the trial Court, praying to give tender of pardon to him, wherein, the present respondent has been shown as respondent.

3. The material averments made in the petition are that the respondent, as complainant, has filed a final report under Sections 120-B r/w.420, 467, 468, 471 of the Indian Penal

Code, 1973 and also under Sections 13(1)(d) r/w.13(2) of the Prevention of Corruption Act, 1988 and the same has been taken on file in Calendar Case No.28 of 2012, wherein, the present petitioner has been arrayed as 6th accused. Further it is averred in the petition that the petitioner is an innocent person. The petitioner has had no personal knowledge about the opening of fictitious account in the name of M/s.Steel India with Axis Bank, George Town Branch, Chennai. None of the witnesses stated anything about the role of the petitioner. In the statements given by Witness Nos.31, 32 and 34, it is clearly pointed out about their performance in connection with the transactions, but they have not been shown as accused. The signatures of the petitioner have been fraudulently obtained. The petitioner is a relative of the 3rd accused. Since some of the accused have been arrayed as witnesses, the same yardstick can also be extended to the petitioner. Under such circumstances, the present petition has been filed to discharge the petitioner by way of giving tender of pardon.

4. On the side of the respondent, a detailed counter has been filed, wherein it has been clearly stated that the petitioner is also one of the members of conspiracy. In fact, huge money has been involved. The relief sought for in the petition need not be granted and therefore, the present petition deserves to be dismissed.

5. On the basis of the divergent contentions raised on either side, the trial Court has dismissed the petition. Against the dismissal order, the present criminal revision case has been preferred, at the instance of the petitioner, as criminal revision petitioner.

6. The learned counsel appearing for the petitioner has repeatedly contended that the petitioner has simply put his signatures at the behest of the third accused. The investigating officer has examined witness Nos.19, 31, 32 and 34 and even from their statements, the Court can easily discern that they have also involved in the alleged offences, but they have been purposely shown as witnesses. Since the petitioner has simply put his signatures at the behest of the 3rd accused, he can also be given the same yardstick. Under the said circumstances, the present petition has been filed for getting the relief sought therein, but the trial Court has given an erroneous finding to the effect that if tender of pardon is given to the petitioner, subsequently he would become a hostile witness and therefore, the dismissal order passed by the trial Court is totally erroneous.

7. Per contra, the learned Special Public Prosecutor has contended that as per Section 306 of the Code of Criminal Procedure, 1973, the petitioner is also having power to

maintain the present petition, but at the same time, it is for the prosecution to obtain evidence for the purpose of proving its case and the specific contention put forth on the side of the respondent is that whatever the evidence available would be sufficient to prove its case and therefore, the role of the petitioner as one of the witnesses is totally unwarranted and further the present petitioner is a relative of one of the main accused and the trial Court, after considering the over all circumstances available on record, has rightly dismissed the petition and therefore, the dismissal order passed by the trial Court need not be set aside.

8. The learned counsel appearing for the petitioner has drawn the attention of the Court to the following decisions:

(a) In AIR 2011 SUPREME COURT 3114 - Rafiq Ahmed @ Rafi Vs. State of Uttar Pradesh, the Honourable Supreme Court has held that plea of prejudice has to be in relation to investigation or trial. The allegation of prejudice to be examined vis-a-vis right to fair trial presumption of innocence and standards of proof.

(b) In AIR 1971 SUPREME COURT 520 - P.Sirajuddin etc., vs. The State of Madras etc., the Honourable Supreme Court has held that granting of amnesty by enquiring Officer to persons who were to be examined as prosecution witnesses is highly irregular.

9. It is an admitted fact that the present petition has been filed praying to grant tender of pardon to the petitioner. At this juncture, a nice legal question arises as to whether the relief sought in the petition can be granted without consent of the prosecution.

10. In 2008(110) Bom LR 567 - Saleha Beig, son of Abdul Geani vs. State and Others, it is observed as follows:

"323. Moreover, the law is well settled that it is for the prosecution to ask that a particular accused, out of several, may be tendered pardon. If the prosecution thinks that the tender of pardon will be in the interests of a successful prosecution of the other accused whose conviction is not easy without the approver's testimony, it is open for the prosecution to agree to the tendering of pardon to a particular accused. The power to tender pardon which the learned Judge exercises, is not on his own behalf but on behalf of the prosecuting agency and must, therefore, be exercised only when the

prosecution joins in the request.
."

11. In 1968 AIR 594 - LT.Commander Pascal Fernandes vs. The State of Maharashtra and Others, the Honourable Supreme Court has observed as follows:

"(3) Ordinarily, it is for the prosecution to ask that a particular accused out of several may be tendered pardon. But when the accused applies directly, the Special Judge must first refer the request to the prosecution, because, the State may not need an approver's testimony and therefore may not desire that any accused should be pardoned; or, it may not like the tender of pardon to the particular accused who may be the worst, offender. It is only when the prosecution joins in the request that the Special Judge should exercise his powers. In exercising his discretion, the Special Judge must bear in mind that the interests of the accused are just as important as those of the prosecution, and no procedure or action can be in the interest of justice if it is prejudicial to an accused."

12. From the conjoint reading of the decisions mentioned supra, it is clear that as per Section 306 of the Code of Criminal Procedure, 1973, it is for the prosecution to ask tender of pardon to some of the accused with a view to obtain evidence so as to prove its case. But at the same time, the accused is also having similar power of invoking the said Section. If an accused has filed a petition, the prosecution should have also joined in the request made by the accused. Unless such thing is happened, it is not possible on the part of the Court to allow a petition filed by an accused under the said Section.

13. In the instant case, the prosecution is not willing to get evidence of the accused. To put it in short, the prosecution has raised its serious objection to the present petition. Under the said circumstances the trial Court has dismissed the same.

14. The main grievance expressed on the side of the revision petitioner is that the witness Nos.19, 31, 32 and 34 have given statements and even from their statements, one can easily know that they have also taken part in the

commission of offences, but the investigating officer, without impleading them as accused, for the purpose known to him, has shown them as witnesses.

15. The learned Special Public Prosecutor has fairly conceded to the effect that if those witnesses have also involved in the commission of offences they can be impleaded as accused at any point of time by invoking Section 319 of the Code of Criminal Procedure, 1973.

16. It is a settled principle of law that if sufficient evidence is available, by invoking Section 319 of the Code of Criminal Procedure, 1973, any person, who has not been shown as accused, can be impleaded as an accused subsequently.

17. As adverted to earlier, the main gravamen expressed on the side of of the revision petitioner is that those witnesses should not be given amnesty and they should be impleaded as accused. It has already been pointed out that by way of invoking Section 319 of the Code of Criminal Procedure, 1973, if sufficient evidence is available so as to proceed against them, they can be impleaded as accused at any point of time. Simply because, those witnesses have not been arraigned as accused in C.C.No.28 of 2012, and since the prosecution does not want to get role of the petitioner as a witness, the Court cannot accpt the contention put forth on the side of the petitioner.

18. The trial Court, after considering the divergent contentions raised on either side, has rightly dismissed the petitin.

19. In view of the discussion made earlier, this Court has not found any errorr nor illegality in the impugned order passed by the trial Court and therefore, the present criminal revision case deserves to be dismissed.

In fine, this criminal revision case is dismissed. The order passed in CrI.M.P.No.5515 of 2014, in Calendar Case No.28 of 2012 on the file of XI Additional Special Judge for CBI cases, is confirmed.

Sd/-
Assistant Registrar(CS-III)

//True Copy//

Sub Assistant Registrar

msh

To

1.The XI Additional Special Judge for CBI cases
Anticorruption Branch, Chennai 6.

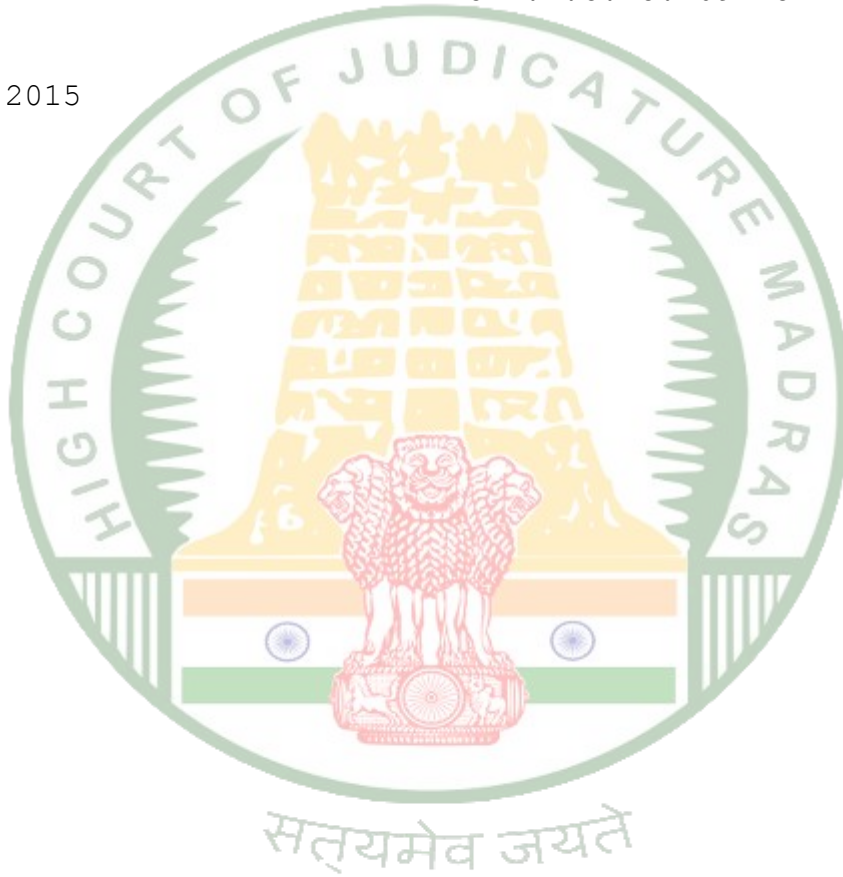
2.The Public prosecutor,
High Court, Madras

+1 cc to Mr.K.Srinivasan, Advocate, sr.66983

+1 cc to Mr.Lakshmipriya, Advocate, sr.66839

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